

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 2, 2014

v

TAMARA SUE FROH,
Defendant-Appellant.

No. 310937
St. Clair Circuit Court
LC No. 12-000112-FH

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of uttering and publishing, MCL 750.249, and perjury, MCL 750.422. Defendant was sentenced to 1 to 14 years' imprisonment for the uttering and publishing conviction and 1 to 15 years' imprisonment for the perjury conviction. We affirm.

Defendant argues that her double jeopardy rights were violated because the same conduct that supported her convictions of perjury and uttering and publishing also supported her prior criminal contempt conviction. We disagree.

Because defendant failed to raise this issue before the trial court, this is an unpreserved claim. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). A double jeopardy issue, however, "presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *Id.* This Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *Id.*

Both the United States and Michigan Constitutions protect a defendant from being placed twice in jeopardy for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Id.* In determining whether a defendant's double jeopardy

rights have been violated in both the multiple punishment and multiple prosecution context, this Court applies the same-elements test, which is commonly known as the *Blockburger*¹ test. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007); *Nutt*, 469 Mich at 575-576.² “The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense.” *People v Baker*, 288 Mich App 378, 382; 792 NW2d 420 (2010). Therefore, the *Blockburger* test inquires into “whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.” *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993).

The offenses of perjury and uttering and publishing contain elements not present in the offense of criminal contempt. “The elements necessary to support a conviction of criminal contempt are (1) a wilful disregard or disobedience of the order of the court, and (2) that the contempt is clearly and unequivocally shown. *People v MacLean*, 168 Mich App 577, 579; 425 NW2d 185 (1988). Further, “[a] wilful disregard consists of an act, omission, or statement tending to impair the authority or impede the functioning of the court.” *Id.* MCL 600.1701 sets forth acts punishable for contempt, and as provided by MCL 600.1745:

Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in imposing sentence. [MCL 600.1745.]

After the probate court held defendant in criminal contempt, the prosecution charged defendant with uttering and publishing and perjury. At this juncture, because the Legislature clearly intended to punish a defendant for contempt and also for the criminal misconduct that gave rise to the finding of contempt, defendant has not received “multiple punishments” in violation of the Double Jeopardy Clauses. *Garland*, 286 Mich App at 4-5; *People v McCartney*, 141 Mich App 591, 596; 367 NW2d 865 (1985).³ The issue becomes, therefore, whether defendant’s convictions of perjury and uttering and publishing after being held in criminal contempt constituted “multiple prosecutions” under the *Blockburger* test. “The crime of uttering and

¹ *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

² Specifically regarding multiple punishments, this Court first looks “to determine whether the Legislature expressed a clear intention that multiple punishments be imposed.” *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). If it is clear that the Legislature intended “to impose such multiple punishments, [then] there is no double jeopardy violation.” *Id.* But “[w]here the Legislature has not clearly expressed an intention to impose multiple punishments, the elements of the offenses must be compared using the *Blockburger* test. *Id.* at 4-5.

³ As this Court has stated, MCL 600.1745 “evinces a clear legislative intent to impose separate punishment on a person who has been adjudged in contempt of court if those actions which constituted contempt are also violative of some criminal provision.” *McCartney*, 141 Mich App at 596.

publishing consists of offering or passing a forged instrument as genuine, knowing the same to be false, with an intent to injure or defraud.” *People v Peace*, 48 Mich App 79, 86; 210 NW2d 116 (1973). Therefore, “[t]o utter and publish a forged instrument is to declare or assert, directly or indirectly, by words or actions, that an instrument is good.” *People v Johnson-El*, 299 Mich App 648, 652; 831 NW2d 478 (2013) (internal quotations and citation omitted). The perjury statute at issue, MCL 750.422, which governs perjury committed in courts, provides:

Any person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison for not more than 15 years.

Perjury is defined “as a willfully false statement regarding *any* matter or thing, if an oath is authorized or required.” *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). Therefore, one commits perjury under MCL 750.422 if they willfully make a false statement before a court while under oath or required to be under oath. *Id.*; see MCL 750.422. In comparing the elements of uttering and publishing and perjury, it is apparent that these offenses contain different elements from the offense of criminal contempt. For instance, neither the offense of perjury or uttering and publishing require a showing that there has been a wilful disregard or disobedience of the order of the court as is required to establish criminal contempt. Therefore, because the offenses are not the “same offense,” there has been no violation of the *Blockburger* test.

Defendant, however, relies on *Dixon, supra*, to support her argument that her convictions of perjury and uttering and publishing and the finding of criminal contempt, violated her double jeopardy rights. In *Dixon*, the United States Supreme Court concluded that a double jeopardy violation occurred where the defendants were held in contempt for violating specific provisions of the court orders, which incorporated specific offenses and then were later prosecuted for committing those specific offenses. *Dixon*, 509 US at 698. Conversely, defendant was not held in contempt for violating an order that incorporated a specific offense nor held in contempt for violating a specific offense. In finding defendant in contempt of court, the probate court stated:

And I’ve already told you that I don’t think you did anything wrong on the information that’s been presented to me, but now you find yourself in the unenviable position of being punished not for what you did, but for trying to hid [sic] it.

I have to do that because people have to know, you have to know that if you ever find yourself in this situation again that you have to tell the truth. You have to tell me what I [sic] did. And if you did the wrong thing then let the chips fall where they may, but don’t get yourself in a position where you get punished for just not telling the truth.

* * *

So, what I'm going to do is I'm going to find you in contempt of court. That is because I believe you made false statements on the accounting that was provided and the supporting documentation.

So, that is going to be the punishment for not telling me the truth for what you did.

As these statements indicate, the probate court held defendant in contempt for her overall actions, not for *specifically* violating MCL 750.422 or MCL 750.249. Therefore, *Dixon* is inapplicable to this matter. Accordingly, there has been no double jeopardy violation.

Defendant argues that the trial court abused its discretion by admitting improper rebuttal evidence. We disagree.

This Court will “not disturb a trial court’s decision regarding the admission of rebuttal testimony absent an abuse of discretion.” *People v Steele*, 283 Mich App 472, 485-486; 769 NW2d 256 (2009). “Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.” *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (internal quotations omitted). Regarding whether evidence constitutes rebuttal evidence, our Supreme Court has stated:

The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.

[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Bettistea*, 173 Mich App 106; 434 NW2d 138 (1988); *Nolte v Port Huron Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986). As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor’s case in chief. [*Id.*]

Further stated, “when the rebuttal testimony at issue was a simple contradiction of the defendant’s testimony that directly tended to disprove the exact testimony given by the witness, it was proper rebuttal testimony.” *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). Additionally, “[a]lthough MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness’ statements.” *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

At trial, defendant testified that, before the probate hearing, an altercation occurred in which the protected person and one of his relatives were removing and adding documents to the binder at issue and noted that because of this incident, she was not in exclusive control of the binder before submitting it to the guardian ad litem. During her testimony, defendant was clear that the altercation, which resulted in the calling and appearance of the police, occurred before

the probate hearing, not after. After proofs were closed, the prosecution requested to call defendant as a rebuttal witness to question her about the date of the altercation. Specifically, the prosecution stated:

Your honor, the information she gave, that was the first I'd heard regarding in particular an altercation that occurred over a binder. She had claimed to give the binder to someone else. And so I have information that I would like to cross-examine her about regarding that.

Once called as a rebuttal witness, defendant reaffirmed her prior statements regarding the date of the altercation even after reviewing the police report, which indicated that the altercation occurred after the probate hearing. Because the purpose of calling defendant as a rebuttal witness was narrowly focused to contradict, repel, or disprove defendant's prior statements regarding the date of the altercation, the evidence was proper rebuttal evidence. Accordingly, the trial court did not abuse its discretion in allowing the prosecution to call defendant as a rebuttal witness.

Even if it was determined that an evidentiary error was made, defendant bears the burden to establish that the preserved, nonconstitutional error resulted in a miscarriage of justice, *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999), and this Court presumes that the error is not a "ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative," *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). An evidentiary error is "outcome determinative" if it undermines the reliability of the verdict. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). In reviewing the error's affect on the verdict, this Court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id.*

After reviewing the record, the alleged error did not affect the reliability of the verdict. At trial, there was strong circumstantial evidence establishing that defendant forged the rental receipt and provided the receipt to the guardian ad litem. In addition, the video recording of the probate hearing was played for the jury, which included defendant's statements affirming the content of the forged receipt. Therefore, defendant has not established that the perceived error was outcome determinative. *Lukity*, 460 Mich at 495-497.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens