STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WALTER AMBERS O'DOWD, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

WALTER AMBERS O'DOWD,

Respondent-Appellant.

UNPUBLISHED
February 5, 2009

No. 280841
Oakland Circuit Court
LC No. 2007-730955-DL

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

A juvenile referee adjudicated respondent, a 14-year-old juvenile, guilty of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for engaging in sexual contact with a four-year-old girl. That decision was affirmed by a circuit court judge. Respondent now appeals by delayed leave granted. We affirm.

Respondent argues that the child victim was not competent to testify, that her testimony was not credible, and that the evidence was therefore insufficient to establish his guilt beyond a reasonable doubt. Accordingly, respondent argues, the circuit court erred in affirming the referee's decision. We disagree.

A judge reviewing a referee's recommendation must adopt the recommendation unless the judge would have reached a different result, or the referee committed a clear error of law that likely affected the outcome or cannot be considered harmless. MCR 3.991(E).

The determination whether a witness is competent to testify is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). In juvenile proceedings, the standard of proof at the adjudicative stage, as in criminal proceedings, is proof beyond a reasonable doubt. MCR 3.942(C); *In re Weiss*, 224 Mich App 37, 42; 568 NW2d 336 (1997). An appellate court reviews the sufficiency of the evidence by reviewing the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242

Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Findings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C); MCR 3.902(A).

A person is guilty of second-degree criminal sexual conduct if the person engages in sexual contact with another person who is less than 13 years of age. MCL 750.520c(1)(a). "Sexual contact" includes "the intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose[.] MCL 750.520a(q); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997).

Initially, we reject respondent's argument that the referee erred in finding that the child victim was competent to testify. MRE 601 provides:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

"The test of competency is thus whether the witness has the capacity and sense of obligation to testify truthfully and understandably. *Watson*, *supra* at 583.

During preliminary questioning to evaluate the victim's competency to testify, the victim explained the difference between the truth and a lie, and gave examples of each. The victim also promised that she would tell the truth. Although respondent contends that the victim had difficulty understanding questions and later gave inconsistent testimony during her examination at trial, these matters relate to the credibility of her testimony, not her competency to testify. *Watson*, *supra* at 583. Because the victim's voir dire responses demonstrated that she understood the difference between a truth and a lie, and that she understood her obligation to testify truthfully, the referee did not clearly err in finding her competent to testify.

Respondent argues that even if the victim was competent to testify, inconsistencies in her testimony rendered the testimony unreliable and noncredible. Credibility determinations are generally for the trier of fact to resolve and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The referee acknowledged that there were inconsistencies in the victim's testimony, but attributed those inconsistencies in part to the victim's young age, noting that she lacked the vocabulary to speak on an adult level and that she sometimes appeared to have difficulty understanding a number of adult questions. The referee also observed that the victim seemed to tire because of the length of time that she was on the witness stand. Despite these factors and the presence of some apparent inconsistencies, the referee found that the victim was clearly attempting to tell the truth and that she was a credible witness. The referee was in a superior position to evaluate the victim's credibility and we find no clear error in the referee's determination of credibility. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), mod 481 Mich 1201 (2008).

Further, a review of the victim's testimony discloses that, despite some inconsistencies, it was sufficient to support respondent's adjudication. As the referee found, "the core of her story

remained throughout" and her testimony "did refer positively to respondent touching her butt and crotch area." The victim testified consistently that respondent pulled down both his pants and her pants, told her to close her eyes and not to look, and placed his crotch on either her crotch or butt. She also testified that when respondent placed his crotch on her crotch, it felt hot, and that respondent wiped something off her butt. Viewed in a light most favorable to petitioner, the victim's testimony was sufficient to establish the elements of second-degree CSC beyond a reasonable doubt.

Contrary to what respondent argues, it was not necessary that petitioner establish a specific date for the offense. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Even a defense of alibi does not make time of the essence. *Id.* Here, the information charged a six-month time period for the offense. Although much of the testimony at trial focused on November 14, 2006, the evidence showed that respondent's family and the victim's family were close, and that there were other occasions within the charged time period when the victim or respondent were at the other's house. Thus, to the extent that the evidence raised questions whether the offense could have been committed on November 14, 2006, those questions did not preclude a finding of guilt, given that it was not necessary to establish that the offense was committed on that date.

For this reason, the fact that the referee determined that respondent's sister was a credible witness did not preclude a finding that respondent committed the offense. The sister's testimony focused on November 14, 2006. As the referee observed, the date of the offense was never clearly established. Because respondent was charged with committing the offense within a six-month timeframe and because time was not of the essence, a determination of respondent's guilt or innocence did not depend on whether the offense was committed on that particular date. Further, even with respect to that date, respondent's sister admitted that the victim may have gone off on her own for a little while.

Respondent also argues that the referee erred in admitting evidence of the victim's statements to her mother under MRE 803A because the delay between the incident and the victim's statement was not "excusable as having been caused by fear or other equally effective circumstance." We disagree. Fear is only one example of an "effective circumstance." Confusion or lack of understanding can have just as much effect on the mind, particularly the mind of a very young child, as fear. The referee did not err in admitting the testimony on the basis of this reasoning.

In any event, even if the referee erred in admitting the victim's statements under this rule, any such error would have been harmless. A preserved nonconstitutional error does not require reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); see also MCR 3.902(A) and MCR 2.613(A) (an error in the admission of evidence at a delinquency proceeding is not a ground for reversal unless refusal to take action is inconsistent with substantial justice). Here, the referee specifically stated that he found beyond a reasonable doubt that the evidence established respondent's guilt of second-degree CSC, and that he "would make this finding without the 803A testimony of Mother." Thus, it is not more probable than not any error was outcome determinative and refusal to take action would not be inconsistent with substantial justice.

Next, respondent argues that he was denied his right to a preliminary hearing under MCR 3.932. Although respondent asserts that he preserved this issue by raising it in a motion to dismiss, the record discloses that he later withdrew that motion. Accordingly, the issue is not preserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The rule cited by respondent, MCR 3.932, refers to a preliminary inquiry, which differs from a preliminary hearing, the latter being governed by MCR 3.935. Where, as here, a juvenile is not in detention, and detention is not being requested, "the court may conduct a preliminary inquiry," which is an "informal review by the court to determine appropriate action on a petition." MCR 3.903(A)(22); MCR 3.932(A). Respondent concedes that a preliminary inquiry was held on March 5, 2007, but argues that he was not afforded an opportunity to attend the inquiry. However, the juvenile's presence is not required at a preliminary inquiry unless the court, in the interest of the juvenile and the public, directs that the juvenile and the parent or guardian appear for formal inquiry on the petition. MCR 3.932(A)(3). Respondent's reliance on *Goss v Lopez*, 419 US 565; 95 S Ct 729; 42 L Ed 2d 725 (1975), in support of his argument that he had a due process right to a preliminary hearing is misplaced. In that case, the Supreme Court held that it was a violation of due process to suspend students from school without notice or an opportunity to be heard. In this case, respondent was afforded notice of the charge against him and afforded a full trial in which he had an opportunity to defend and be heard. Accordingly, his due process rights were not violated. For these reasons, we find no plain error.

Finally, respondent argues that he was prejudiced in his ability to proceed and defend against the charge because a complete transcript was not prepared and timely delivered during trial. Because respondent never raised this issue below, appellate relief is precluded absent a plain error affecting respondent's substantial rights. *Carines*, *supra* at 763. The record does not support respondent's claim. After the victim testified on June 1, 2007, the referee agreed to adjourn the trial until a transcript of her testimony was prepared. When the parties next appeared on July 2, 2007, they agreed that there were problems with the transcript. The referee advised the parties that the court reporter would use the backup tape to correct the transcripts. Before the trial concluded, the parties appeared again on July 25, 2007, and defense counsel acknowledged receiving the corrected transcript. Respondent brought several motions during trial, but no objection was raised regarding the delivery or content of the corrected transcript. On this record, respondent has failed to demonstrate either a plain error or shown that his substantial rights were affected.

For these reasons, the circuit court did not err in affirming the referee's decision.

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto