

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANT MISAK ATIKIAN,

Defendant-Appellant.

UNPUBLISHED

May 29, 2001

No. 219890

Oakland Circuit Court

LC No. 98-158611-FH

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360; MSA 28.592, and was sentenced to eighteen months' probation. Defendant was also ordered to complete the Special Alternative Incarceration program. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court abused its discretion when it admitted a telephone bill that the prosecutor failed to properly authenticate as required by MRE 803(6), the business record exception to hearsay. MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the billing record was a business record generated by a third-party outside the course of trial or other hearing. Additionally, the billing contained a list of telephone numbers called by the user of the stolen phone on and after the date the phone was stolen. These telephone numbers were linked to defendant. The prosecutor introduced the billing to establish that the phone was used after its theft and that it was used to telephone the numbers appearing on the bill on the date and at the time indicated on the billing statement. In other words, the billing record constitutes an extrajudicial statement offered for the proof of the matter asserted. The prosecutor offered the phone bill as circumstantial evidence tending to prove that it was defendant who took the phone because defendant was the one using the phone to place calls. Thus, the phone bill is hearsay.

Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802; *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980). Furthermore, in order for the billing statement to qualify as a record of regularly conducted activity under MRE 803(6), the proponent of this evidence must lay a proper foundation. In *People v Vargo*, 139 Mich App 573,

580; 362 NW2d 840 (1984), we articulated the standard for laying a proper foundation under this hearsay exception:

For a proper foundation to be established for the admission of this document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

We find that, because the complainant is not a “qualified witness” within the meaning of the rule, the prosecution failed to establish an adequate foundation for the admission of the phone bill under MCR 803(6).¹ Thus, we hold that the trial court abused its discretion in admitting the telephone bill into evidence. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

We further find that the improper admission of the evidence was not harmless. Under a harmless error analysis, we must determine whether the error is prejudicial. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). In doing so, we focus “on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence.” *People v Mateo*, 453 Mich 203, 215; 551 Nw2d 891 (1996).

The prosecutor’s case against defendant depended heavily on the admission of the billing statement at trial. Although defendant’s former girlfriend testified that defendant called her during the early morning hours of December 28, 1997, and testified that defendant told her that he had stolen cellular phones while at parties, no other evidence was presented to establish that the stolen telephones to which defendant referred included the complainant’s cellular telephone or that defendant stole the complainant’s cellular telephone. Thus, the error was obviously prejudicial and defendant is entitled to a new trial.²

Our dissenting colleague concludes that, because the remaining evidence was insufficient to sustain defendant’s conviction, double jeopardy bars a retrial. We disagree. The dissent has improperly conflated the harmless error analysis with the sufficiency of the evidence analysis. Under the harmless error analysis, this Court must decide whether the untainted evidence was sufficient to sustain the conviction.³ *Mateo, supra*. If not, the error is prejudicial and the proper remedy is to remand for a new trial. Under a sufficiency of the evidence analysis, this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence admitted at trial was sufficient to sustain the conviction. *People v Petrella*, 424 Mich 221, 268-279; 380 NW2d 11 (1985). Here, the evidence admitted at trial was sufficient to sustain the conviction. Our conclusion on appeal that the telephone bill evidence was improperly admitted for lack of foundation does not negate the fact that sufficient evidence was presented to sustain the conviction. Rather than posing a sufficiency problem, this case involves only evidentiary

¹ This is not to say that the prosecutor will be unable to establish a proper foundation on remand.

² In light of our resolution of this issue, we need not address the remainder of the issues raised by defendant.

³ Indeed, due process mandates that a conviction be based on legally admissible evidence.

error. To vacate defendant's conviction and bar a retrial would be to punish the prosecutor for relying on the trial court's evidentiary ruling. Had the trial court sustained defendant's objection, the prosecutor would have been allowed to attempt to lay a proper foundation for the evidence. The prosecutor should not be denied that opportunity on remand.⁴ This case involves a routine remand for retrial where evidentiary error was not harmless. Double jeopardy concerns are not implicated in this case.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

⁴ The dissent concludes that the prosecutor was not prepared to offer a foundation for the telephone bill during the trial and therefore was not able to establish an essential element of the crime. We cannot agree with this conclusion. During the brief colloquy following defendant's objection to admission of the telephone bill, the prosecutor indicated that he believed the complainant's testimony was sufficient, and the trial court agreed. The prosecutor therefore had no need to attempt to lay the proper foundation, and we cannot conclude that the prosecutor was otherwise unwilling to lay a proper foundation for the evidence. Had the trial court sustained defendant's objection, the prosecutor likely would have requested an adjournment to call the proper witness.