STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2011
v	No. 298050 Ogemaw Circuit Court
JOSEPH KENNETH MANNI, Defendant-Appellant.	LC No. 09-003343-FH

Before: STEPHENS, P.J., and SAWYER and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his bench trial conviction for first-degree home invasion, a violation of MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 5 to 30 years' imprisonment. He argues that the trial court abused its discretion when it admitted, over objection, an unauthenticated letter that was allegedly written by defendant while he was incarcerated in a county jail. We affirm.

I. BASIC FACTS

Kathleen Kennedy testified that before her husband died in 2000, they socialized with defendant. Defendant also did work on the Kennedys' roof. On August 30, 2009, defendant came to Kennedy's house, but she did not recognize him and so did not answer the door. Defendant left a note telling her that he would probably stop back later. Defendant stopped by again on September 3, 2009, Kennedy let him inside, and they spoke for about 30 minutes. Kennedy noticed that defendant was wearing nice cologne or had a nice soap smell on him.

Kennedy stated that three days later, on September 6, 2009, which was the day after the anniversary of her husband's death, defendant returned once again to her house. Kennedy did not want to talk to defendant so she took her cigarettes from the table and left the kitchen to hide in the hallway area. Kennedy noted that she saw the same grey vehicle that had been at her house the other two times defendant was there. She also saw defendant both directly as she peeked around a window and in a reflection on her china cabinet.

Kennedy explained that her kitchen has three windows, one of which slides and has a large cat door in it. The cat door was closed but not locked. While in the hall area, Kennedy heard defendant knock and call her name, saw her cat run past, and heard a cracking sound. She observed a grey car pulling out of the driveway, and returned to the kitchen. She noticed that the

cat door was open, pushed in, and had a new crack in it. Kennedy smelled the same cologne or soap fragrance that she noticed when defendant visited previously. She also noticed that $87 was missing from her kitchen table.

Kennedy testified that sometime after the theft, she received by mail a money order for $100 along with a note. Thereafter, she received another letter. The second letter was signed by "Joe." The trial court admitted the letter into evidence over defendant's objection. The letter read as follows:

> Kathleen,
>
> I had my mother send you your missing money because I need to get out of jail. My mom just sent me this letter saying my youngest son's mother, my x; just past away, Sat., 12th this month. Natalie and I were close all the way untill the cops arrested me for the charge you have against me. Kat, I did not take your money. I've been to your house many times in the past and nothing that I know of has gone up missing! The hollidays are here, my son's mother is dead, and I'm facing life for something I didn't do!
>
> I know this isn't your fault, I don't hold this against you, but please for God's sake call the prosecutor and tell him you found your money?! No one would be at fault this way. I pray God is in your heart, Kat, not in the system! Your money, $100.00 is payed, please get these assholes off my back.
>
> Joe
>
> I'm being held at the Clare County Jail:
>
> 255 W. Main St.
> Harrison, MI 48625

Following proofs and closing arguments, the trial court indicated that, as trier of fact, it was the court's responsibility to determine the credibility of the witnesses. The court then proceeded to review Kennedy's testimony. Kennedy testified that she knew defendant from when he had done work on her home while her husband was alive. When defendant stopped by unexpectedly on August 30, 2009, Kennedy, not immediately recognizing him, did not answer the door. Defendant left a note. When he stopped by a few days later, Kennedy was comfortable letting him into the home and speaking with him. She noted a "striking" smell of cologne at the time. On September 6, 2009, Kennedy was in the kitchen when she observed defendant through the window. Not interested in speaking with him, she went to the hallway. Kennedy heard a "cracking" sound a few seconds later. The trial court was not "unduly concerned about" the exact amount of time that lapsed:

> But what she did say was – she had an unusual cat door. I mean, I have never seen a cat door like this. I am familiar with the kind that fit in the doorway and go in and out and that is the way it is. But she had a big hunk of plexiglass that inset in place of the screen, it looks like. And the cat which was, as Mr.

> Schaiberger said a big cat, a Snagglepuss of a cat, if one remembers an old cat that used to be around West Branch. This was a big cat.
>
> But she testified. And frankly, from her testimony and from her demeanor on the stand, I am satisfied was correct, she wasn't going to leave windows open at night so the cat could go in and out. She had the windows shut. The window was shut, the cats were inside.
>
> ***
>
> Plainly possible, based upon the testimony, to reach in if you push that cat door beyond where it is meant to go, crack it, reach in and grab the money. How long does it take to leave at that point? Matter of seconds to get to a car.
>
> That is what she testifies happens. And I am satisfied that is what happened. I am satisfied she sees Mr. Manni coming. She hides. Mr. Manni is looking and peers in the door, trying to see, calling her name, "Kathy, Kathy," and then she ducks back, she doesn't see him.
>
> She hears a crack, three seconds elapsed, twelve seconds, she is not sitting there with a stop watch. She doesn't know. She estimates like we all do, oh, it is only a couple seconds. And when she goes in, the cat door is broken, the money is gone.

The trial court also noted that Kennedy could smell the same cologne as when defendant had been to the house days earlier.

The trial court then set forth the elements for first-degree breaking and entering, as well as the evidentiary support for each element: 1) actual breaking into a dwelling (defendant "applied force to the cat door. . . breaking it."); 2) entering the dwelling (defendant "got his arm and his head and reached in. Enough of his body to leave the faint odor of the cologne."); 3) with an intent to commit an offense ("In this case, larceny from the building. I am satisfied there is no other reason to stick your head in and ram into something unless you saw something. When he was there in that window he saw the money on the table."); and, 4) another person was lawfully present in the dwelling ("Mrs. Kennedy was present in the dwelling. He didn't know it. . . But she was there."). Following the trial court's meticulous recitation of the facts, it found "the circumstantial evidence in my mind is clearly beyond a reasonable doubt. Mr. Manni is the guy that stuck his hand in, grabbed the money, took the money."

Defendant was sentenced as a fourth habitual offender to 5 to 30 years' imprisonment. He now appeals as of right.

II. ANALYSIS

Defendant argues that the admitted letter was not properly authenticated and admission was unfair because the prosecutor suggested that defendant sent it to urge Kennedy to perjure herself. Defendant further maintains that the letter's contents were not distinctive enough to be admissible. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of

discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The abuse of discretion standard recognizes there may be no single correct outcome in certain situations. Instead, there may be more than one reasonable and principled outcome. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The following discussion took place regarding admissibility of the letter:

Court: Not hearsay if it can be established it's a statement made by the defendant.

Defense Counsel: But there is no--

Court: This is where we are going to go from there. Let's find out who wrote it.

Prosecutor: Was there a reference in the letter in regard to the visit on September 6th that you just testified to?

A: Yes.

Prosecutor: That was the only Joe that was there on September 6th?

A: Yes.

Prosecutor: I think it is established, your Honor.

Defense Counsel: It is not, Judge. There is a lot of Joes out there. I object.

Court: And you can argue that, [defense counsel]. But she has basically established that that set of circumstances and I think that is sufficient to get over the threshold. You are asking to admit that letter?

Prosecutor: That is correct.

Court: Objection is overruled. The letter is admitted.

In rending its verdict, the trial court noted:

But in my opinion, what is most supportive of this is, I did look at this letter. Okay? And I understand that at no point, as [defense counsel] points out, does he ever admit that he took the money. What he said is, "I didn't take the money." Okay?

Here is what I looked at, though. And when you sort of fly speck this thing, "I had my mother send you your missing money." How did he know the money was missing? Well, he is being charged with it. But more to the point, he took it. So he sends her the missing money.

When it comes to the admission of evidence, a proper foundation must be laid in which the item can be identified as that which it is purported to be and is connected with the crime or the defendant. *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). Testimony of a witness with knowledge "that a matter is what it is claimed to be" is one method of authentication or identification that conforms with MRE 901(a). MRE 901(b)(1). The authentication requirement can also be met through "*Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." MRE 901(b)(4).

The letter in the present case was authenticated based on the contents referring to the money and amount stolen from Kennedy and the signature by "Joe," in conjunction with the circumstances and testimony from Kennedy that defendant was the only Joe at her house the day her money was stolen. Additionally, the court determined that Kennedy was a credible witness and found that the events in question happened as she testified.

MRE 901(b) reflects that there are numerous ways for a document to be authenticated. The trial court's determination of authentication fell within a principled range of outcomes and was not an abuse of discretion, given the distinctive characteristics of the letter's contents and the surrounding circumstances supported by Kennedy's testimony.

We acknowledge the concerns raised by the dissent, but even if the letter was not properly authenticated, any error in its admission was harmless in light of the overwhelming evidence against defendant. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (preserved nonconstitutional error not grounds for reversal unless it is more probable than not that the error was outcome determinative). In rendering its decision, the trial court set forth a detailed summary of Kennedy's testimony. These findings of fact span eight transcript pages. The trial court concluded, "[t]hat is what she testifies happens. And I am satisfied that is what happened." Although the trial court referenced the letter as "most supportive," it is clear that the trial court would have convicted defendant on Kennedy's testimony alone. In contrast to the trial court's detailed findings of fact regarding Kennedy's testimony and credibility, the trial court's discussion regarding the letter was a mere two paragraphs of transcript. It is clear that, even if the letter had not been considered, the trial court would have found defendant guilty.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly