

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA JEAN SMITH,

Defendant-Appellant.

UNPUBLISHED
February 14, 2008

No. 271504
Wayne Circuit Court
LC No. 06-000643-01

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to a year's probation and initially ordered her to pay \$1,280 in attorney fees, plus additional court costs. We affirm.

Defendant's conviction arises from an altercation she had with a Wayne County Sheriff's Deputy at the Wayne County Friend of the Court (FOC) office on August 3, 2005. Defendant went to the FOC to get a printout detailing the activity in her child support case; defendant's ex-husband was delinquent on his child support payments. When she arrived at the office, defendant filled out a customer service inquiry form and presented it to Diedra Gilbert, an FOC information specialist. Gilbert asked defendant for her government issued identification in accordance with FOC policy. Defendant did not have her identification on her person, and she refused to retrieve it from her car. According to Gilbert, defendant got angry and loud and asked to speak to her supervisor. Roberta Wright, the FOC supervisor, explained the identification policy to defendant but defendant continued to loudly refuse to produce identification. At this point, Wayne County Sheriff's Deputy Michael Tyson came up to defendant and told her to step out of line if she was not going to produce identification. Defendant yelled at Deputy Tyson, "I'm not talking to you. Get away from me." Deputy Tyson then put his hand on defendant's elbow to guide her out of the line; defendant snatched her arm away from him. The deputy tried again to guide defendant out of the line by her elbow, and defendant began yelling at him and swinging her arms and hands at his upper torso. Defendant hit him once on his upper torso. Deputy Tyson then grabbed both of defendant's arms and forced them down to her sides. Backup officers arrived, and one of them handcuffed defendant.

Defendant testified that when she told Gilbert that she did not have her identification, Gilbert became irate. Defendant asked to speak to her supervisor. When Wright appeared,

defendant tried to explain to her that she did not know about the identification policy and had left her identification in her car. Before she could ask Wright whether she would validate her parking, Deputy Tyson came up behind defendant and grabbed her by both arms. Defendant claimed that Tyson then dragged her into a dark room and pinned her against a stack of chairs. Defendant denied ever striking Deputy Tyson. When asked if she filed a complaint against the deputy, defendant claimed that she called the sheriff's department "a couple of times" to file a complaint, but no one ever returned her calls.

The prosecutor called a rebuttal witness, Detective Allen Bulifant, to refute defendant's claim that she tried to file a complaint against Deputy Tyson. Defendant objected to Detective Bulifant's testimony concerning statements made by Commander Kevin Losen, the officer in charge of processing complaints against court officers, stating, "Object, your Honor. I'm going to object to relevance on this. Why isn't Officer Losen here; why is he doing this through this particular officer?" The trial court overruled defendant's objection, instructing the prosecution to "tie up" with one or two questions. Detective Bulifant then testified that Commander Losen told him that defendant never filed a complaint against Deputy Tyson.

The jury found defendant guilty as charged. The trial court sentenced her to a year's probation and ordered her to complete an anger management course. After asking defendant whether she was employed, to which defendant answered that she was not, the trial court ordered her to obtain full-time employment and pay "\$60 state costs, crime victim assessment of \$60, a supervision fee of \$100, court costs of \$600," along with \$1,280 in attorney fees to be paid in monthly installments.

On appeal, defendant first argues that the trial court improperly admitted hearsay testimony from Detective Bulifant, which was highly prejudicial to her. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, the decision to admit evidence frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. *Id.* We review questions of law de novo. *Id.* Therefore, when such a preliminary question is at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.* Also, even though defendant preserved this issue below, defendant must overcome the presumption that the error is harmless by persuading this Court that "it is more probable than not that the error in question was outcome determinative." *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (citation omitted).¹

¹ Because we conclude that defendant properly preserved this evidentiary issue below, we need not address her argument that trial counsel was ineffective for failing to make an objection specific enough to preserve the evidentiary error. Defendant objected to the testimony, and it is evident from her objection that her grounds for objecting were relevance and hearsay. Defendant, therefore, preserved this evidentiary issue because she made a timely objection and specified the same ground for challenge, hearsay, as she asserts on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

The trial court abused its discretion by admitting hearsay testimony, which is inadmissible as a matter of law. See *Katt, supra* at 278. Hearsay is an out-of-court statement offered for the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless a specific exception applies. MRE 802. In his testimony, Detective Bulifant repeated out-of-court statements Commander Losen made to him regarding whether defendant filed a complaint against Deputy Tyson. Also, the out-of-court statements were offered for the truth of the matter asserted; specifically, to prove that defendant did not file a complaint. None of the hearsay exceptions are applicable to Bulifant's testimony. See MRE 803 and 804. Thus, the trial court abused its discretion when it allowed Bulifant to testify about the statements Losen made to him.²

We conclude, however, that defendant is not entitled to relief. The error is harmless as defendant fails to show that “‘it is more probable than not that the error in question was outcome determinative.’” *Whittaker, supra* at 427 (citation omitted). Although the improperly admitted hearsay may have somewhat undermined defendant's credibility by contradicting her testimony that she attempted to file a complaint against Deputy Tyson, it did not tip the scale in the prosecution's favor. The evidence presented at trial supported the version of events proffered by the prosecution that defendant became angry and loud and hit Deputy Tyson when he tried to remove her from the line. The testimony from the two FOC employees and the deputy supported the prosecution's version of events; defendant's account varied substantially from that of the other witnesses. Therefore, the jury could have easily concluded that defendant's testimony was not credible, even without considering the improperly admitted hearsay. Consequently, we conclude that the error in question was not outcome determinative, and reversal based on this evidentiary error is not warranted.

Defendant next argues that the trial court erred in ordering reimbursement of attorney fees without considering her ability to pay. This issue is moot because, on recommendation of defendant's probation officer due to loss of home and low income, the trial court amended the probation order and allowed her to complete 330 hours of community service in lieu of paying the court ordered costs and fees. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995) (an issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy). Therefore, we shall not review this issue any further.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello

² On appeal, the prosecution concedes that the trial court abused its discretion by admitting the detective's statements.