

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No. 134473

JUNIOR FRED BLACKSTON
Defendant-Appellee.

Lower Court No00-011975-FC
COA NO. 245099

*134473
Amicus*

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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FILED
DEC 5 2007
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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Statement of the Question

I.

In order to preserve an issue for review on appeal the specific ground for admission or exclusion of evidence must be cited to the trial court; is the citation of the proper ground on a motion for new trial sufficient to avoid review under the plain-error standard?

Amicus answers: "NO"

Statement of Facts

Amicus joins the statement of facts of the People.

Argument

I.

In order to preserve an issue for review on appeal the specific ground for admission or exclusion of evidence must be cited to the trial court; the citation of the proper ground on a motion for new trial is insufficient to avoid review under the plain-error standard.

Introduction

This court has directed the parties to brief the following points:

- considering that the grounds for evidentiary error that defendant asserted at trial, citing MRE 613, differ from the grounds he now advances upon appellate review, whether the Court of Appeals applied the correct standard of review when addressing admissibility under MRE 806 and MRE 403;
- whether the trial court could properly exclude two witnesses' inconsistent statements, which were made after they had testified in the defendant's first trial but before the defendant's second trial;
- whether exclusion of this evidence, if error and if the claim of error was properly preserved, was harmless beyond a reasonable doubt; and
- whether exclusion, if error but the claim of error was not preserved through a sufficient objection at trial, is plain error requiring reversal.

Amicus wishes to focus on the first question raised in this court's order.

Discussion

This case presents an unusual factual scenario. Two prosecution witnesses refused to testify at trial. *After* the trial court had granted a new trial, necessitating the current trial, and for reasons unrelated to the present appeal, these witnesses essentially wrote out "testimony" inconsistent with their testimony at the previous trial. The defense attempted to offer this "testimony" under MRE 613, and thus not for its truth but to impeach the prior testimony being read to the jury. Because MRE 613 concerns examination of witness at trial concerning "prior statements"—that is, made

previous to the testimony given at trial—inconsistent with the trial testimony, the trial judge held the statements made *after* the testimony at the first trial to fall without the rule.

It was not until the motion for new trial that defendant argued that the written recanting statements were admissible under MRE 806. The trial judge's approach to the motion was to consider the merits of the claim, and to reject it on the ground that though he concluded that the statements *were* subject to admission under MRE 806, he would have precluded them in any event had that ground for admission been offered, finding them inadmissible under MRE 403 (in part because he viewed them as a fraud given the circumstances; that is, recanting while avoiding being placed under oath).

The Court of Appeals in its first opinion in this case treated the matter as though the MRE 806 argument had been advanced at trial, rather than a postconviction motion. It concluded that the statements were admissible under MRE 806¹—as did the trial judge—but disagreed with the trial judge's finding—again in his ruling on the postconviction motion for new trial—that *had* the proper ground been raised he would have excluded the statements under MRE 403, finding an "abuse of discretion" on the part of the trial court in denying the motion for new trial. While the trial court's approach is understandable, that of the Court of Appeals is not permissible.²

Though considering its own actions, and the actions or inactions of the parties, in a motion for new trial, the trial court nonetheless is acting as a reviewing court when considering the motion. Those doctrines of issue preservation, forfeiture, waiver, and the like that apply to an appellate court

¹ "Defendant should have been permitted to impeach the witnesses with their statements under MRE 806...." Slip opinion, at 5.

² In its first opinion, the Court of Appeals found error, and found that error reversible under the standard for preserved nonconstitutional error. On remand with instructions from this court, the court found the error reversible as not harmless beyond a reasonable doubt, applying (as this court instructed) the standard for preserved constitutional error. But the proper standard, as amicus will argue, as have the People, is the plain-error standard, as the issue was not properly preserved at trial.

reviewing the trial apply equally to a trial court; it would certainly be an odd review system were it otherwise.³ It is not sufficient to preserve a claim for review to make the appropriate objection at *any time* so long as it is made in the trial court; rather, the objection made or the ground for admission of evidence advanced must be reasonably contemporaneous to the action taken *during the trial*, for the point of a contemporaneous-objection rule is to allow the *curing* of possible error before judgment is made by the factfinder. It is the "when" of the matter, and not the "where," that is critical. After trial, because objection, or the citation of a proper ground for admission of evidence, comes too late for any curative action, the issue is forfeit and a more onerous standard of review applied than had the opportunity for curative measures been presented to the trial judge before judgment.

Illustrative is *United States v Swan*.⁴ There defense counsel objected to the admission of certain testimony as hearsay. In a motion for new trial counsel raised a different ground, a fact pointed out by the trial court in denying the motion. On appeal defendant argued that the abuse-of-discretion standard rather than the plain-error standard applied because he had raised the "specific ground" of objection in his motion for new trial. The seventh circuit, however, held that objection "at that time was not timely"—the ground raised during trial must be the same as that raised on review or review is for plain error.⁵

It is understandable that the trial court might take the approach when considering a forfeited claim of error that a new trial is not justified if the court would have excluded the evidence even under the belatedly cited ground for admission. But the ultimate question, and the one that must be

³ See e.g. MCR 6.431(B): "On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice."

⁴ *United States v Swan*, 486 F3d 260 (CA 7, 2007).

⁵ See 486 F3d at 263-264.

answered by an appellate court under MRE 103(a) and (b),⁶ is, where the proper ground for admission was not cited at trial, whether plain error occurred. A more rigorous standard for both error (it must have been plain or obvious) and prejudice (the error must have been essentially outcome-determinative, or "seriously affect the fairness, integrity, or public reputation of judicial proceedings") apply, standards not applied by the Court of Appeals here, and which must be applied for appropriate review of the issue.⁷

⁶ It has consistently been held that failure to cite the specific ground for *admission* of evidence is as fatal as failure to cite the specific ground for exclusion of evidence. See *e.g.*, *United States v. Seymour*, 468 F.3d 378, 387 (CA 6, 2006) (applying plain-error review to exclusion of evidence because ground for admission was not raised at trial); *United States v. Humphrey*, 279 F.3d 372, 377-78 (CA 6, 2002) (applying plain-error review to evidence that supposedly "could have been admitted as a business record" where "defense counsel did not raise this specific exception at trial"); *United States v. Phillips*, 888 F.2d 38, 41 (CA 6, 1989) (applying plain-error review to excluded evidence where ground for admission—bias—was not raised below); *United States v. Millen*, 594 F.2d 1085, 1088 (CA 6, 1979), all cited in *United States v. Arnold*, 486 F.3d 177, 193 -194 (CA 6, 2007), finding, interestingly enough, forfeiture for failure to cite FRE 806 as the ground of admission!

⁷ Amicus leaves to the People the argument on application of the plain-error standard, but would refer the court again to the *Arnold* case, involving as it does failure to cite FRE 806 as a ground for admission of evidence. There the court said "Arnold satisfies the first and second prongs of the plain-error test. As the government acknowledges, Rule 806 permits the introduction of this statement for impeachment purposes (though not for its truth), and the error is plain. We need not decide whether the evidence satisfies the third prong of the plain-error test because it does not satisfy the fourth prong....[exclusion of the evidence] did not 'seriously affect [] the fairness, integrity, or public reputation' of the proceedings in this case." 486 F3d at 194.

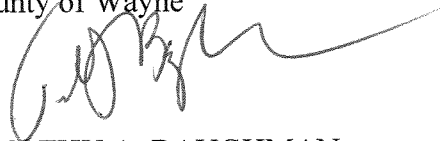
Relief

WHEREFORE, amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

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