STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PAUL DRAY,

Defendant-Appellee.

UNPUBLISHED
August 7, 2003

No. 242622
Wayne Circuit Court
LC No. 00-005117

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was charged with kidnapping, MCL 750.349, in connection with the alleged kidnapping of Randy Meixner. Prior to trial, the prosecution sought the admission of a probate court order appointing Randy Meixner's mother, Diane Meixner, as his full guardian in order to demonstrate he lacked the capacity to consent to the alleged kidnapping. The trial court denied the prosecution's motion to introduce evidence of the probate court order at trial. Subsequently, the prosecution filed an application for leave to appeal with this Court. This Court denied the prosecution's application for failure to persuade the Court of the need for immediate appellate review. Thereafter, the prosecution applied for leave to appeal to the Michigan Supreme Court. In lieu of granting the prosecution's motion for leave to appeal, the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted pursuant to MCR 7.302(F)(1). *People v Dray*, 466 Mich 892; 649 NW2d 74 (2002). We affirm.

The prosecution asserts that the trial court erred in denying its motion to introduce evidence at trial of the probate court order regarding Randy Meixner's appointment of a guardian and legal incapacity. Specifically, the prosecution contends that the evidence is relevant pursuant to MRE 401, and is admissible as an exception to the hearsay rule pursuant to MRE 803(23).

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003); *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "When the decision regarding the admission

of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, __ Mich __; __ NW2d __ (Docket No. 121864, issued 7/9/2003), slip op p 3.

In the instant case, defendant was charged with kidnapping pursuant to MCL 750.349, which provides:

> Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.
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> Every offense mentioned in this section may be tried either in the county in which the same may have been committed or in any county in or through which the person so seized, taken, inveigled, kidnaped or whose services shall be sold or transferred, shall have been taken, confined, held, carried or brought; and upon the trial of any such offense, the consent thereto of the person, so taken, inveigled, kidnaped or confined, shall not be a defense, unless it shall be made satisfactorily to appear to the jury that such consent was not obtained by fraud nor extorted by duress or by threats.

In the context of the crime of kidnapping and the defense of consent, "[t]he prosecution bears the burden of proving defendant's guilt beyond a reasonable doubt and, where defendant produces enough evidence to put an affirmative defense into controversy, the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt." *People v Thompson*, 117 Mich App 522, 528; 324 NW2d 22 (1982). In *Thompson*, *supra*, this Court instructed the trial court, on remand, that if the evidence introduced warranted instructions on consent as a defense to kidnapping or criminal sexual conduct, the instructions should indicate that the burden of proof was on the prosecution to disprove consent beyond a reasonable doubt. *Id*. at 529. In the present case, defendant indicated his intention to raise the defense of consent in relation to the kidnapping charge. In order to rebut the consent defense, the prosecution sought to introduce a probate order appointing Diane Meixner as Randy Meixner's legal guardian.

First, the prosecution contends that the probate court order is relevant on the issue of Randy Meixner's mental capacity to consent to being taken and confined by defendant. We find that the evidence sought to be presented by the prosecution is relevant pursuant to MRE 401.

"Logical relevance is the foundation for admissibility of evidence." *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002) citing *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these

> rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 401 provides, in part, that "relevant evidence" is evidence that has:

> 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.

Here, the prosecution sought to admit the probate order appointing Diane Meixner as Randy Meixner's legal guardian to demonstrate that he was mentally incapacitated at the pertinent times involved in this case. If defendant presented enough evidence to put the defense of consent into controversy, the prosecution would bear the burden of disproving the affirmative defense of consent beyond a reasonable doubt. See *Thompson*, *supra*. The probate court order appointing Diane Meixner as Randy Meixner's legal guardian due to his incapacity would make a fact of consequence, his lack of capacity to consent, more probable than it would be without the order. Therefore, the probate court order is relevant pursuant to MRE 401.

Next, the prosecution argues that the evidence is admissible as an exception to the hearsay rule pursuant to MRE 803(23), and that the evidence was more probative that prejudicial. We think it is unnecessary to determine whether the evidence was admissible pursuant to MRE 803(23)[1] because even if it was, the trial court did not abuse its discretion in finding that its probative value was substantially outweighed by the danger of unfair prejudice.

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[1] The question of whether this document would be admissible under MRE 803(23) would be an issue of first impression in the state of Michigan. Although, we need not address this question, we note that every indication is that such documents would not be admissible under MRE 803(23) which provides, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . [j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation." The Eleventh Circuit Court of Appeals determined that such an order was inadmissible hearsay, when the order sought to be admitted was a district court order entered against the defendant in a civil case the defendant filed against his former employer for sex discrimination and retaliatory discharge. *United States v Jones*, 29 F3d 1549, 1551 (CA 11, 1994). The district court order concluded that the defendant's attendance and interpersonal problems were the reasons for his termination. *Jones*, *supra*. underlying facts, they did so expressly." *Jones, supra* at 1554, citing FRE 803(22) and FRE 803(23). In discussing the Mississippi Rule of Evidence 803(23), which is substantially similar to MRE 803(23), the Mississippi Supreme Court stated "conditions of health, either mental or physical, do not appear to be within the scope of these rules, as they have more to do with legal status in relation to another." *Knowles v Mississippi*, 708 So 2d 549, 558-559 (Miss, 1998) quoting *Mask v Elrod*, 703 So 2d 852 (Miss, 1997). In *Knowles*, *supra*, the Mississippi Supreme Court directed the trial court, on remand, to exclude a chancery court decree finding that the defendant was not in contempt for failure to pay child support as well as a letter attached to the decree, containing a physician's opinion that the defendant was physically disabled from employment. *Knowles*, *supra* at 558. As stated by the *Knowles* Court, conditions of health, either mental or physical, do

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A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). A "declarant" is "a person who makes a statement." MRE 801(b). "Hearsay is inadmissible as substantive evidence at trial, except as provided for in the Rules of Evidence." *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997) (citations omitted); MRE 802. There is no disagreement as to whether the contents of the probate order are considered hearsay, but rather, whether the probate order is admissible based on an exception to the hearsay rule, MRE 803 (23).

The trial court's decision to exclude the probate order was, apparently, based on defendant's arguments that the distinction between the standards and burdens of proof in guardianship proceedings and criminal proceedings would be lost by the jury, and that the admission of the probate court order would be substantially more prejudicial than probative.[2] MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The determination of whether the probate order was more probative than prejudicial presents a close question. The prosecution itself submits that it is "unclear whether a civil judgment that is under [sic] admissible under MRE 803(23) may be admitted in a subsequent criminal action," but contends that the rule itself imposes no such limitations. "The trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001) quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). Accordingly, the trial court did not abuse its discretion in excluding the evidence on the basis that the unfairly prejudicial nature of the evidence substantially outweighed its probative value.

Admission of the probate order is prejudicial in that it is likely to have the effect of confusing or misleading the jury. When consent is at issue, the prosecution must prove beyond a reasonable doubt that there was no consent to the act of in question, and in the probate appointment of a guardian, for an incapacitated person, the burden is "clear and convincing evidence" that the individual is "an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated

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not appear to be within the scope of these rules, as they have more to do with legal status in relation to another. Thus, every indication is that the probate court order appointing Diane Meixner as Randy Meixner's legal guardian would not fall within the scope of MRE 803(23). However, that determination is unnecessary in the present case.

[2] This is not entirely clear, but a review of the proceedings reveals that, at least, on the motion to reconsider the trial court adopted the argument that the contents of the probate document were substantially more prejudicial than probative. Further, the trial court noted that this was "essentially" the original ruling.

individual." There is danger of the jury giving too much weight to the probate court's determination of incapacity, and the possibility that the jury will accept these findings as binding.

Further, the admission of the probate court order would have merely been cumulative to other evidence the prosecution intended to produce. The prosecution acknowledged in its brief on appeal that the probate court order would, "at the very least, corroborate to a certain extent Diane Meixner's testimony that her son was mentally incapacitated at the pertinent times involved here." Evidence, although relevant, may be excluded on the basis of needless presentation of cumulative evidence. *Herndon*, *supra* at 420 n 110, citing MRE 403. In light of the fact that this is not the only evidence of Randy Meixner's incapacity, as Diane Meixner was going to testify to the same, and the likelihood that the evidence would mislead and confuse the jury, the trial court did not abuse its discretion in excluding the probate court order from trial on the basis that its probative value was substantially outweighed by the danger of unfair prejudice.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen