STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2007
v	No. 272990 Oakland Circuit Court
PAUL CHRISTOPHER MAY, Defendant-Appellant.	LC No. 2006-207465-FC

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of carjacking, MCL 750.529a. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Joya Weekes and Courtney Rice drove to a nail salon at a strip mall in Oak Park. Accompanying them in another car were Aaron Staten and Larry Harrell. Harrell parked next to Weekes, and Weekes went into the salon with Harrell and Staten. Rice remained in the car with the engine and air conditioning running.

Weekes, Rice, Staten, and Harrell testified that they saw defendant walking slowly on the sidewalk in front of a bakery in the mall near the salon. Defendant said hello to Harrell. A short time after the others entered the salon, defendant opened the door of the car, and sat down in the driver's seat. Rice, who was frightened, asked defendant to let her out, but defendant told her to stay. He then put the car in reverse. Rice managed to get out of the car.

Rice ran into the salon and told the others what had happened. Weekes called the police, and she and Rice went outside. Weekes and Rice received information from an individual who worked at the bakery concerning the identification of the person who had taken the car. Rice subsequently provided a description of the person who had taken the car, and his possible identity, to the police. Both Rice and Harrell identified defendant in the photographic lineup and at trial. Staten was unable to make an identification during the photographic lineup, and did not identify defendant at trial. Weekes identified another individual during the photographic lineup, but also stated during trial that defendant was the person who had taken the car.

On appeal, defendant maintains that the trial court erred when it permitted Rice to testify, over defendant's objection, that an unidentified person told her that the person who had taken the

car was the husband of a woman who worked in the bakery. He contends that this constituted impermissible hearsay testimony.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Hearsay generally may not be admitted as substantive evidence unless it is offered under an exception to the hearsay rule. MRE 802; MRE 803. Here, the prosecutor does not argue that an exception to the hearsay rule permits the evidence in question. Rather, the prosecutor argues it is not hearsay at all, as it was not offered for its truth. The prosecution maintains the contested testimony was offered to explain how the police discovered the identity of the perpetrator and, thus, how they were able to create a photographic lineup that included a photo of defendant.

Had the prosecution called as a trial witness the bakery employee who informed Rice of the identity of the person who took the car instead of eliciting this evidence from Rice, there would be no issue regarding the propriety of this evidence. Michigan has long permitted an identifier to testify to his extrajudicial identification. *People v Londe*, 230 Mich 484; 203 NW 93(1925). Here, however, a third party is testifying to the bakery employee's extrajudicial identification.

In *People v Sanford*, 402 Mich 460, 489; 265 NW2d 1 (1978), our Supreme Court addressed this issue:

> Our case law and that of other jurisdictions do not present a clear case for admission of this type of testimony. While most jurisdictions admit the testimony of the identifier as an extrajudicial identification, most jurisdictions do not admit the testimony of a third party to an extrajudicial identification, except in limited circumstances. . . . Where admitted, such testimony has usually been limited to (1) rebuttal of testimony tending to impeach or discredit the testimony of the identifying witness or (2) testimony of the circumstances surrounding the identification.

In *Sanford*, a witness, Anderson, identified the two defendants as the perpetrators to a police officer the day after the crime. Our Supreme Court affirmed the trial court's decision to allow the police officer to testify to Anderson's identification:

> In this case the officer testified to an event he had witnessed, the identification of the defendants by Mr. Anderson, the complaining witness. He was not testifying to the truth of the identification statement but to the fact that it was made and the circumstances surrounding it. Hearsay is defined 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. *People v Hallaway*, 389 Mich 265, 275; 205 NW2d 451 (1973). Since the police officer was not testifying to prove that the defendants were the alleged assailants, but only to show that on February 27, 1974 he witnessed an event, the identification of the defendants by Mr. Anderson, his testimony was not hearsay.

While the Supreme Court in *Sanford* concluded that the testimony at issue in that case was not inadmissible hearsay, our Supreme Court nonetheless cautioned against the potential for abuse of such evidence. *Id* at 491-492. See also, *Id* at 493-500 (concurring opinions of Justices Ryan, Kavanagh and Levin). The present case is distinguishable from *Sanford*. In *Sanford*, both the identifier, Mr. Anderson, and the third party police officer testified at trial. The testimony of the police officer removed potential confrontation clause issues. Here, the identifier was not called to testify at trial.

Even if we conclude the trial court erred in concluding this testimony was not hearsay, the error was harmless as a matter of law. A preserved nonconstitutional error is not a ground for reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). Here, substantial evidence established defendant's role in the crime. The two individuals who had the greatest opportunity to interact with defendant before the carjacking consistently identified him as Rice's assailant. Notably, Rice appeared to have no difficulty identifying defendant. Both she and Harrell also provided identical observations as to how defendant's hairstyle at the time of the carjacking differed from that in his photograph. The other two witnesses, who admittedly could not identify defendant in the photographic lineup, did provide corroborating descriptions. In light of this evidence, we find the alleged hearsay testimony cumulative and not significantly prejudicial. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell