STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ALYSSA N. KITZMAN, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARIA LINDBERG,

Respondent-Appellant.

UNPUBLISHED
October 27, 1998

No. 207599
Gogebic Juvenile Court
LC No. 94-000037 NA

In the Matter of SPENCER KITZMAN, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARIA LINDBERG,

Respondent-Appellant.

No. 207937
Gogebic Juvenile Court
LC No. 94-000038 NA

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Respondent Maria Lindberg is the biological mother of the minor children, who were placed under the temporary jurisdiction of the juvenile court after a petition was filed alleging physical abuse and emotional neglect by respondent and her husband, Brian Lindberg. Following a two-week trial, a jury determined that the children came within the continuing jurisdiction of the juvenile court.

Respondent's post-trial motion for new trial or judgment notwithstanding, the verdict was denied by the court. Respondent appeals as of right.

Respondent first argues that the juvenile court abused its discretion in denying her motion for new trial where it was established that one of the minor children had lied at trial. We find no abuse of discretion. A motion for a new trial based on a witness' recanted testimony has been traditionally regarded as suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). The moving party must establish that the recanted testimony would render a different result probable on retrial. *Barbara, supra*. Here, although it was established at the evidentiary hearing that the child had indeed recanted portions of her trial testimony regarding the February 1997 incident involving her stepfather, the child's allegation that she was struck with an object, most likely a plastic coat hanger, resulting in a severe bruise, remained intact. Moreover, the child did not recant the other allegations of abuse and neglect involving respondent and Mr. Lindberg. Accordingly, because respondent did not establish that a different verdict was probable on retrial, the trial court did not abuse its discretion in denying respondent's motion for a new trial on the basis of the recanted testimony.

Respondent next argues that the juvenile court abused its discretion in denying her motion for new trial on the basis of juror misconduct. We disagree. A long established common-law rule prohibits the admission of post-verdict juror testimony or affidavits to impeach a jury verdict. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *People v Pizzino*, 313 Mich 97, 108; 20 NW2d 824 (1945). See also *Tanner v United States*, 483 US 107; 107 S Ct 2739; 97 L Ed 2d 90 (1987). An exception to this general rule applies where the jury is exposed to extraneous influences that may have improperly influenced its deliberations. *Budzyn, supra*. Any attempt to impeach a jury verdict initially encounters two evidentiary obstacles, competency and sufficiency, and, assuming that those evidentiary obstacles are overcome, the party seeking to overturn the verdict must also establish actual prejudice. See *Gov't of Virgin Islands v Gereau*, 523 F 2d 140, 148 (CA 3, 1975).

Here, respondent's allegation of juror misconduct was minimally competent, given that the two jurors' alleged personal history of child abuse constituted an "undisclosed extraneous influence," *Larry Smith, supra* at 212, which was pertinent to the ultimate issue in the controversy, *Gereau, supra* at 152. However, the affidavit submitted by respondent does not meet the sufficiency requirement. On this point, the juvenile court acknowledged that the two jurors' nondisclosure of their alleged history of child abuse was "troubling," but concluded that the affidavit was insufficient because of its lack of specificity and vagueness, as well as the fact that the information had been brought forth, not by the two challenged jurors, but by another juror who had acknowledged the verdict as her own when polled.

An allegation of juror misconduct is sufficient if it establishes that a juror was properly excusable for cause. *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998); *Grist v The Upjohn Co*, 16 Mich App 452; 168 NW2d 389 (1969).[1] In a civil case, a prospective juror may be challenged for cause under various grounds listed in MCR 2.511(D), but the ultimate decision to grant or deny a challenge for cause is within the sound discretion of the trial court. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989). Here, the juvenile court noted that no direct question had been posed to the jurors during voir dire regarding a personal history of child abuse and,

therefore, the nondisclosure was unintentional. Although a strike for cause would have been allowed had it been revealed during voir dire that the jurors were unable to be impartial, there was no evidence here to suggest that they were excusable for grounds of bias. Further, respondent has failed to demonstrate actual prejudice.[2] We find no abuse of discretion in the ruling that respondent's evidence was insufficient to overturn the jury's verdict.

Next, we find no abuse of discretion by the juvenile court in partially granting petitioner's request to amend the petition, as allowed by MCR 5.118(A)(2). As to the issue of adequate notice, we note that petitioner's amended petition was filed by the deadline imposed by the juvenile court in its pre-trial order, and respondent was allowed to raise any challenges to the amendments at that time. Respondent has not established that her substantial rights were materially prejudiced by any delay. Moreover, we find no abuse of discretion by the juvenile court in denying respondent's request for an adjournment of the trial for longer than one day.

Respondent also argues that the juvenile court erred in refusing to conduct a new preliminary hearing at which the court would be required to make a finding of probable cause as to each new allegation in the amended petition. This argument is without merit. Pursuant to MCR 5.965(B)(9), the juvenile court "may authorize the filing of the petition upon a showing of probable cause, unless waived, *that one or more of the allegations in the petition are true* and fall within MCL 712A.2(b); MSA 27.3178(598.2)(b)." Contrary to respondent's argument, there is no requirement, either in the court rule or mandated by due process, that a new preliminary hearing be held when a petition is amended to include new allegations of abuse or neglect.

Lastly, respondent argues that she was denied both a fundamentally fair investigation by the Family Independence Agency (FIA) and a fair trial by the juvenile court. Certainly, as the juvenile court acknowledged, the FIA investigation was flawed, and the trial, viewed in hindsight, was not perfect. Nonetheless, after reviewing the entire record, we reject respondent's blanket condemnation of the proceedings as violative of her due process interest. Respondent also asserts that the juvenile court's procedural and evidentiary rulings contravened *In re Brock*, 442 Mich 101; 499 NW2d 752 (1993), and established criminal case law. However, as the *Brock* Court clearly held, child protective proceedings are civil in nature, not criminal, and the paramount purpose of such proceedings is the protection of children, not the punishment of parents. *Id.* at 107-108. Thus, the juvenile court appropriately refused to be bound by the heightened standard for criminal proceedings in deciding the procedural and evidentiary issues that arose before and during trial.

Affirmed.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] Respondent's reliance on *People v Graham,* 84 Mich App 663; 270 NW2d 673 (1978), for her claim that she was denied the right to exercise her peremptory challenges to dismiss the challenged jurors, is misplaced. Recently, a panel of this Court declined to follow *Graham* and its progeny to the extent that those cases held that an aggrieved party would be entitled to relief from juror misconduct if the party could establish that the juror would have been "otherwise dismissed" by the exercise of a peremptory challenge during voir dire. *Daoust, supra* at 7-8. The *Daoust* Court held that the "otherwise dismissed" language was not based on the defendant's right to an impartial jury, and its application required the trial court to conduct a futile task. *Id.* at 8. Thus, respondent here could only be successful by establishing that the jurors were excusable for cause.

[2] Respondent comments parenthetically, but does not argue, that this Court should find that she was denied effective assistance of counsel. We disagree. There is no showing here that counsel's performance was below an objective standard of reasonableness, and that there is a reasonable probability that,but for counsel's error, the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994).