STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of EDDIE CHARLY MATTHEWS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

EDDIE CHARLY MATTHEWS,

Respondent-Appellant.

UNPUBLISHED
January 26, 2010

No. 286976
Wayne Circuit Court
Family Division
LC No. 04-435489-DL

Before: Bandstra, P.J. and Sawyer and Owens, JJ.

PER CURIAM.

Respondent appeals as of right his May 2, 2008, bench trial adjudication for armed robbery, MCL 750.529. On June 6, 2008, the trial court entered an order of disposition placing defendant under the jurisdiction of the court with the Wayne County Department of Children and Family Services. We affirm.

On appeal, respondent argues that the trial court abused its discretion in refusing to allow him to present the testimony of an alibi witness, Lisa Dungie. *In re MU*, 264 Mich App 270, 276; 690 NW2d 495 (2004). An abuse of discretion occurs where the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003). In juvenile proceedings, "procedure is governed by the court rules applicable to proceedings in the juvenile division of the probate court." *In re Alton*, 203 Mich App 405, 407; 513 NW2d 162 (1994), citing MCR 5.901, now MCR 3.901. MCR 3.922(B) provides:

> (1) Within 21 days after the juvenile has been given notice of the date of trial, but no later than 7 days before the trial date, the juvenile or the juvenile's attorney must file a written notice with the court and prosecuting attorney of the intent to rely on a defense of alibi or insanity. The notice shall include a list of the names and addresses of defense witnesses.
>
> (2) Within 7 days after receipt of notice, but no later than 2 days before the trial date, the prosecutor shall provide written notice to the court and defense of an

> intent to offer rebuttal to the above-listed defenses. The notice shall include names and addresses of rebuttal witnesses.
>
> (3) Failure to comply with subrules (1) and (2) may result in the sanctions set forth in MCL 768.21.

Pursuant to MCL 768.21(1), where "the defendant fails to file and serve the written notice prescribed in section 20 or 20a [MCL 768.20 or MCL 768.20a] the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi . . . ." MCL 768.21(1). MCR 3.901(B)(1) provides that MCR 3.901-3.930 "apply to delinquency proceedings[.]" See *In re Lee*, 282 Mich App 90, 99; 761 NW2d 432 (2009). Respondent was required to include the addresses of alibi witnesses in his notice, MCR 3.922(B)(1), and failure to do so gave the trial court discretion to exclude the alibi witness, MCL 3.922(B)(3). *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002) (use of the word "may" designates discretion).

The record reflects that defense counsel filed a notice of intent to claim an alibi defense on March 11, 2008, but that the notice not contain Dungie's address. Respondent's notice therefore did not comply with MCR 3.922(B)(1). The trial court had the discretion to use the exclusion sanction available in MCL 768.21(1). MCR 3.922(B)(3). When deciding whether to exclude evidence because of a faulty notice of alibi, we consider

> "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." [*People v Travis*, 443 Mich 668, 681-682; 505 NW2d 563 (1993), citing *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Examining the reason for failing to disclose Dungie's address, the record reflects that Attorney Judith New provided to the prosecutor all of the information that she had on the first day of trial, March 18, 2008. New did not have more specific contact information because respondent's mother had surgery and was in and out of the hospital. Additional time was given to respondent to comply with the notice requirements, but the address was never provided to the prosecutor. The record further reflects that because of the failure to disclose, the prosecutor suffered prejudice in that she was unable to investigate Dungie or any rebuttal alibi witnesses. Additionally, the evidence supporting respondent's guilt was strong. The victim of the robbery, Leroy Fleming, accurately described the clothing respondent wore during the incident. Fleming identified respondent shortly after the incident and at trial. Fleming specifically testified that respondent was with the boy who took his money, respondent threw stones at him, and respondent hit him with a stick. On the record, we find that the trial court did not abuse its discretion in refusing to allow Dungie to testify. *In re MU*, 264 Mich App at 276.

Moreover, respondent presented conflicting testimony at trial, and it is unclear whether Dungie's proposed testimony that respondent was at school during the incident would even have provided respondent with an alibi. An alibi witness "plac[es] the defendant elsewhere than at the scene of the crime." *People v McGinnis*, 402 Mich 343, 345-346; 262 NW2d 669 (1978), quoting *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974). According to

respondent's own testimony, he was not at school with Dungie when Fleming gave his money to respondent's friend; respondent was with another friend at that time. Thus, regardless of the trial court's decision to exclude Dungie's testimony, reversal is not required where we cannot conclude that defendant was more probably than not affected by the decision. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, respondent argues that there was insufficient evidence to sustain the trial court's finding that he committed armed robbery. When reviewing a challenge to the sufficiency of the evidence in a bench trial, we review the evidence de novo, in the light most favorable to the prosecution, in order to determine whether the essential elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). We defer to the trial court's determinations regarding credibility of the witnesses at trial. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

We conclude that there was sufficient evidence to support, beyond a reasonable doubt, the trial court's conclusion that respondent committed armed robbery. Armed robbery, MCL 750.529, provides:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

MCL 750.530, unarmed robbery, provides:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
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> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Viewed most favorably to the prosecution, the evidence established that Fleming positively identified respondent as one of the four boys who approached him on November 28, 2007. One boy asked Fleming for change, and when Fleming handed him five, $1 bills, the boy did not provide a $5 bill in return, but instead, the boy turned and walked away. Respondent walked away with the boy who had taken Fleming's money. Fleming followed. The boys cut in between some houses, and Fleming went around the block and came upon respondent and the three boys again. Fleming asked them to return his money. Fleming then became scared when he noticed that the boys were wearing bandanas. One of the boys started throwing rocks or

sticks at Fleming. Respondent also threw something at Fleming and chased him. Fleming fell, and respondent hit Fleming with a mop stick several times as Fleming was on the ground. Fleming testified that he was absolutely certain that respondent hit him with the stick. The boys fled when a passing motorist called out to them to stop. Fleming accurately described that respondent wore a brown Carhartt jacket, and he identified respondent shortly after the incident.

The evidence supported that in the course of committing the larceny, including respondent's attempt to retain possession of the property, MCL 750.530(2), respondent used force against Fleming by hitting him with a stick and throwing things at him while the boys tried to retain possession of the money. MCL 750.530(1). See *People v Chambers*, 277 Mich App 1, 7-8 n 5; 742 NW2d 610 (2007). Here, force was used to retain possession of the money. MCL 750.530(2). The mop stick that respondent wielded and with which he hit Fleming constituted a dangerous weapon or article used as a dangerous weapon. See *People v McCadney*, 111 Mich App 545, 548-549; 315 NW2d 175 (1981) (a stick can constitute a dangerous weapon). In addition, respondent's intent to permanently deprive Fleming of the money was circumstantially proven by the fact that respondent aided and assisted in the commission of the robbery by helping the other boys throw things at Fleming and hitting Fleming with a broomstick when Fleming tried to get his money back. Respondent also donned a bandana once the boys got away from Fleming and Fleming caught up to them around the corner. Respondent also associated with, and then walked away with, the boy who took Fleming's money. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (citations omitted).

In respondent's final claim of error, he asserts that he was denied the effective assistance of counsel because his trial counsel failed to recall Officer Mike Fedenis on the second day of trial to continue cross-examination. Our review of this unpreserved claim of error is limited to the any mistakes that are apparent on the record available. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Respondent must show that his counsel's performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms, and that he suffered prejudice as a result, i.e., there is a reasonable probability that, absent the error, the outcome of the trial could have been different. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). In making this showing, respondent "must also overcome the presumption that the challenged action was trial strategy." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The record reflects that the parties planned on continuing the trial after the first day and resuming with the cross-examination of Officer Fedenis. However, it appears that Officer Fedenis was not present on the second day of trial, and defense counsel did not call him to testify or object to his absence. The record does not reveal why Officer Fedenis was not present or called as a witness. However, our review is limited to the record available. *Snider*, 239 Mich App at 423-424. Respondent has failed to overcome the strong presumption that trial counsel's decisions regarding whether to recall Officer Fedenis at the continued trial for further cross-examination or whether to object to his absence constituted sound trial strategy. *Hoag*, 460 Mich 1 at 6. Although respondent asserts that he suffered prejudice because Officer Fedenis was not further cross-examined about Fleming's statements to Officer Fedenis, the record does not support this. Respondent fails to indicate what further cross-examination of Officer Fedenis on this topic would have produced, i.e., how respondent was thereby deprived of a substantial defense that would have likely led to a different outcome. See *People v Dixon*, 263 Mich App

393, 398; 688 NW2d 308 (2004) (Failing to call a witness will only constitute ineffective assistance where it deprives respondent of a substantial defense). Moreover, respondent had an opportunity to cross-examine Officer Fedenis on the first day of trial, and he was questioned about several issues respondent raises on appeal: trial counsel cross-examined Officer Fedenis regarding the description that Fleming provided of respondent's clothing, Fleming's identification of respondent, respondent's statements to Officer Fedenis, and the circumstances surrounding respondent's arrest and questioning. Although Officer Fedenis was not cross-examined regarding why the other boys were not arrested, respondent fails to indicate what information this questioning would have produced such that there was a reasonable probability it would have changed the outcome of his trial. *Dixon,* 263 Mich App at 398; *Pickens,* 446 Mich at 314. Additionally, there was substantial evidence indicating that respondent was involved in the robbery of Fleming. Respondent has failed to demonstrate that his counsel's representation was deficient, or that, even if there had been any errors, there is a reasonable probability that the result of the trial would have been different. *Pickens,* 446 Mich 312-314.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens