STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 293227 Ingham Circuit Court
TRISHA ANN BEEMAN, Defendant-Appellant.	LC No. 07-001338-FH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of uttering and publishing, MCL 750.249. She was sentenced to 60 days in jail and three years' probation. Defendant appeals as of right. We affirm.

I. BASIC FACTS

In June 2007, Louellen Beeman opened a checking account with the Lansing Area Federal Credit Union (credit union). The credit union gave her a box of checks. Louellen placed a book of checks in her purse. She left the other books in the box, which she stored in a jewelry box in her bedroom. Also in the jewelry box were her social security card and several credit cards.

On August 6, 2007, after receiving her July bank statement, Louellen attempted to balance her checkbook. She noticed that the statement included "checks that shouldn't have been written." Louellen was writing checks numbered in the 1030s and 1040s, but checks numbered in the 1070s had been cashed. Louellen immediately went to the credit union, where she spoke with Mary McDaniels, the branch manager. McDaniels pulled surveillance video from when some of the checks had been cashed, and showed Louellen photographs from the video. Louellen identified the person cashing the checks as defendant, her daughter-in-law. Defendant was married to her son Harley Beeman.

Louellen filled out an affidavit of forgery and a stop payment notice. On the advice of McDaniels, she also went to the police station and made a police report.

Later that afternoon, defendant presented a check for payment at the credit union's drive-thru lane. The check was drawn on Louellen's account; it was made out to defendant in the

amount of $400 and appeared to be signed by Louellen. The teller asked defendant to step inside the credit union, while McDaniels called the police. Defendant was subsequently arrested, and her purse was searched. A book of checks for Louellen's checking account was found in the purse, as was Louellen's social security card and several credit cards belonging to Louellen or her deceased husband.

Nine checks, either made out to defendant or Harley, in the total amount of $2,600, forged with Louellen's signature, had been cashed in a two-week period. Louellen denied that she had given defendant and Harley any blank checks with the suggestion that they use the checks to pay their bills. She also denied giving them any credit cards. The credit union reimbursed Louellen's account with the amount of the forged checks.

Defendant and Harley testified that, approximately two weeks before defendant was arrested, Louellen gave them a book of checks. They were in financial trouble, and Louellen was going to file for bankruptcy, and Louellen suggested that they use the checks to get caught up. According to Harley, Louellen suggested that either he or defendant sign her name to the checks. Louellen did not explain why she wanted them to sign her name, but he presumed it was because Louellen was extremely dyslexic, and he had previously helped her write checks. Louellen also instructed them not to use more than $2,500. Defendant admitted that she and Harley used several of the blank checks and that they had signed Louellen's name to the checks.

Defendant and Harley also testified that Louellen had given them the credit cards found in defendant's purse. The cards in the name of Louellen's husband (and Harley's father) were given to Harley shortly after his father's death. Defendant had them in her purse because she was going to place them in a scrapbook. The other credit cards were given to them recently by Louellen to use for gas, although they never used the cards. Neither defendant nor Harley could explain why Louellen's social security card was in defendant's purse.

The uttering and publishing charge related to the check that defendant presented for payment on August 6, 2007. Defendant admitted that she signed Louellen's name on the check and she intended to obtain $400 from Louellen's checking account.

II. LIMITS ON CROSS-EXAMINATION

Defendant argues that the trial court improperly limited her cross-examination of Louellen regarding her motive for bringing the uttering and publishing charge against defendant. We disagree.

We review a trial court's limitations on cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

On redirect examination, Louellen testified that, despite defendant's actions, she had maintained a relationship with defendant and Harley, even continuing to give them financial assistance. And when asked if there was any motive for her to continue to "pin" the charge on defendant, she answered, "No." Then, on recross-examination, defense counsel asked her, "But, the bank has since that period, in August of 2007, reinstated your account with the amounts of all

these checks, correct?" Before Louellen could answer, the trial court called the attorneys to the bench and, thereafter, instructed the jury to disregard the question.

After the prosecution rested, defense counsel asked to place an exception on the record concerning his question to Louellen that if she had admitted the checks were authorized and not fraudulent, would the credit union require her to reimburse it. The trial court stated that it had precluded the question because it did not believe that whether the credit union had reimbursed Louellen's checking account was relevant to the uttering and publishing charge. We agree with defendant that the trial court's reason for limiting defense counsel's recross-examination of Louellen was not supported by the record. Louellen had already testified on cross-examination, without objection by the prosecutor, that the credit union had reimbursed her checking account.

Nonetheless, when defense counsel placed his exception on the record, the trial court acknowledged that it was in the record that the credit union had reimbursed Louellen's account.[1] It also stated that defense counsel could recall Louellen to the witness stand and ask her questions that counsel may have deemed precluded by its prior ruling. In its rebuttal case, the prosecutor recalled Louellen, and defense counsel had an opportunity to question Louellen. He did not, however, ask her whether, because her account had been reimbursed by the bank, she had a continuing motive to "pin" the charge on defendant. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Counsel, by not reasking Louellen about a continuing motive to "pin" the charge on defendant, when given the opportunity to do so, contributed to the alleged error by failing to use the opportunity presented to ask the question at issue as permitted by the trial court's ruling.[2]

Defendant also claims that the trial court erred in not allowing her to question Louellen about whether she held Harley responsible for the forged checks. We disagree.

After defense counsel asked Louellen if she concluded that Harley was involved in fraud, the trial court asked the attorneys to approach for a bench conference. After the conference concluded, defense counsel asked Louellen a different question. Although the trial court did not explain on the record why it prevented the question, the trial court stated at the hearing on defendant's motion for a new trial that it prevented the question because whether Louellen believed that Harley had engaged in fraud was not relevant to the uttering and publishing charge for which defendant was on trial.

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[1] McDaniels also testified that the credit union had reimbursed Louellen's checking account.

[2] Even if there was error attributable to the trial court, the error does not require reversal. Defendant fails to establish that "after an examination of the entire cause, it . . . affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (internal quotations and citation omitted).

Generally, all relevant evidence is admissible, and evidence that is not relevant is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. On the facts presented, we agree with the trial court that defendant failed to establish that any fact that was of consequence would be more or less probable with Louellen's testimony regarding her belief of Harley's culpability. Accordingly, the trial court did not abuse its discretion in determining that Louellen's conclusion regarding Harley's culpability was not relevant.

III. EVIDENCE OF THEFT

Defendant claims that the trial court erred in prohibiting her from introducing evidence that Louellen was fired from her job at Wal-Mart for theft. Defendant claims that the evidence should have been admitted under either MRE 608(b) or MRE 404(b). We disagree.

Defendant never claimed before the trial court that evidence of Louellen's firing was admissible under either MRE 608(b) or MRE 404(b). "[I]ssues not raised before and considered by the trial court are not properly preserved for appellate review." *People v Conner*, 209 Mich App 419, 422; 531 NW2d 734 (1995). We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court did not plainly err in failing to admit evidence of Louellen's firing from Wal-Mart under MRE 404(b). Defendant offered the evidence to prove Louellen's character for untruthfulness. Evidence of a witness's other bad acts is not admissible under MRE 404(b) to prove the witness's character. MRE 404(b)(1); *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002).

MRE 608(b) provides, in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

After Louellen testified that she was fired from her job at Wal-Mart in January 2008, the trial court dismissed the jury in order to hear the circumstances of Louellen's firing. The trial court heard Louellen's explanation for why she was fired from Wal-Mart, and concluded that the

incident had no bearing on Louellen's credibility.[3] The trial court, having made this finding, did not plainly err in failing to allow defense counsel to question Louellen about her firing pursuant MRE 608(b).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises two claims of ineffective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must prove that defense counsel's performance fell below objective standards of reasonableness under prevailing professional norms and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Defendant first argues that defense counsel was ineffective when he agreed to the trial court's response to a question from the jury that defendant, when she presented the check, intended to defraud "someone" and that the "someone" included Louellen or the credit union. Defendant claims that counsel should have required that the jury be instructed that she intended to defraud Louellen because that was the theory the prosecution presented in its opening statement and closing argument.

Defendant raised this claim of ineffective assistance in her motion for a new trial. Thus, the issue is preserved, but because the trial court did not hold a *Ginther*[4] hearing, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

There are three elements to the crime of uttering and publishing: "(1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment." *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). Regarding the intent to defraud element, the trial court instructed the jury that it must find that "when the Defendant [presented the forged check], she intended to defraud or cheat someone." The jury subsequently asked the trial court whether the "someone" referred to Louellen, the credit union, or anyone. With the agreement of the prosecutor and defense counsel, the trial court instructed the jury that the "someone" would include either Louellen or the credit union.

We cannot conclude that defense counsel's agreement to the instruction fell below objective standards of reasonableness. The intent to defraud element focuses on the defendant's

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[3] The trial court specifically ruled that evidence of Louellen's firing was not admissible under MRE 609 because Louellen was not convicted of any theft crime.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

state of mind and does not require proof of who in particular will ultimately bear the expense of the fraud. MCL 767.83. Accordingly, the trial court's initial instruction that the jury must find that defendant intended to defraud "someone" was a correct statement of the law. Thereafter, the trial court was confronted with a specific question from the jury regarding whether the "someone" defendant intended to defraud referred to Louellen, the credit union, or anyone. We find that, in the context of the evidence presented at trial, the trial court's response that the "someone" included either Louellen or the credit union was proper. Under the proofs presented, it was only Louellen or the credit union that could have been defrauded. Consequently, an objection to the instruction would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

In addition, defendant admitted that she signed Louellen's name to the check that she presented for payment on August 6, 2007, and that she intended to obtain $400 from Louellen's checking account. Ultimately, the main issue presented for the jury's determination, as evidenced by the parties' opening statements and closing arguments, was whether Louellen had given defendant and Harley a book of checks with her permission to forge her name on the checks. Counsel may have reasonably determined that resolution of this issue, which was essentially a credibility determination, did not depend on whether the jury determined that defendant intended to defraud Louellen or the credit union. If the jury believed Louellen, rather than defendant and Harley, it would find that defendant intended to obtain from the credit union $400 from Louellen's checking account, which was money that she was not authorized to have. Under the circumstances, defendant has failed to show that defense counsel's performance in agreeing to the instruction was deficient.[5]

Second, defendant argues that to the extent the filing of a pretrial notice would have allowed defense counsel to question Louellen about her firing from Wal-Mart, counsel was ineffective for failing to file a pretrial notice. We disagree.

MRE 404(b)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. . . .

We must interpret MRE 404(b)(2) according to its plain language. See *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009) ("When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation."). The plain language of MRE

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[5] Defendant also fails to show that had the jury been instructed that the "someone" defendant intended to defraud was only Louellen, there is a reasonably probability that she would have been acquitted.

404(b)(2) requires the prosecution to provide pretrial notice of its intent to introduce bad acts evidence, but the rule makes no similar requirement of defendants. Thus, even if evidence of Louellen's firing from Wal-Mart was proper MRE 404(b) evidence, its admission was not dependent on counsel giving pretrial notice. As defense counsel was not required to file a pretrial notice, counsel was not ineffective for failing to do so. *Fike*, 228 Mich App at 182.

V. GREAT WEIGHT OF THE EVIDENCE

Defendant claims that she is entitled to a new trial because her conviction for uttering and publishing is against the great weight of the evidence. We disagree.

We review a trial court's decision on a motion for a new trial predicated on the verdict being against the great weight of the evidence for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against it that it would be a miscarriage of justice to allow the verdict to stand. *Id.* "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.*

Here, the jury was presented with conflicting testimony regarding whether Louellen had given a book of checks to defendant and Harley with the suggestion that they use the checks to pay their bills. Conflicting testimony is not, however, a sufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities," a court must defer to the jury's determination. *Id.* at 645-646 (internal quotations and citation omitted). It is the province of the jury to resolve issues of witness credibility. *Lacalamita*, 286 Mich App at 470. The testimony of defendant and Harley, along with that of the other defense witness, did not deprive Louellen's testimony of all probative value such that the jury could not believe it. Thus, the trial court properly deferred to the jury's credibility determination, and did not abuse its discretion in denying defendant's motion for a new trial.

VI. CUMULATIVE ERROR

Defendant finally claims that the cumulative effect of the errors denied her a fair trial. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal . . . . Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Defendant has failed to establish any errors and, therefore, we reject her claim of cumulative error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher