S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2011
v JOHNATHAN RICHARD SPAYDE, Defendant-Appellant.	No. 294300 Ottawa Circuit Court LC No. 09-033400-FH

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant Johnathan Richard Spayde appeals as of right his jury convictions for four counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (person under 13 years of age). The trial court sentenced defendant to 29 to 180 months' imprisonment with 53 days of jail credit for each count of CSC, to be served concurrently. The trial court also ordered defendant to be on lifetime electronic monitoring. We affirm.

Defendant's convictions arose from incidents involving the two minor daughters of a family friend, A.K. and E.K. The girls' mother became friends with defendant's parents when she met her husband in 1995. The families maintained a close relationship, and when the girls' father died, the defendant's family offered to help care for the girls, then ages six and two. This help including picking up the girls from school and babysitting them. Defendant was 19 years old and lived at home. There were times that defendant and the girls were alone in the house. Each child alleged that defendant had inappropriately touched their private parts on multiple occasions.

The defense called Amanda Leandro as a witness. The trial court required an offer of proof as to Leandro's testimony. Leandro testified that her twin daughters went to school with E.K. When Leandro was volunteering at the school sometime around December 2007, E.K. told her that "my ma has me on Vicodin so I can sleep at night." E.K. said the Vicodin was to keep her quiet while her mom and her boyfriend were in bed. Leandro thought that it sounded like "[t]hey all seemed to sleep in the same bed. It was just to keep her quiet at night." In January 2009, Leandro's twins came home from school upset because E.K. told them that a 41-year-old cousin was "laying in bed with her and putting stuff up her butt and playing with her and doing different games . . . ." Leandro reported the information to the school and was informed that it was going to be reported to the police. Shortly thereafter, in February 2009, E.K. began making

fun of Leandro's children calling them "tattle tales" and "brats," and other children began picking on them as well. In the beginning of March 2009, when Leandro was at the school again volunteering, E.K. admitted to her that the 41-year-old cousin was still around and then started saying things about "fingers up her butt" and that "she [was] not supposed to talk about it because they are in court."

The trial court ruled that Leandro could not testify at trial because her testimony was largely hearsay, based on statements that she received from her own children. Furthermore, the trial court found that a good portion of the testimony was not relevant to any issue in dispute, and because the testimony involved other sexual instances, it violated the rape shield law, MCL 750.520j. The trial court also found that Leandro's testimony was improper character evidence in the form of specific acts of character used to attack the credibility of the witness, and there was a lack of foundation for portions of the testimony because it was Leandro's own interpretation of events.

Following his convictions, defendant moved for a new trial and argued that he was denied effective assistance of counsel because counsel failed to exclude an expert witness statement and a statement A.K. made to her mother about the sexual abuse, and because he also failed to properly move for the admissibility of critical evidence regarding E.K.'s alleged statements about other sexual abuse.

The trial court issued an opinion and order on defendant's motion for a new trial. The trial court found that defense counsel's performance was deficient for the failure to object to the admission of expert witness Dr. Simms'[1] testimony that she diagnosed A.K. with a "probable case of pediatric sexual abuse." This was deficient because a medical expert in a CSC case cannot base her opinion of whether a victim was sexually assaulted solely on the victim's emotional state or history provided to the physician. The trial court found that defense counsel's error was prejudicial as to the count involving A.K. but not the counts involving E.K. It was not clear beyond a reasonable doubt that that the jury would have convicted defendant of the count against A.K. without Dr. Simms' testimony because A.K. had not disclosed abuse at the forensic interview, and her testimony was extremely limited and less convincing than E.K.'s. In contrast, E.K. disclosed the abuse at the forensic interview and her descriptions of the abuse were stronger, more detailed, and consistent over time.

The trial court concluded that defense counsel's performance was not deficient for failing to object to the mother's testimony that A.K. told her that she did not like it when defendant put his hands down her pants or for failing to move for the admission of Leandro's testimony. A.K.'s statement to her mother was admissible under MRE 803A, and though the prosecutor may not have provided formal notice, any error was harmless because defendant had advance knowledge of the statement. The trial court agreed that possible abuse by another person would

[1] Dr. Debra Simms, a child abuse and neglect physician at the Helen DeVos Children's Hospital, Center for Child Protection and medical director at the Children's Advocacy Center.

be relevant to whether defendant sexually assaulted the girls and that under certain circumstances the rape shield statute could violate a defendant's right to confrontation. However, it concluded that E.K.'s statements were hearsay, which were not admissible under MRE 803(24), and defendant's right to confrontation was not violated because he could have cross-examined E.K.

Finally, the trial court ruled that mandatory lifetime electronic monitoring was not cruel or unusual punishment. Although a harsh penalty, the trial court held that it was not facially unconstitutional or unconstitutional as applied to defendant.

Defendant first argues that he was denied effective assistance of counsel because counsel failed to object to the opinion testimony of the expert witness Dr. Simms. We disagree.

"Whether a person has been denied effective assistance of counsel is [generally] a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo. *Id*. To the extent that the trial court made findings of fact related to a defendant's claim that he was denied the effective assistance of counsel, this Court reviews those findings for clear error. *Id.*

The denial of effective assistance of counsel violates a defendant's constitutional rights. US Const, Am VI; Const 1963, art 1, § 20. To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel's representation fell below an objective standard of reasonableness and was so prejudicial it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that counsel's performance was deficient, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant demonstrates prejudice by showing the "existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

Trial counsel has "great discretion in the trying of a case—especially with regard to trial strategy and tactics." *Pickens*, 446 Mich at 330. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76. Counsel is not required to advance meritless arguments or raise futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, 237 Mich App at 76-77. "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Under MRE 702, expert testimony is admissible if it is relevant and "'assist[s] the trier of fact to understand the evidence or to determine a fact in issue . . . .'" *People v Beckley*, 434 Mich 691, 713-714; 456 NW2d 391 (1990), quoting MRE 702. "The determination of when such testimony is admissible lies within the discretion of the trial court and will vary according to the area at issue and the particular facts of the case. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). "It is generally improper for a witness to comment or provide an opinion on the

credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

More specifically, "[a]n expert may not vouch for the veracity of a victim." *Id.* In sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). A physician is not permitted to "lend his expert opinion testimony as to the crucial issue of whether or not the prosecutrix was actually *raped* at a specific time and place." *People v McGillen #2*, 392 Mich 278, 285; 220 NW2d 689 (1974) (emphasis in original). A medical expert's opinion that a victim was sexually assaulted based on the "emotional state of, and history given by, the complainant" rather than on his "medical capabilities or expertise" is inadmissible. *Smith*, 425 Mich at 112. An opinion based on the self-reported history of a victim is nothing more than the opinion that the victim is telling the truth. *Id.* at 109. However, a physician may provide an expert opinion that there has been penetration against the will of the victim, based on physical examination findings, the history received by the victim, the emotional condition of the victim, and his years of experience in examining victims of alleged assaults. *People v Wells*, 102 Mich App 558, 562; 302 NW2d 232 (1980). "[A]n expert may [also] testify with regard to consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson*, 450 Mich at 352-353.

Defendant fails to prove that defense counsel's performance was deficient based on the failure to object to Dr. Simms' expert opinion testimony. At the hearing on defendant's motion for a new trial, defense counsel indicated:

> I have a vague recollection when I heard the substance of this testimony of turning to my client . . . and, although I don't recall saying anything to him, I kind of recall nodding or giving some facial gesture to him that this testimony appeared to be favorable to our case in terms of stating that one of these children had been abused.
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> Obviously, [Dr. Simms] couldn't testify as to who did the abuse. But the fact that there had been an abuse of this child, at least theoretically or at least as an expert conclusion, could work in our favor.

Defense counsel's failure to object to Dr. Simms' testimony thus appears to have been a matter of trial strategy. See e.g., *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001); *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Defense counsel believed that he might be able to use the evidence in defendant's favor. Defense counsel had elicited testimony regarding the mother's boyfriend, and as he explained, he could have "suggest[ed] in a general way that something had happened at school or in the home."

In determining what arguments to make and strategy to use at trial, counsel had "great discretion." *Pickens*, 446 Mich at 330. This Court should not substitute its judgment for that of defense counsel "even if that strategy backfired." *Rodgers*, 248 Mich App at 715. Defendant has not overcome the strong presumption that counsel's performance constituted sound trial strategy. *Carbin*, 463 Mich at 600. Because defendant failed to demonstrate that defense

counsel's performance was deficient, he cannot demonstrate that he was denied effective assistance of counsel. *Strickland*, 466 US at 687.

Defendant next argues that the trial court improperly excluded Leandro from testifying as to statements that E.K. made to her regarding other accusations of sexual abuse. We disagree.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The trial court's decision on a close evidentiary question is generally not an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Accordingly, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "[W]hether the admission of evidence would violate a defendant's constitutional right of confrontation is a question of law that [this Court] review[s] de novo." *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

"Harmless error analysis applies to claims concerning Confrontation Clause errors." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (citation omitted). Generally, a preserved, constitutional error is not grounds for reversal "if the prosecutor proves that the error was harmless beyond a reasonable doubt." *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008).

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with all witnesses against him . . . ." US Const, Am VI. The Michigan Constitution also provides a defendant with this right. Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). "Statements are testimonial if the 'primary purpose' of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). If a statement is nontestimonial, then "the Confrontation Clause does not restrict state law from determining admissibility." *Id*. State hearsay rules may govern the admissibility of nontestimonial statements. *People v Jordan*, 275 Mich App 659, 662; 739 NW2d 706 (2007), citing *Crawford*, 541 US at 68.

"'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008), quoting *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006). A criminal defendant's

right to present a defense is also protected by the Michigan Constitution. *Id*. at 250. Although a defendant has a fundamental constitutional right to present a defense, this right is not absolute. *Id*. "Our state has broad latitude under the Constitution to establish rules excluding evidence from criminal trials[,]" and "[s]uch rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id*. (quotations omitted).

Initially, the trial court did not allow Leandro's testimony because it found that it was largely hearsay, was not relevant, violated the rape shield statute, and constituted improper character evidence in the form of specific acts of character used to attack the credibility of the witness, and there was a lack of foundation for a portion of the testimony. Defendant concedes that Leandro's testimony concerning E.K.'s statements about taking Vicodin were irrelevant under MRE 402 and more prejudicial than probative under MRE 403. Defendant also agrees that the statements Leandro's daughters told her regarding what E.K. had told them about sexual abuse was inadmissible hearsay. The only issue is whether Leandro was properly excluded from testifying that E.K. told her that "the forty-one-year-old [sic] cousin was still around" and that E.K. talked to Leandro about "fingers up her butt."

Leandro's testimony regarding E.K.'s statements about other sexual abuse allegations was properly excluded as inadmissible hearsay. "Hearsay is a statement, other than the one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). E.K.'s statements were hearsay because they were out of court statements offered to prove the truth of the matter asserted. MRE 801(c).

E.K.'s statements were nontestimonial because their primary purpose and the questioning eliciting them was not to "establish or prove past events potentially relevant to later criminal prosecution." *Garland*, 286 Mich App at 10. Consequently, the admissibility of the statements was governed by the Michigan Rules of Evidence pertaining to hearsay. *Jordan*, 275 Mich App at 662. The trial court could exclude the evidence pursuant to these rules without violating defendant's right to confrontation or to present a defense because the Michigan Rules of Evidence "ensure the integrity of criminal trials and are neither 'arbitrary' nor 'disproportionate to the purposes they are designed to serve.'" *Unger*, 278 Mich App at 250.

Defendant next argues that Dr. Simms' expert opinion testimony resulted in plain error that affected defendant's substantial constitutional rights. We disagree.

Unpreserved claims of constitutional error are reviewed for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Under the plain error rule, the defendant must demonstrate: 1) there was an error, 2) the error was clear or obvious, and 3) the plain error affected substantial rights by influencing the outcome of the lower court proceedings. *Id*. at 763. Ultimately, this Court "will reverse only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003)

We conclude that Dr. Simms' opinion testimony was improper because the essence of her testimony was that the sexual abuse occurred and that A.K. was telling the truth. See *Smith*, 425 Mich at 109, 112-113. There was a lack of objective findings, and Dr. Simms testified that the most important part of the overall assessment was the history from A.K. Her opinion that A.K. had been sexually abused was primarily based on the history that A.K. had provided during the examination. On the other hand, an argument can be made that Dr. Simms' expert testimony was proper. Dr. Simms never testified that defendant was the person who assaulted A.K. or that a sexual assault took place at a particular time or place. *Smith*, 425 Mich at 110-111. Dr Simms' explained that the nonspecific findings were consistent with A.K.'s description of abuse because scarring and tearing would not be expected. In addition, Dr. Simms' indicated that the overall assessment was from a national ratings scale and "the child history, background history, circumstances, what they are telling us that day and our physical exam findings[ellipsis][a]nd we pull all of that together, and the overall assessment for A.K. was that this was probable pediatric sexual abuse."

Although there was error because Dr. Simms' expert opinion testimony was improper, defendant fails to satisfy the plain error standard. He cannot demonstrate that the error was plain and "clear or obvious." *Carines*, 460 Mich at 763. As previously discussed, whether Dr. Simms' testimony was proper was a close evidentiary question. "The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion." *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). As a result, the error was not plain because it was not sufficiently clear and obvious. *Carines*, 460 Mich at 763; see *People v Knox*, 256 Mich App 175, 188; 662 NW2d 482 (2003).

Although the outcome of the case hinged on the credibility of A.K., E.K., and defendant, Dr. Simms' testimony did not affect the overall outcome of the lower court proceedings. A.K. and E.K. testified to incidents of abuse at trial, and E.K. also revealed that she had seen defendant molesting A.K.. The testimony of E.K. and A.K. did not have to be corroborated. MCL 750.520h. The jury heard the direct testimony of A.K. and E.K. about the sexual abuse, and the jurors were able to make their own credibility determinations. Also, the trial court instructed the jury that it did not have to believe the expert's opinion and that it should "think about the reasons and the fact that she gave for her opinion and whether those facts are true." In light of these circumstances, Dr. Simms' testimony was not outcome-determinative with respect to the charges related to E.K.

Next, defendant argues that he was deprived of his constitutional rights to due process and to present a defense because the trial court permitted the charges to cover a two-year time span. We disagree.

This Court reviews constitutional issues de novo. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). The trial court's determination regarding the degree of specificity required in the information as to the date of the offense is reviewed for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich app at 217. "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, [this Court] would be disinclined to hold that

an information or bill of particulars was deficient for failure to pinpoint a specific date." *Naugle*, 152 Mich App at 234.

In the original complaint, there was one count that alleged defendant engaged in sexual contact with E.K. on or about November 25, 2008. At the end of the preliminary examination, the trial court granted the prosecution's request to amend the information based on the testimony it heard. The information was amended to add two additional counts of CSC based on the allegation that defendant engaged in sexual contact with E.K. who was under 13 years of age and one count based on the allegation that defendant engaged in sexual contact with A.K. who was under 13 years of age. The dates of the alleged offenses were amended to January 2007 through December 2008. On or about May 15, 2009, defendant moved for a bill of particulars requesting specification of the dates of the four counts of CSC and a more detailed description of the offense committed in each count.

At the hearing on defendant's motion, he argued that it was "virtually impossible to defend" allegations occurring over a period of two years. Defendant also claimed that he needed more specificity concerning the description of the offenses. In the trial court's opinion and order denying defendant's motion, it concluded that the prosecutor had attempted to pinpoint the dates and that "given the nature of the crime and the young age of the victim . . . the time in the information [was] specified as nearly as the circumstances permit[ted]." As far as the description of the offenses, the trial court found that "the counts on which defendant was bound over [were] based on the acts described in the preliminary examination testimony," and to convict defendant the prosecution had to prove those acts occurred." Accordingly, defendant had adequate notice of the charges against which he had to defend.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence[.]" *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). The Michigan Constitution provides that the accused shall have the right to be informed of the nature of the accusation in every criminal prosecution. Const 1963, art 1, § 20. "But the constitutional notice requirement is not an abstract legal technicality; it 'is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him.'" *McGee*, 258 Mich App at 699-700, quoting *Darden*, 230 Mich App at 601. "So, to establish a due process violation, a defendant must prove prejudice to his defense," *id*. at 700, or that a failure of justice resulted, MCL 767.76.

MCL 767.76 and MCR 6.112(H) allow the trial court to amend an information before, during or after trial. "[A]n amendment must not cause unacceptable prejudice to the defendant through 'unfair surprise, inadequate notice, or insufficient opportunity to defend.'" *McGee*, 258 Mich App at 688, quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). In evaluating whether the trial court abused its discretion in its determination regarding the specificity of the information, this Court considers: "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *Naugle*, 152 Mich App at 233-234. In order to be sufficient, the information must identify the charge so that the defendant's conviction or

acquittal will bar a subsequent charge for the same offense and notify him of the nature and character of the offense so that he can prepare a defense. *People v Mast*, 126 Mich App 658, 661; 337 NW2d 619 (1983), rev'd on other grounds 128 Mich App 613 (1983). MCL 767.51 provides:

> Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or filing of the complaint and within the period of limitations provided by law: Provided, That [sic] the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

"[T]he dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense." *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989). "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

An information must contain "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b). "Time is not of the essence, nor is it a material element in [CSC] cases involving a child victim[,]" and "an alibi defense does not make time of the essence." *Dobek*, 274 Mich App at 83. This Court is disinclined to hold that an information is deficient for failure to pinpoint a specific date "[w]here the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation . . .." *Naugle*, 152 Mich App at 234.

In this case, although there was a large date range for the time the offenses occurred, the facts demonstrate that the prosecutor stated the dates of the offenses "as nearly as the circumstances [would] permit." MCL 767.51. Time was not of the essence because the CSC charges involved child victims. *Dobek*, 274 Mich App at 83. And, defendant's alibi defense did not necessitate further specification of the dates of the offenses. See *Naugle*, 152 Mich App at 234.

E.K. and A.K. both alleged that defendant sexually abused them multiple times when they spent time at Spayde's house, which was from approximately January 2007 through November 2008. E.K. was able to testify that the molestation occurred over a length of time in which she had two birthdays and that she was six years old when it first began and eight years old when it stopped. A.K. would only have been two years old when the childcare arrangement at Spayde's home first began. At trial, E.K. was nine years old, and A.K. was five years old. Because of their young, tender ages, the girls "were justified in not remembering the specific dates of the incidents." See *id*. at 235. Defendant's alibi defense for November 25, 2008, did not make time of the essence where E.K. and A.K. alleged multiple assaults, and because of the nature of the allegations, a single alibi defense was not a viable defense. See *Dobek*, 274 Mich App at 83. On this record, the trial court's decision denying defendant's request for further specificity in the information was not outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217. Furthermore, defendant fails to establish a due process violation

because he cannot prove prejudice to his defense or that a failure of justice resulted. *McGee*, 258 Mich App at 700; MCL 767.76.

Next, defendant simply claims that the error regarding the date range was compounded by jury instructions concerning "generic accusations of genital touching." We disagree. Defendant abandons any argument regarding the specificity of the offenses because he provides no citing authority and does not elaborate any further on his argument. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Finally, defendant argues that lifetime electronic monitoring is cruel and unusual punishment and that the statutes that define the broad parameters of electronic monitoring of individuals convicted of second-degree CSC, MCL 750.520c(2)(b), MCL 750.520n, and MCL 791.285, are unconstitutional both facially and as applied specifically to defendant. We disagree.

"Whether a statute is constitutional is a question of law that this Court reviews de novo." *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). Statutes are presumed constitutional and must be construed as such unless its unconstitutionality is clearly apparent. *People v Hubbard*, 217 Mich App 459, 483-484; 552 NW2d 493 (1996). "The party challenging the statute has the burden of proving its unconstitutionality." *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002).

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article 1, § 16 of the Michigan Constitution provides: "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Generally, Michigan's Constitution's prohibition against cruel or unusual punishment is more broadly interpreted. *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). The Michigan constitutional provision prohibits grossly disproportionate sentences. *Id*. at 32. If a punishment, "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

This Court must first determine whether lifetime electronic monitoring constitutes punishment. *People v Dipiazza*, 286 Mich App 137, 147; 778 NW2d 264 (2009). The totality of circumstances should be considered when determining whether government action constitutes punishment. *Id*. (citation omitted). This Court should particularly consider "(1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation." *Id*. (citations omitted). "[P]unishment, generally, is the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline an offender . . . ." *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999), quoting *Doe v Kelley*, 961 F Supp 1105, 1108 (WD Mich, 1997).

The lifetime electronic monitoring program was established by 2006 PA 172, effective August 28, 2006. *People v Kern*, 288 Mich App 513, 518-519; 794 NW2d 362 (2010). MCL 750.520c(2), provides:

Criminal sexual conduct in the second degree is a felony punishable as follows:

> (a) By imprisonment for not more than 15 years.
>
> (b) ***In addition to the penalty*** specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age. [Emphasis added]

Here, the emphasized language indicates that the 15-year term of imprisonment is "the penalty" and the electronic monitoring is "in addition to" that penalty. Had the legislature intended the lifetime electronic monitoring to be considered a part of the punishment for second degree CSC, then the language "in addition to the penalty" would be superfluous. We must avoid a construction of a statute that would render part of the statute surplusage or nugatory. *Robinson v City of Lansing*, 486 Mich 1, 21, 782 NW2d 171 (2010). Furthermore, we are obligated to adopt the interpretation of the law that best avoids constitutional problems. *See INS v St Cyr*, 533 US 289, 299-300; 121 S Ct 2271; 150 L Ed 2d 347 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems.")

Relevant provisions of MCL 750.520n provide that:

> (1) A person convicted under section 520b or 520c for [CSC] committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.
>
> (2) A person who has been sentenced under this chapter to lifetime electronic monitoring under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285, who does any of the following is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both:
>
> (a) Intentionally removes, defaces, alters, destroys, or fails to maintain the electronic monitoring device in working order.
>
> (b) Fails to notify the department of corrections that the electronic monitoring device is damaged.
>
> (c) Fails to reimburse the department of corrections or its agent for the cost of monitoring.

MCL 791.285 provides:

> (1) The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. The lifetime electronic monitoring program shall accomplish all of the following:

> (a) By electronic means, track the movement and location of each individual from the time the individual is released on parole or from prison until the time of the individual's death.
>
> (b) Develop methods by which the individual's movement and location may be determined both in real time and recorded time, and recorded information retrieved upon request by the court or a law enforcement agency.
>
> (2) An individual who is sentenced to lifetime electronic monitoring shall wear or otherwise carry an electronic monitoring device as determined by the department under the lifetime electronic monitoring program in the manner prescribed by that program and shall reimburse the department or its agent for the actual cost of electronically monitoring the individual.
>
> (3) As used in this section, "electronic monitoring" means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded.

Here, we note that there is a difference between being punished to confinement by tether as an alternative to being sent to jail, and being subject to lifetime electronic monitoring under MCL 750.520n. In the former situation, the individual's movements are restricted, he is required to be certain places at certain times, and the device will often monitor his use of alcohol. In the later case, under MCL 791.285, the monitoring does not restrict a defendant's movement, it merely provides a record of a defendant's location. Aside from the inconvenience of wearing and maintaining the monitoring device, being monitored remotely by GPS does not restrict a defendant's ability to go about his life unencumbered.

We are not persuaded by defendant's argument that this statute must be punitive in nature because it is located within the penal code and within the penalty provisions for both first-degree and second-degree CSC. MCL 750.520b(2); MCL 750.520c(2). The location and labels of a statute do not by themselves transform a civil remedy into a criminal one. *Smith v Doe,* 538 US 84, 94; 123 S Ct 1140; 155 L Ed 2d 164 (2003). Even if the objective of a statute is consistent with the purposes of a State's criminal justice system, "the State's pursuit of it in a regulatory scheme does not make the objective punitive." *Id.* In addition, a legislative restriction that is incident to the State's power to protect the public will be considered regulatory rather than punitive. *Id*. at 92. Protecting the public from sex offenders is a nonpunitive objective. *Id*. at 102-103.

Electronic monitoring is analogous to requiring convicted sex offenders to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. SORA has been characterized as "merely a remedial regulatory scheme furthering a legitimate state interest[,]" "not actually a punitive measure intended to chastise, deter or discipline an offender." *People v Fonville*, __ Mich App __; __NW2d __ (2011) (Docket No. 294554, issued January 25, 2011), slip op 10 (quotations omitted). Like the SORA, lifetime electronic monitoring is also an investigative tool for law enforcement and its primary purpose is to gather data.

Because lifetime electronic monitoring is not punishment, defendant's argument that it is cruel and/or unusual must fail.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens