STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of YUSUF EBAN QAWEE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

YUSUF EBAN QAWEE,

Respondent-Appellant.

UNPUBLISHED
January 26, 2001

No. 218619
Wayne Circuit Court
Family Division
LC No. 97-355875

Before: Saad, P.J. and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Respondent appeals as of right from the family court order, adjudicating him a temporary court ward and committing him to the Family Independence Agency, entered after he was found guilty of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). We affirm.

Respondent's sole issue on appeal is that he is entitled to a new trial because he was denied his right to the effective assistance of counsel at trial. Effective assistance of counsel is presumed and the respondent bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a respondent must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* A respondent must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Respondent first argues that he is entitled to a new trial because defense counsel failed to object to complainant's mother's testimony regarding complainant's statement to her concerning

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the charged incident, because it was not admissible under MRE 803A. We disagree. MRE provides in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

Here, the record shows that complainant was six years old when she made the statement at issue. Complainant's mother testified that, after her son said that complainant had something to tell her, she asked complainant what she had to say. Complainant made the statement describing the incident in response to her mother's open-ended question of what she had to tell her. Complainant's mother did not specifically question complainant about sexual abuse or respondent. Under these circumstances, complainant's statement was spontaneous and lacked any indication of manufacture. Further, complainant's approximate one-week delay in relating the events that transpired to her mother was "excusable" under MRE 803A(3), in light of the evidence that complainant was instructed by respondent to refrain from telling anyone and the fear of being punished. See, e.g., *People v Dunham*, 220 Mich App 268, 272-273; 559 NW2d 360 (1996); *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995).

However, respondent maintains that the statement the complainant made to her mother was not the first one. He argues that the complainant told respondent's sister and her brother about the incident first. However, respondent's sister denied that the complainant told her about the incident. Moreover, the testimony did not clearly establish that the complainant made a corroborating statement about the incident to her brother. Therefore, the complainant's statement to her mother represented the first corroborative statement about the incident.

Accordingly, we find that the complainant's mother's testimony was admissible under MRE 803A. Therefore, defense counsel was not ineffective for failing to object. Counsel is not required to make frivolous or meritless objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Respondent's next claim of ineffective assistance of counsel is that defense counsel failed to object to the hearsay testimony offered by complainant's brother. Having reviewed the challenged testimony, we find that it did not warrant a hearsay objection. The brother merely acknowledged that the complainant had told him something about what had happened to her and did not testify about the substance of their conversation. Because there was nothing objectionable about the testimony of the complainant's brother, counsel was not ineffective for failing to object. *Id*.

Respondent's third claim of ineffective assistance of counsel is that defense counsel failed to object when the trial court called and questioned the investigating officer as a witness in this case. Again, we disagree. A trial court may call and question a witness to clarify testimony or elicit additional relevant information. MRE 614; *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1995). In questioning a witness, the court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial. *Id*. The court may not assume the prosecutor's role with advantages unavailable to the prosecution. *Id*. A trial judge has greater discretion in questioning witnesses in a bench trial than in a jury trial. *People v Wilder*, 383 Mich 122, 124-125; 174 NW2d 562 (1970); *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Here, the trial court's few questions were not intimidating, argumentative, prejudicial, unfair, or partial, but were intended to elicit additional relevant information to assist the court in its role of factfinder, specifically determining witness credibility. Moreover, the questioning did not elicit any hearsay, because the officer merely testified that the complainant's trial testimony was consistent with what the complainant had told her. Because there was nothing objectionable about the court's questioning of the officer, counsel was not ineffective for failing to object. *Gist, supra*.

Respondent's fourth claim of ineffective assistance of counsel is that defense counsel was ineffective when he failed to voir dire the six-year old complainant regarding her competence to testify at trial. We disagree. There is a presumption of competency that may be rebutted by showing that a witness does not have sufficient capacity or sense of obligation to testify truthfully or understandably. MRE 601; *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). If a court permits a witness to testify, it has implicitly found her competent to testify. See *People v Kasben*, 158 Mich App 252, 257; 404 NW2d 723 (1987). Absent an abuse of discretion, this Court will not reverse a trial court's decision that a child witness is competent to testify. *Burch, supra*.

Here, the trial court implicitly found that complainant was competent to testify, i.e., that complainant had sufficient intelligence and sense of obligation to tell the truth. Complainant testified that she was six years old, attended Wilkens School, and was in the first grade. In response to an oath administered by the court, complainant affirmatively acknowledged that she would testify truthfully. Complainant reaffirmed this intention to the prosecutor. Respondent does not argue that complainant was incompetent to testify, but merely that defense counsel should have questioned the child. Further, respondent does not state, what, if anything, defense counsel could have asked to negate complainant's promises to tell the truth or how counsel could have established that the witness was incompetent to testify. Accordingly, this claim is unpersuasive.

Respondent's fifth claim of ineffective assistance of counsel is that defense counsel was ineffective when he failed to object to the trial court's "badgering" of a sixteen-year old defense witness. Contrary to respondent's claim, the trial court's questions were not improper, because they were clearly intended to assist it in its role as the trier of fact, by clarifying the witness' seemingly confusing testimony, which is not improper. MRE 614; *Weathersby*, *supra*. The witness testified that she observed complainant in the dining room for the entire evening, yet she also testified that for part of the evening she was on the porch. After the trial court intervened, the witness explained that she was on the porch for only five minutes. Further, the record does not support respondent's claim that the trial court badgered or argued with the witness. Moreover, as previously indicated, a trial judge has greater discretion in questioning a witness in a bench trial than in a jury trial. *Wilder*, *supra*; *Jackson*, *supra*.

Respondent's final claim of ineffective assistance of counsel is that defense counsel failed to object to three improper remarks made by the prosecutor during rebuttal argument that were not based on any evidence presented during trial. Our review of the record reveals that the challenged statements made by the prosecutor during rebuttal argument were either proper responses to defense counsel's arguments or reasonable inferences from the evidence produced at trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Moreover, even if the prosecutor's remarks were improper, any error may be deemed harmless because, unlike a jury, a judge is presumed to possess an understanding of the law which allows her to understand the difference between admissible and inadmissible statements of counsel. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). We therefore conclude that respondent has failed to demonstrate that, but for counsel's action or inaction, the result of the proceeding would have been different. *Effinger*, *supra*. Therefore, respondent is not entitled to a new trial on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B Burns