STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 279863 Schoolcraft Circuit Court
JAE-LYN TATROW, Defendant-Appellant.	LC No. 06-006481-FH

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of embezzlement by an agent of money or property with a value of $1,000 or more but less than $20,000, MCL 750.174(4)(a), and one count of attempted embezzlement by an agent of money or property with a value of $20,000 or more but less than $50,000, MCL 740.174(5)(a). Defendant was sentenced to four months in jail and to pay $6,008 or, in the alternative, to serve eight months in jail on each count. We affirm.

Defendant's sole argument on appeal is that she was denied a fair trial because hearsay testimony was allowed by the trial judge. Specifically, defendant challenges two portions of the testimony provided by her former brother-in-law, who co-owned the impacted businesses with defendant's former husband, the witness's brother. The first portion of testimony addresses access to company accounts given defendant. Defendant preserved this challenge for appellate review because she objected to the alleged hearsay testimony at trial. The second portion of testimony addresses a $15,000 transfer of business funds from one of the witness's business accounts to defendant prior to her receiving financing to purchase a bar/restaurant. Here, defendant raised a lack of first-hand knowledge objection, not a hearsay objection. Because this is not the same ground now being argued on appeal, this hearsay challenge is forfeited. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court reviews preserved evidentiary decisions for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A forfeited evidentiary challenge is reviewed for plain error affecting substantial rights. *Carines, supra* at 763.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defendant argues that the challenged testimony was offered on direct examination for its truth

and, therefore, is hearsay.[1] She also argues that statements relating past events are statements of belief or memory and are explicitly omitted from MRE 803(3).

The witness was asked to explain, to the best of his knowledge, how it was that defendant's name was put on the bank account. However, it is clear from the witness's testimony that his knowledge is not first-hand. It is clear that the witness was testifying about an out-of-court statement (or statements) made to him by another (or others) on which defendant has a legitimate need to cross-examine.

Defendant presumes that when answering defendant's hearsay objection, the court's reference to state of mind being an issue is a reference to MRE 803(3). This is erroneous. MRE 803(3) addresses the state of mind of the declarant—here, both defendant's former husband and the businesses' secretary—but it appears in context that the court's reference is to the state of mind of the witness as receiver or hearer of the statement(s). While, the witness's state of mind is not relevant under the substantive law, it can be reasoned that defendant put it in issue in his opening statement when he questioned the motivation of the witness, defendant's former husband, and the secretary in testifying. Specifically, defendant put into issue the question whether the brothers would deny how much access defendant actually had to company monies to pay for bar expenses, as well as whether the motivation for the entire criminal complaint was to stop defendant from receiving spousal support, and perhaps even punish her for requesting it. Defendant pursued this theory in his cross-examination of the witness. When the witness came to know about the nature of defendant's account access was relevant to counter the argument made by defendant.

With respect to the witness's testimony about the $15,000, it is also relevant because it addresses defendant's argument that the motivation for the entire criminal complaint stemmed from defendant seeking spousal support in the divorce proceedings. When the witness came to know about the nature of the $15,000 transfer was relevant to counter the argument made by defendant. Thus, defendant cannot show plain error.[2]

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering

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[1] Defendant also cites in her brief on appeal a portion of her cross-examination of this witness. She cannot assess error based on her own questioning. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176, lv den 461 Mich 919 (1999), habeas corpus den sub nom *Griffin v Berghusi*, 298 F Supp 2d 663 (ED Mich, 2004) (observing that "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence").

[2] Defendant cites *People v Snyder*, 462 Mich 38; 609 NW2d 831 (2000) in support of her argument that admission of the challenged testimony was outcome determinative. Unlike *Snyder*, however, the jury here "was given the opportunity to hear the admissible evidence it needed to make its decision." *Id.* at 44. In *Snyder*, the jury was prevented from hearing impeachment evidence that would have undermined the credibility of the complainant. *Id*. at 44-45. Here, nothing was kept from the jury that would have undermined the credibility of the complaining witnesses.