FILED
MAY 24 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-148 / 89-844

MAX O. PELZER, Executor of the Estate of **JOSEPH E. ZAUGG,**

Appellee,

209

vs.

MAE SCHULLER,

Appellant.

Appeal from the Iowa District Court for Palo Alto County, Frank B. Nelson, Judge.

Appellant appeals from the decision of the district court rendering judgment against her pursuant to a jury verdict. **REVERSED AND REMANDED FOR NEW TRIAL.**

John D. Brown and Roger A. Berkland of Berkland & Brown, Emmetsburg, and Emil Trott, Jr., of Barrett & Trott, Des Moines, for appellant.

James D. Hart of Anderson, Pelzer & Hart, Estherville, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

PER CURIAM 210

Appellant Mae Schuller appeals from the decision of the district court rendering judgment against her pursuant to a jury verdict. She contends the district court erred in permitting certain testimony over her hearsay objections. We reverse and remand for new trial.

On January 13, 1987, Joe Zaugg gave his niece, appellant, a check for $40,000. Zaugg died on February 22, 1987. Appellee Max O. Pelzer was appointed as Executor of Zaugg's estate. While preparing the inventory for Zaugg's estate, Pelzer found the canceled check for $40,000. The check had been endorsed by Mae Schuller. After a subsequent investigation by Pelzer, he concluded the $40,000 to be a loan and requested repayment from appellant. Appellant refused, claiming that the money was a gift. Pelzer subsequently brought suit against appellant for the $40,000.

At trial, prior to the introduction of evidence, the district court ruled that hearsay statements offered for the limited purpose of showing Zaugg's intent at the time of the transaction were admissible under exceptions to the hearsay rule. The trial court also permitted appellant a standing objection to any hearsay admitted to prove intent. During trial, appellee introduced the testimony of Irene Anderson and Eli Gerber. Anderson's testimony, concerning a conversation she had with Zaugg in August or September of 1986, was as follows:

211

> Joe said I've got to give Mae $35,000. And I said why? And he said, she needs it to save the farm. And I said, oh, Joe, you shouldn't do that. And he said, I've got to or she'll lose the farm. But she'll pay me back. And I said, how can she pay you back if she owes for the farm and the loan that you're giving her? And he said, well, when she gets the farm going again she'll pay it back. She promised.

Gerber, relating a conversation he had with Zaugg at some point after January 13, 1987, testified:

> Q. Did you have a later conversation with Joe Zaugg concerning this house in Mallard and Mae Schuller? A. We stopped there after the 13th of January. And he said he loaned her the money to buy the house, $40,000, until she sold an acreage or sold some land. Nothing was said about interest. But he loaned her the $40,000 until she sold the acreage or some land to pay him back.
> Q. And this -- Did this conversation occur before or after he had given her the check? A. It would have been after.

Appellant claimed that Zaugg gave her the money so she could purchase a home in Mallard.

I.

Our review is on errors assigned. Iowa R. App. P. 4. The first issue we address is appellant's assertion that the trial court erred in permitting Gerber's testimony over her standing hearsay objection. Appellee claims appellant failed to preserve error on this issue.

Standing objections are disfavored by the appellate courts of this state. See State v. Johnson, 237 N.W.2d 819, 823 (Iowa 1976); Prestype Inc. v. Carr, 248 N.W.2d 111, 117 (Iowa 1976); Bornn v. Madagan, 414 N.W.2d 646, 648 (Iowa App. 1987). When permitted, however, a standing objection may be sufficient to preserve error. Cf. In re

Marriage of Schneckloth, 320 N.W.2d 535, 537 (Iowa 1982). Appellant was permitted a standing hearsay objection by the trial court at the commencement of the trial. The disputed testimony at issue here concerns the admission of purported hearsay. We conclude that error was preserved.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Hearsay is inadmissible "except as provided by the Constitution of the State of Iowa, by statute, or [the rules of evidence], or by other rules of the Iowa Supreme Court." Iowa R. Evid. 802.

It is readily apparent Gerber's testimony was offered to prove the truth of the matter asserted, namely that Zaugg had loaned appellant $40,000 in order for her to purchase a house. The trial court permitted Gerber's testimony to be introduced under rule 803(3), Iowa R. Evid. This rule excepts from the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Emphasis added). Zaugg's discussion with Gerber was clearly reflective in nature, having purportedly occurred after the draft was issued by Zaugg to appellant. Since Zaugg's statements were reflective, they do not fall within

the hearsay exception created by rule 803(3). See Bratten v. Bond, 408 N.W.2d 39, 45 (Iowa 1987). As such, the trial court abused its discretion in permitting testimony of Gerber's discussion with Zaugg to be introduced at trial. The admission of hearsay evidence is presumed to be prejudicial error absent the opposite being affirmatively shown. Fratzke v. Meyer, 398 N.W.2d 200, 204 (Iowa App. 1986); see Madison v. Colby, 348 N.W.2d 202, 204 (Iowa 1984). Since this presumption of prejudice has not been rebutted here, we are compelled to reverse and remand for a new trial.

II.

Since the issue of Anderson's testimony is likely to reoccur on retrial, we address it today. Anderson's testimony was admitted, over appellant's hearsay and relevancy objections, under rule 803(3), Iowa R. Evid. Assuming without deciding that the Anderson testimony is introduced to prove the truth of the matter asserted in that out-of-court statement, thereby bringing the statement within the confines of the hearsay rule, the statement is nonetheless admissible under Iowa Rule of Evidence 803(3) as a statement reflecting Zaugg's existing state of mind with regard to intent. See Estate of Thompson, 164 N.W.2d 141, 151 (Iowa 1969). Zaugg's statement to Anderson would therefore also be relevant to the matter at hand as circumstantial evidence of a lack of donative intent on the part of Zaugg.

211

Having reversed and remanded this matter for retrial, we need not address the other issues raised by appellant.

REVERSED AND REMANDED FOR NEW TRIAL.