

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LAMONT HOUSEY,

Defendant-Appellee.

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UNPUBLISHED

February 3, 2009

No. 281559

Wayne Circuit Court

LC No. 07-012908-FC

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

The prosecutor appeals by interlocutory leave granted<sup>1</sup> the trial court's order denying a motion to admit evidence. We reverse.

Defendant allegedly robbed 65-year-old Linda Moon at gunpoint and took her purse, which contained her cellular phone and car keys. Moon selected defendant from an array of six photographs, and stated that she had no difficulty in identifying defendant. However, at the preliminary examination, Moon was unable to unequivocally identify defendant as the man who robbed her. Nevertheless, the district court bound defendant over for trial.

As a result of Moon's preliminary examination testimony, the prosecution sought to obtain additional information to link defendant with the crime. Several calls were made on Moon's cellular phone after it was stolen. As part of their investigation, the prosecutor's office obtained the list of numbers called from Moon's cellular phone after the robbery date and the prosecutor called several of these numbers. Her strategy was to phone and ask for Lamont. On the third number she called, she inquired whether Lamont was there. The woman who answered told her to hold on and, shortly thereafter, a man came to the telephone. The prosecutor asked, "I want to make sure that I have the right Lamont. Is this Lamont Housey?" The man replied, "Yes." During the subsequent motion hearing, the prosecutor admitted she "panicked" at this response, said she had the wrong Lamont, and hung up the telephone.

During the hearing, acknowledging that she could not identify the voice on the telephone as defendant, the prosecutor sought to admit the evidence under the catchall exception to the

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<sup>1</sup> This Court also stayed the proceedings below pending resolution of this appeal.

hearsay rule, MRE 803(24). The prosecutor argued that the evidence was probative and had circumstantial guarantees of trustworthiness based, in part, on Moon's prior identification of defendant as the robber. The court denied the motion, finding that it could not be reliably determined that the man who answered the phone actually was defendant, rather than someone pretending to be him.

On appeal, the prosecutor argues that the trial court erred in denying her motion for admission of this evidence. Specifically, the prosecutor alleges that the trial court committed legal error when it ruled that the proposed evidence was inadmissible because it did not meet the requirements of MRE 901(b)(6). The prosecutor contends the trial court confused the requirements for authentication and admissibility and that the proffered evidence is admissible as an exception to hearsay pursuant to either MRE 803 (24) or MRE 801(d)(2)(A).<sup>2</sup>

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court selects an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We also review a trial court's determination regarding the authentication of evidence for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). This Court considers de novo any preliminary questions of law impacting the admissibility of the evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

As a preliminary matter, in analyzing this issue, we must first determine whether the proffered evidence is relevant. Relevant evidence is defined as "evidence having 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." MRE 401. We find that the evidence is relevant because it serves to establish defendant's identity as the man who robbed Moon and stole her cellular phone. Although Moon affirmatively identified defendant as the man who robbed her from a photographic array, at the preliminary examination she indicated merely that defendant bore a resemblance to the individual that robbed her and was equivocal in her identification. Hence, a man affirmatively identifying himself as Lamont Housey in response to a telephone call to a phone number contacted after Moon's cellular telephone was stolen is both relevant and material to ascertaining the identity of the robber and comprises a fact of consequence in this action.

Having determined the relevancy of the proffered evidence, we turn next to the matter of authentication as a precondition to its admissibility. MRE 901. MRE 901(a) requires "authentication . . . [of] evidence sufficient to support a finding that the matter in question is what its proponent claims." Specifically, MRE 901(b)(6) delineates how a telephone

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<sup>2</sup> Plaintiff also asserts for the first time on appeal, that the trial court should have considered the admissibility of the evidence pursuant to MRE 803(3). However, this Court's order granting leave to appeal was "limited to the issues raised in the application." Therefore, we will not address this argument as the issue was not raised in the application and is not properly before this Court.

conversation may be authenticated, but is “[b]y way of illustration only, and not by way of limitation.” MRE 901(b); see also *People v Berkey*, 437 Mich 40, 50 n 15; 467 NW2d 6 (1991).

Although the telephone call at issue does not fall within the examples provided by MRE 901(b)(6) because the number phoned was identified as belonging to Kim Thomas and not to defendant, this does not preclude the ability to authenticate the proffered evidence. Although the prosecutor acknowledged she did not recognize defendant’s voice, the woman who answered the call, when asked whether Lamont was present, handed the telephone to a man who positively responded that he was Lamont Housey. Given these factual circumstances, we find there is sufficient support to establish that the conversation engaged in by the prosecutor was what she claimed it to be – a verbal interaction between her and a man who represented himself as Lamont Housey. The speaker’s representation of himself as Lamont Housey qualifies as “sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(a). We would further note that this case is distinguishable from more typical situations involving authentication pursuant to MRE 901(b)(6) because it seeks merely to admit the prosecutor’s testimony regarding the conversation and not the actual conversation. Because the trial court determined the prosecutor to be a credible witness and, given the totality of the circumstances, we find the proffered evidence has been sufficiently authenticated to allow us to proceed to the final step regarding a determination of its admissibility.

In general, all relevant evidence is admissible. MRE 402. However, as stated in MRE 802, “[h]earsay is not admissible” absent an exception. The proffered evidence clearly constitutes hearsay because the prosecutor seeks to offer an out-of-court statement made by an unidentified male with whom she conversed on the telephone. Primarily, the prosecutor argues that the proffered evidence is admissible under the catch-all exception to hearsay, MRE 803(24), because it is not covered by any other exception. Defendant mistakenly asserts that MRE 901(b)(6) comprises such an exception and, therefore, prevents admission. Contrary to defendant’s position, MRE 901(b)(6) deals with authentication and not admissibility and cannot, therefore, preclude the application of MRE 803(24) in this instance.

For evidence to be admissible under MRE 803(24) it must meet four requirements: “(1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on the fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice.” *Katt, supra* at 279.

We find the first factor of trustworthiness as delineated in *Katt* to have been met. Various factors have been identified as relevant in the determination of whether a statement possesses particularized guarantees of trustworthiness. These factors include, but are not limited to the following:

- (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements

were made. [*People v Geno*, 261 Mich App 624, 634; 683 Nw2d 687 (2004) (citation omitted).]

The record in this matter contains nothing to suggest that the statement of the man to the prosecutor while on the telephone was untrustworthy. The response was made immediately and without any hesitation when the man accepted the phone. There is no indication that the individual had any particular motive to lie or dissemble. The statement appears to have been both voluntary and spontaneous in response to the simple question posed.

In addition, when viewed in context, the “totality of the circumstances” suggests the evidence is trustworthy. Moon identified defendant as the robber, who took her cellular phone, through a photographic array. The prosecutor’s office then obtained a listing of telephone numbers called from that cellular phone after the robbery. When one of those telephone numbers was contacted, the prosecutor requested to speak to Lamont and the woman answering the call gave the phone to a man who then acknowledged that he was, specifically, Lamont Housey. Thus, the evidence has circumstantial guarantees of trustworthiness. The proffered evidence also serves to establish a material fact because it demonstrates defendant was connected to a telephone number phoned after the cellular phone was stolen and, thus, bolsters that defendant was the individual that assaulted Moon.

Defendant contends that the prosecutor’s proposed testimony is not the most probative evidence pertaining to the telephone call. Defendant argues that the prosecutor should subpoena and produce Kim Thomas. However, the prosecution has indicated that it has made reasonable efforts secure the appearance of Thomas, but that the address available for her is for an abandoned home and have not meet with success in further attempts to locate her. As a result, because Thomas cannot be produced for trial, the prosecutor’s testimony is the most probative available pertaining to the telephone call. We also find that admission of the evidence would serve the interests of justice because it corroborates Moon’s initial photographic identification of defendant as the man that robbed her.

“It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly.” *Berkey, supra* at 52. While the weight to be attributed to the prosecutor’s proposed testimony may be at issue, we find that its admissibility is not. Finally, because we find the proffered evidence admissible pursuant to MRE 803(24), we need not address the prosecutor’s additional claims pertaining to MRE 801(d)(2)(A).

Reversed.

/s/ Michael J. Talbot  
/s/ Richard A. Bandstra  
/s/ Elizabeth L. Gleicher