STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 289855 St. Joseph Circuit Court
RAYMOND AMBROSE BELCHER, Defendant-Appellant.	LC No. 07-014647-FH

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of uttering and publishing, MCL 750.249, and embezzlement of more than $20,000 in property belonging to oneself and another, MCL 750.181(5)(a).[1] The trial court sentenced defendant to concurrent nine-month jail terms and five years' probation. Defendant was also ordered to pay restitution in the amount of $652,035.18. Defendant appeals as of right. We affirm.

FACTS AND PROCEDURAL HISTORY

Defendant was one of the owners and a member of Cikira LLC, a manufacturer of travel trailers. In early 2007, the company had a significant number of unsold travel trailers. In March 2007, defendant presented a verbal cash deal to Cikira members regarding the sale of 27 travel trailers to RV Kountry, a dealer in Florida, for the discounted price of $270,000. Defendant initially represented that RV Kountry would pay the entire $270,000 up front. After the trailers began being delivered to RV Kountry, however, defendant indicated that RV Kountry would make three $90,000 installment payments as the trailers were delivered to them.

When the initial $90,000 payment was not received, Cikira member Alan Carter inquired about the payment. Defendant indicated that RV Kountry would be sending a check by Federal Express. The payment did not arrive as expected, and Carter again questioned defendant about the payment. Defendant stated that he intercepted the check from the courier and deposited it into Cikira's bank account. Defendant presented a deposit slip for a $90,000 deposit. After all of the trailers had been delivered to RV Kountry, Carter confronted defendant regarding the

[1] The jury acquitted defendant of one count of forgery, MCL 750.248.

balance due for the trailers. Defendant indicated that he would be going to Florida to assist RV Kountry with a trade show, and that he would be bringing back a check for the balance due. Upon his return, defendant presented to Cikira a check purportedly from RV Kountry, drawn on a JP Morgan Chase bank account, in the amount of $180,000.

As Carter prepared to take the check to the bank for deposit, defendant told him that he promised RV Kountry that he would hold the check for a couple of days to enable RV Kountry to get the funds together to cover the check. Carter agreed to wait until the following day to cash the check. Cikira's administrative assistant, Elaine Stidham, made a photocopy of the check, placed the copy on her desk, and placed the check in her desk drawer.

The following morning, Stidham arrived at work and discovered that the corner of the checking containing the routing number had been torn off. She found the corner of the check shredded into pieces in her drawer, along with some dried up mouse droppings. The copy of the check was missing. Carter then contacted Eric Eishen, the president of Sturgis Bank and Trust, to see if the damaged check could be deposited. Eishen told Carter to bring the check to the bank to have Becky Breneman, the person in charge of hard to process checks, determine what could be done with the check. Before leaving for the bank, Carter asked defendant if there was a problem with the check. Defendant stated that the check was good and that RV Kountry was "good" for the funds. Defendant reiterated the same sentiment on two additional occasions.

The following day, Eishen phoned Carter and told him that the check was "bad" and that there was a "high level of certainty" that the check was fraudulent. Carter told defendant that a problem existed with the check and that he had to go to the bank. Carter never saw defendant again after leaving for the bank.

Carter contacted RV Kountry and learned that it had a written sales agreement with defendant regarding the 27 Cikira travel trailers. Documents provided to Carter from RV Kountry's attorney of record, including a sales agreement and a title to a yacht, revealed a personal deal between RV Kountry and defendant involving a transfer of ownership of a yacht in exchange for 27 Cikira travel trailers. Carter later learned that the $90,000 deposited into Cikira's account came from defendant's personal account, and not from RV Kountry. He also learned that RV Kountry did not have a bank account with JP Morgan Chase Bank, and that the account number on the $180,000 check was not a valid account number.

Carter subsequently hired a certified public accountant to analyze all of Cikira's bank records, checks, and deposits. The investigation revealed that defendant had opened up private "doing business as" accounts that bore names similar to legitimate Cikira vendors, as well as a Cikira account opened without member approval. Defendant had manipulated the accounting software to transfer Cikira funds into these private accounts. According to Carter, a review of Cikira's documents revealed that the net amount missing from Cikira's assets was more than $600,000. This amount consisted of funds from Cikira's payroll account going into one of defendant's d/b/a accounts, funds from Cikira's general account going into another of defendant's d/b/a accounts, and the value of the trailers taken to RV Kountry for which Cikira had not received payment.

I

Defendant first argues that the trial court erred by admitting into evidence the purported sales agreement between defendant and RV Kountry, which called for the trade of a yacht to defendant in exchange for 27 Cikira travel trailers. He asserts that the sales agreement did not meet the business record exception to the hearsay rule under MRE 803(6). We review a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001).

Under MRE 803(6) the following are not excluded by the hearsay rule, even if the declarant is available to testify:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Further, this Court articulated the evidentiary foundation required to admit business records under MRE 803(6) in *People v Vargo,* 139 Mich App 573, 580; 362 NW2d 840 (1984):

> For a proper foundation to be established for the admission of a document as a business record, a qualified witness must establish that the record was kept in the ordinary course of regularly conducted business activity and that it was the regular practice of such business activity to make the record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

Here, the testimony of Penny Henkel, the president and owner of RV Kountry, established that the standard sales agreement was made in the ordinary course of business as a regular part of RV Kountry's business, and was made at or near the time of the transaction. There was further testimony that the record contained the handwriting of RV Kountry's bookkeeper, and that Henkel's husband and co-owner signed off on the trade-in information in the agreement. This evidence disclosed an adequate foundation under MRE 803(6).

Contrary to defendant's arguments, the fact that Henkel was not the records custodian at the time the sales agreement was negotiated is of no import. These foundational requirements do not require presentation of either the actual author or someone else who can interpret the contents of the records. *People v Safiedine,* 152 Mich App 208, 217; 394 NW2d 22 (1986). Indeed, such a requirement would defeat the purpose of the business records exception, which is based on the assumption that the statements of a declarant acting in the regular course of his or her business are inherently trustworthy. See *Merrow v Bofferding,* 458 Mich 617, 628, n 8; 581 NW2d 696 (1998). Additionally, the fact that the sales agreement involved the sale of RV Kountry's owners' personal boat does not somehow render the sales agreement outside the

course of RV Kountry's normal business practice. Henkel testified that RV Kountry often sold items other than trailers, including items they would sell on consignment on behalf of others and themselves. Lastly, defendant's suggestion that the "underlying circumstances [of the document's making or production] indicate a lack of trustworthiness" because the "person who made the sales agreement had a motive to misrepresent" is not supported by the record. The record provides no factual support for defendant's suggestion that the sales agreement was a sham on the part of RV Kountry and was intended to "pin the blame on [defendant] for this shady deal" in which RV Kountry would get 27 Cikira trailers "without paying a penny for them."

Defendant further contends that the admission of the photocopy of the sales agreement at issue violated MRE 1002 (requirement of original). Because defendant failed to object to the admission of the photocopy on best evidence grounds, this issue is unpreserved. MRE 103(a)(1). To prevail in a claim of unpreserved nonconstitutional error, "[t]he defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Pursuant to MRE 1002, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Under MRE 1003, however, a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Here, contrary to defendant's suggestion, defendant never introduced any evidence questioning the authenticity of the sales agreement or of the copy submitted. Defendant never suggested that the photocopy of the sales agreement somehow differed from the original sales agreement. Henkel testified regarding the authenticity of the business record and to the handwriting of both her bookkeeper and her co-owner husband. She also indicated that the original sales agreement was housed in her office in Florida. Had defendant raised a best evidence objection, presumably Henkel could have obtained the original. Even assuming that the trial court erred by admitting a photocopy of the sales agreement, defendant has failed to demonstrate that he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

II

Defendant contends that he was denied his constitutional right to a unanimous verdict by the trial court's reading of the standard general unanimous jury verdict instruction. During the course of discussions regarding the jury instructions, defendant did not request a special instruction on jury unanimity. With the exception of the trial court's denial of an unrelated instruction, defense counsel approved the instructions before the trial court gave them. When asked by the trial court if he had any objections to the instructions as given, defense counsel replied, "I have none, Your Honor."

Where a party expressly approves the instructions before the trial court gives them, the party waives any challenges to jury instructions on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, a party expressly approves the trial court's jury instructions where the trial court asks if there are any objections to the instructions and, as in the

present case, in response to that direct question by the trial court, the party denies any objections to the jury instructions. *Id.* "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000). Accordingly, this issue is waived. *Id.*

III

Defendant argues that defense counsel rendered ineffective assistance of counsel by failing to object to the admission of the sales agreement and by failing to request a specific unanimity instruction. Because defendant failed to raise these issues in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand),* 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier,* 478 Mich 231, 243; 733 NW2d 713 (2007).

Even assuming that defense counsel should have objected to the admission of Exhibit 3 and that he erred by failing to request a specific unanimity instruction, on this record there is no reasonable probability that the result of the proceeding would have been different but for counsel's error.

As discussed in Issue II, no evidence was presented questioning the authenticity of the sales agreement or of the copy submitted. Even if defense counsel had objected to the admission of the sales agreement on best evidence grounds, it is not probable that the trial court would have refused to admit the photocopy. Further, had defendant objected, the prosecutor could have obtained and presented the original sales agreement. There is no reasonable probability that the result of the proceeding would have been different had defense counsel objected.

With regard to the jury instruction, defendant argues that the trial court's jury instruction was deficient because there was testimony regarding two distinct types of embezzlement (property and money), and the jury was not specifically advised that they had to agree on a particular instance to convict.

Defendant is entitled to a unanimous verdict, and the trial court has an obligation to properly instruct the jury regarding the unanimity requirement. *People v Cooks,* 446 Mich 503, 510-511; 521 NW2d 275 (1994); US Const, Am VI; Const 1963, art 1, § 14. Usually, when the prosecution presents evidence of alternative acts "as evidence of the actus reus element of the charged offense," the general instruction on unanimity will suffice, "unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to

believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id.* at 524.

This Court has indicated that when a prosecutor offers evidence that a defendant committed two or more criminal acts, but *charges* him with only one offense, the trial court should instruct the jurors that they all have to agree on which of those multiple acts constituted the actus reus of the single charged offense. See, e.g., *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992). This rule is not absolute. See *Cooks*, 446 Mich 503, 512-513.

Here, the prosecutor did not suggest that defendant committed two or more acts of embezzlement, and did not charge defendant with multiple acts of embezzlement. Rather, the prosecutor's theory was that defendant engaged in a continuing pattern of embezzling property and funds from Cikira, and the prosecutor presented evidence of defendant's scheme. The jury was instructed, with regard to the embezzlement charge, that the prosecutor had to prove each of the following elements beyond a reasonable doubt:

> First, that the money or property belonged to Cikira RV.
>
> Second, that the Defendant had a relationship of trust with Cikira RV because the Defendant was an employee and member of the LLC which controlled Cikira RV.
>
> Third, that the Defendant obtained possession or control of the money or property because of this relationship.
>
> Fourth, that the Defendant either dishonestly disposed of the money or property, or converted the money or property to his own use, or took or hid the money or property with the intent to convert it to his own use without the consent of Cikira RV, LLC.
>
> Fifth, that at the time the Defendant did this, he intended to defraud or cheat Cikira RV of some property.
>
> Sixth, that the fair market value of the property or amount of money embezzled was $20,000 or more. *You may add together the value of the property or money embezzled in separate incidents if part of a scheme or course of conduct when deciding whether the Prosecutor has proved the amount required beyond a reasonable doubt.* [Emphasis added.]

Here, even if defense counsel had requested a specific acts instruction, there is no reasonable probability that the result of the proceeding would have been different but for counsel's error. Even if the trial court had given specific instructions separating the trailer deal from the funneling of Cikira funds to defendant's personal accounts, the result would have been

the same given the overwhelming evidence of defendant's guilt with regard to each.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering