STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2002
v	No. 234545 Wayne Circuit Court
JOANNE HILL, Defendant-Appellant.	LC No. 00-007868

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Following a jury trial, defendant Joanne Hill was convicted of larceny, MCL 750.356(2)(a) ($20,000 or more). She was sentenced to two years' probation and restitution of $95,000. Defendant appeals as of right. We affirm.

In this case, the prosecution alleged that defendant stole $95,000 from the safe of the complainant, George Goodwin. Defendant was the complainant's girlfriend or friend for over twenty years, and cared for the homebound complainant for almost two years before he died. In anticipation of his death, the complainant withdrew $98,000 from his bank account to distribute to his family. The complainant's son, Major Goodwin, testified that soon afterward, he went to his father's house, where defendant was sitting on the floor counting $98,000 in cash with the complainant seated nearby. The complainant then gave defendant $3,000, and asked his son and defendant to put the remaining $95,000 in the safe, for which they knew the combination. They did so, but when the complainant's son returned another day and opened the safe at the complainant's request, the safe was empty. The complainant testified that defendant initially denied taking the money, but admitted to it in the presence of witnesses. According to the prosecution, defendant said that she deserved the money for her long length of service to the complainant. Soon after the complainant reported the incident as a theft, he died of natural causes.

First, defendant argues that the interviewing police officer's testimony regarding the complainant's statement to police was hearsay. We agree.

We review a trial court's evidentiary rulings for an abuse of discretion. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997). MRE 801(c) provides: "[']Hearsay[']

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." See also MRE 802 ("[h]earsay is not admissible . . . ").

The challenged testimony, consisting of the testifying police officer reading his previous exchange with the complainant into the record, is as follows:

> [*Prosecutor*]: Officer, could you read the questions and answers you got with . . . Mr. Goodwin [the complainant] in to the record?
>
> [*Witness*]: [*Interviewer*]: Who is Joanne Hill to you?
>
> [*Complainant*]: She was a friend. I had known for 21 to 22 years. We started dating in 1998.
>
> She has never lived here but has a key to my house. She did stay here for a year, maybe in 1998, but not in 1999. She had rented her house to her daughter.
>
> [*Prosecutor*]: Go ahead. Please continue.
>
> [*Witness*]: [*Interviewer*]: Who placed it in the safe?
>
> [*Prosecutor*]: What was that question in reference to?
>
> [*Witness*]: The money, the $95,000.
>
> [*Prosecutor*]: Okay. Go ahead.
>
> [*Witness*]: [*Complainant*]: Joanne did. I told her to put the money in the safe and for her to take $3,000 for herself. It was $98,000 altogether; $95,000 after she took the $3,000 I gave her.
>
> I checked behind her to make sure it was there and it was.
>
> [*Interviewer*]: When did you check the safe?
>
> [*Complainant*]: I checked the safe as soon as I got up, seen the money was missing. I asked Joanne if she took it. At first she said, no, then she said, yes.
>
> [*Interviewer*]: Was anything else missing from the safe?
>
> [*Complainant*]: Two titles to the vehicles and the deed to my house. She gave the deed back to my son, Major. She said she wasn't going to take the house, but that she had taken the title to the van and changed it into her name.
>
> This was a few days ago. The vehicle –

At that point, I wrote down the vehicle information, to two different vehicles.

* * *[1]

[*Prosecutor*]: Okay. So, the next question and answer.

[*Witness*]: [*Interviewer*]: How much money was taken?

[*Complainant*]: Ninety-five thousand dollars. Because the $3,000 I had given to her.

[*Interviewer*]: Do you want to press charges?

[*Complainant*]: Yes, I do.

At the outset, we note that the parties agreed to admit the first portion of the statement – the portion regarding the length of the complainant's relationship with defendant. Thus, defendant's agreement to admit that portion waived the issue and extinguished any error. See *People v Carter*, 462 Mich 206, 214, 215-216; 612 NW2d 144 (2000).

Defendant contends that the trial court erred in admitting the majority of the statement as evidence of the complainant's state of mind under MRE 803(3). We agree.

MRE 803(3) provides that the following is not precluded by the hearsay rule:

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception is applicable only when the state of mind of the declarant is at issue, i.e., relevant. *McCallum v Dep't of Corrections*, 197 Mich App 589, 605; 496 NW2d 361 (1992); see also MRE 401 ("definition of ['']relevant evidence['']").

The remaining portion of the statement contains the complainant's outright accusation that defendant stole the money and other property. The complainant's state of mind on this matter was simply not relevant. See *McCallum*, *supra* at 605. As a result, we cannot conclude that this portion of the statement was not offered to prove the truth of the matter asserted. See MRE 801(c). Rather, the statement tended to prove facts remembered or believed by the declarant in violation of MRE 803(3).

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[1] The material omitted here was not part of the complainant's statement sought to be introduced into evidence; it consists of direct questioning of the officer witness. Therefore, it is not hearsay. See MRE 801(c).

Although the statement was inadmissible hearsay, a review of the testimony otherwise admitted at trial reveals that the statement was cumulative of other evidence properly admitted. See *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992), and *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988) (otherwise hearsay testimony is admissible if it is cumulative of other properly admitted evidence). The complainant's son testified to the majority of the statement's factual content, including the confrontation between the complainant and defendant, the missing deed and vehicle titles, and the amount of money stolen. Furthermore, with regard to the last two sentences of the statement, it was already obvious to the jury by the nature of the trial that charges were filed against defendant. Thus, admission of the statement in its entirety was not error requiring reversal because it was cumulative. See also, *People v Lukity*, 460 Mich 484, 492-493; 596 NW2d 607 (1999).

The second issue on appeal is whether the prosecution elicited testimony from its witnesses that defendant asserted her right to remain silent, in violation of the due process and self-incrimination protections of the United States and Michigan Constitutions. See US Const, Am V, XIV; Const 1963, art 1, § 17; *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276, amended in part on other grounds 437 Mich 1208 (1990). Defendant waived her objection regarding this issue by explicitly agreeing on the record to admission of trial testimony regarding her *voluntary* statement to police. See *Carter*, *supra* at 214, 215-216; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Therefore, review of this issue is precluded.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie