STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PATRICK RONALD GROGAN, a Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

PATRICK RONALD GROGAN,

Respondent-Appellant.

UNPUBLISHED
March 17, 2005

No. 256181
Macomb Circuit Court
Family Division
LC No. 00-049807

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right an order of adjudication entered following delinquency proceedings in which a jury determined that respondent, a minor, was guilty of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). The trial court entered an order of disposition placing respondent under the supervision of the Family Independence Agency ("FIA") in a sexual offender program. We affirm.

Respondent's first claim on appeal is that he was denied his due process right to a fair trial when the trial court allowed testimony regarding certain physical evidence recovered from the victim's underwear. We disagree.

To preserve a claim of error regarding the admissibility of evidence for appellate review, a party must timely and specifically object below. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Generally, to be timely, an objection should be interposed between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Because respondent's counsel objected for the first time to the allegedly erroneous evidence at the dispositional hearing, we conclude that counsel's objection was untimely. Without a timely objection to the admission of evidence, our review is limited to plain error affecting respondent's substantial rights. *Knox*, *supra* at 508.

Generally, all relevant evidence is admissible. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). Relevant evidence consists of evidence with any tendency to prove or disprove a fact of consequence. MRE 401; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Relevant evidence is material to the issues and has probative value. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). To be material, a fact need not be an element of a crime or defense; however it must be "in issue" such that it is "within the range of litigated matters in controversy." *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995), mod on other gds 450 Mich 1212 (1995). If the credibility of a witness offering relevant evidence becomes a disputed issue, evidence to support or attack the witness' truthfulness also becomes relevant. *Id*. at 72.

Petitioner called David Woodford, a forensic scientist, to testify to his analysis of a pair of blue panties. Woodford testified that he found two sperm heads on the inside crouch area of the panties. Woodford explained that his report indicated he found nothing of evidentiary value because a minimum of three sperm heads is required in order to classify a substance as semen. Woodford also explained that he did not send the sample for DNA analysis because there must be samples from both the person wearing the underwear and the alleged depositor of the sperm cells and there must be enough sperm cells to test. Respondent's counsel cross-examined Woodford regarding his failure to obtain a DNA analysis of the sperm heads. Woodford explained that he could have sent the sperm heads for such analysis, but it was "highly unlikely" that any DNA samples could have been extracted from only two sperm heads.

Woodford's testimony of finding sperm heads on the underwear that police collected from the victim was relevant to this case because his testimony corroborated certain aspects of the victim's testimony. The victim testified that respondent sexually penetrated her against her will, and that respondent ejaculated on her shorts and leg. She also testified that she put her shorts and underwear in the laundry, but her underwear was unwashed when the police recovered it. Although the sperm heads could not be positively identified as belonging to respondent, Woodford's testimony confirmed that the victim had engaged in some form of sexual activity with a male. Moreover, Woodford's testimony explained the reason petitioner was unable to present DNA evidence linking respondent to the crime.

All probative evidence is inherently prejudicial to an extent. Otherwise relevant evidence is excludable when the probative value of the evidence is substantially outweighed by unfair prejudice. MRE 403; *People v Martzke*, 251 Mich App 282, 294; 651 NW2d 490 (2002). Rather than object to the forensic evidence as prejudicial, respondent's counsel cross-examined Woodford regarding the sperm heads and stressed the inadequacy of the testing procedure and the limitations of the results. Given the noted limitations of the physical evidence, the jury was not likely to be confused by the evidence or give it undue weight. Generally, we defer to evidentiary decisions of the trial court because the trial court is in the best position to contemporaneously assess the effect of the evidence on the jury. *Bahoda*, *supra* at 291. Accordingly, we hold that the trial court did not err in admitting Woodford's testimony regarding the physical evidence as probative and not unduly prejudicial.

Respondent's second claim on appeal is that the trial court erred by allowing an alibi rebuttal witness to testify at trial although petitioner failed to provide respondent with notification of the rebuttal witness pursuant to statute. We disagree.

Again, respondent's counsel failed to timely object to the admission of the evidence that forms the basis of this appeal. Therefore, we review this issue for plain error affecting respondent's substantial rights. *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999).

Contrary to respondent's contention on appeal, petitioner did not call any rebuttal witnesses. During the case-in-chief, petitioner called a witness who testified that her daughter and respondent were at the victim's house on the afternoon of the sexual assault and that she observed a moped parked on the side of the victim's house that afternoon when she picked up her daughter. This witness was listed on petitioner's witness list but was not listed as a rebuttal witness. Although the witness' testimony contradicted respondent's alibi claim, it also corroborated some testimony of the victim and another witness. Because this witness was not a rebuttal witness we conclude that respondent's claim lacks merit.

Respondent's third claim on appeal is that he was denied his due process right to a fair trial when he was tried by a six-member jury. We disagree. Because there is no record that respondent's counsel objected to the number of jurors impaneled, we review this issue for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This Court has held that it is well settled law that "the full panoply of constitutional rights" does not apply to juvenile delinquency proceedings. *In re Whittaker*, 239 Mich App 26, 28; 607 NW2d 387 (1999), citing *People v Hana*, 443 Mich 202, 225; 504 NW2d 166 (1993). "While juveniles are entitled to appropriate notice, to counsel, to confrontation and cross-examination, to a privilege against self-incrimination, and to a standard of proof beyond a reasonable doubt, there is no constitutional right to a jury trial." *In re Whittaker*, *supra* at 28, citing *McKeiver v Pennsylvania*, 403 US 528, 533; 91 S Ct 1976; 29 L Ed 2d 647 (1971). "[J]uvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution." *In re Whittaker*, *supra* at 28-29, citing *Hana*, *supra* at 210, 213, 220. Although a juvenile's right to a jury trial is not constitutionally protected, a juvenile is entitled to a jury at the trial in a juvenile proceeding pursuant to MCR 3.911(A). Contrary to respondent's contention, this case is not a "criminal felony prosecution." Rather, a juvenile delinquency proceeding is considered to be civil in nature and is primarily governed according to the procedural guidelines at MCR 2.510-2.516. *In re Whittaker*, *supra* at 29. MCR 2.511(B) provides that six jurors "shall constitute the jury." See also MCL 712A.17(2). Accordingly, we conclude that respondent was not denied his due process right to a fair trial when he was tried by a six-member jury.

Respondent's fourth claim on appeal is that his conviction was contrary to the great weight of the evidence presented at trial. We disagree.

Respondent forfeited this issue by failing to raise the issue in a motion for a new trial below. Therefore, our review is limited to plain error affecting respondent's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Respondent's primary argument is that the victim's testimony was rendered unbelievable because it contradicted her prior oral and written statements to police and another witness' testimony. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219, citing *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Absent exceptional circumstances, it is the sole province of the jury to determine the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," the credibility of witnesses is for the jury." *Id*. at 643. (citation omitted). Therefore, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647.

The majority of the inconsistencies between the victim's oral and written statements to police and her trial testimony consisted of details that the victim omitted during her initial statements to police. At trial, the victim admitted that her statements "left out a few details" initially. However, she attempted to explain her incomplete statements as related to the fact that, at the time she gave police the statements, she was still dazed and unsure of what to write, the victim also claimed that she was most concerned about providing details of the actual sexual assault and less concerned with the details of other things that occurred that day, including that her best friend was present at her house, that respondent had attempted to kiss her and her friend earlier that day, and that she and respondent went to the drug store that afternoon.

These inconsistencies do not warrant a new trial because the victim's testimony was not void of all probative value or utterly unable to be believed by the jury. See *Lemmon*, *supra* at 643. Moreover, other witnesses corroborated portions of the victim's testimony. After viewing the evidence in its entirety, including the impeachment evidence, the jury found that respondent committed two separate acts of third-degree CSC. It is for the trier of fact to resolve questions of credibility and intent. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). To hold that the jury's verdict was contrary to the great weight of the evidence would be improperly substituting this Court's judgment in matters of credibility for the judgment of the jury. See *Lemmon*, *supra* at 642-647. Accordingly, we conclude that respondent failed to demonstrate the existence of a plain error affecting his substantial rights.

Further, we disagree with respondent's related argument that the cumulative effect of errors requires reversal. Because the admission of Woodward's testimony regarding certain physical evidence was not improper, petitioner did not present a rebuttal witness, and the trial court did not err by impaneling a six-member jury, no errors existed and respondent's claim lacks merit.

Respondent's fifth claim on appeal is that he was denied the effective assistance of counsel. We disagree.

The determination of whether a defendant was denied the effective assistance of counsel is a combined question of fact and constitutional law. We review a trial court's findings of fact for clear error and constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Absent an evidentiary hearing, our review is limited to mistakes

apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must meet the two-part *Strickland*[1] test by demonstrating that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and by showing that this deficiency resulted in prejudice so egregious that it altered the outcome of the trial. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); see also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley*, *supra* at 140.

First, respondent contends that his trial counsel was ineffective for failing to assert that respondent had a right to be tried by a twelve-member jury. However, respondent had no constitutional or statutory right to be tried by a panel of twelve jurors and trial counsel is not ineffective for failing to raise a futile objection or motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Second, respondent asserts that his trial counsel was ineffective for failing to call three additional alibi witnesses to support respondent's theory that he was not present at the victim's house when the alleged sexual assault occurred. Counsel's failure to call a witness is presumed to be trial strategy. *Avant*, *supra* at 508. "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Moreover, review extends only to evidence on the record, and a reviewing court's judgment should not be substituted for the judgment of counsel regarding matters of trial strategy. *Avant*, *supra* at 508. If the record is silent as to the content of a witness' testimony, the defendant cannot prove that failure to call the witness resulted in a different trial outcome. *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990).

Here, respondent attached the police reports of the three proposed alibi witnesses to his brief on appeal. Because these reports were not part of the lower court record, this Court cannot consider them on appeal. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998). Consequently, the record remains silent regarding the content of the proposed witnesses' testimony and whether such testimony would have been beneficial respondent's alibi defense. Further, respondent's trial counsel called two other alibi witnesses who testified that respondent was not at the victim's house on the day of the alleged sexual assault. Accordingly, respondent was not deprived of a substantial defense.

Third, respondent contends that his trial counsel was ineffective for failing to notice the presence of an alibi witness on petitioner's witness list. Because we have found that no rebuttal

[1] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

witness was called, trial counsel was not ineffective in failing to raise this meritless objection. *Fike*, *supra* at 182.

Finally, respondent claims that his trial counsel was ineffective for failing to timely object to the admission of Woodford's testimony regarding the sperm heads found on the victim's underwear. Because Woodford's testimony, including the results of his analysis of the victim's underwear, was relevant and not unduly prejudicial trial counsel cannot be deemed ineffective for failing to raise a futile objection or motion. *Id*.

Respondent's sixth claim on appeal is that the trial court abused its discretion when it placed him under the supervision of the FIA in a sexual offender program rather than with his parents. We disagree.

The right to review of sentencing determinations applies to juvenile court proceedings, *In re Chapel*, 134 Mich App 308, 314; 350 NW2d 871 (1984), and involves review for abuse of the trial court's discretion. MCL 712A.18; *People v Thenghkam*, 240 Mich App 29, 42; 610 NW2d 571 (2000), overruled in part on other grounds 469 Mich 108 (2003).

Proceedings in the family division of circuit court are civil in nature. MCL 712A.1(2). The family division of circuit court has broad authority to sentence a juvenile determined to have committed a crime. Juvenile adjudications can vary from a warning or community service to placement in an institution or boot camp. MCL 712A.18. Pursuant to MCL 712A.18(1)(e), a trial court may commit a juvenile to the supervision of the FIA provided such a disposition is "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained."

At the dispositional hearing, respondent's counsel asserted that the trial court should regard various mitigating factors as the basis for lessening respondent's punishment. Counsel emphasized that respondent completed an anger management program, maintained a high grade point average while at the youth facility awaiting adjudication, and exhibited "exemplary" behavior at the youth facility. Counsel noted that respondent spent nearly seven months in custody pending adjudication of this case. Counsel provided several letters of support at the hearing. Additionally, respondent's parents stated that respondent's behavior had improved and that he had not fought back when provoked and attacked by others at the youth facility. The trial court ordered that respondent remain a state ward under the supervision of the FIA. The trial court also ordered placement of respondent at the Woodland Center Sexual Offender Program in Whitmore Lake, Michigan, and stated that the court would review his placement every ninety days.

A jury found that respondent committed two counts of third-degree CSC under MCL 750.520d(1)(b), which requires force or coercion. Additionally, the trial court noted that respondent was only sixteen years old and had accumulated other crimes in the community that were more offensive than the instant crimes. The trial court further noted that the prosecution had instituted seven prior juvenile delinquency proceedings against respondent. The trial court stated that "[t]he Court and the community have made all reasonable efforts to rehabilitate the defendant in the community, long-term placement is necessary." Given the serious nature of the crime respondent committed and respondent's extensive juvenile record, this Court concludes

that the trial court's order placing respondent under the supervision of the FIA in a sexual offender program did not constitute an abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly