STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINDA BOHL,

Defendant-Appellant.

UNPUBLISHED

No. 175439
LC No. 93-7502-FH

Before: Holbrook, Jr., P.J., and Taylor and W.J. Nykamp,* JJ.

HOLBROOK, Jr., P.J., dissenting.

I dissent.

Defendant was denied a fair trial when the prosecutor was permitted to impeach her with improper rebuttal evidence that she had allegedly failed to report baby-sitting income earned in 1992. In arguing her motion in limine,[1] the prosecutor stated that she had just received a transcript from an unrelated legal proceeding in which defendant had testified that she received baby-sitting income in 1992 and that she reported that income to her caseworker. The prosecutor sought to cross-examine defendant regarding this testimony, and then, assuming that defendant reiterated its truthfulness, sought to recall defendant's caseworker to the stand to testify that defendant had not, in fact, reported the baby-sitting income. The prosecutor argued that admission of the evidence was "important to [defendant's] credibility because that's what we're deciding here." The trial court ruled that the evidence was admissible as impeachment evidence, and, although it was prejudicial, its probative value outweighed any unfair prejudice.

While I agree that it was within the broad discretion of the trial court to allow the prosecutor to attempt to impeach defendant on cross-examination regarding her alleged failure to report baby-sitting income to her caseworker, error requiring reversal occurred when the prosecutor was permitted to offer, in plain violation of MRE 608(b), extrinsic evidence in the form of rebuttal testimony of defendant's caseworker that defendant had, in fact, not reported this income.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Thus, MRE 608(b) allows specific instances of conduct to be "inquired into" on cross-examination to attack credibility, but does not provide for the admission of extrinsic evidence such as rebuttal testimony because to do so would result in mini-trials being conducted on collateral matters. Whether defendant reported baby-sitting income that was earned in 1992 was a collateral matter. See McCormick on Evidence (3d ed, 1984), § 47, p 111 ["Facts showing misconduct of the witness (for which no conviction has been had) are . . . collateral, and if denied on cross-examination cannot be proved to contradict."] Thus, once defendant reiterated on cross-examination that she had received baby-sitting income and that she had reported that income to her caseworker, the prosecutor should have been bound by that answer.

> In jurisdictions which permit character-impeachment by proof of misconduct for which no conviction has been had, an important curb is the accepted rule that proof is limited to what can be brought out on cross-examination. Thus, if the witness stands his ground and denies the alleged misconduct, the examiner must "take his answer," not that he may not further cross-examine to extract an admission, but in the sense that he may not call other witnesses to prove the discrediting acts. This rule is adopted by Federal Rule of Evidence 608(b). [McCormick on Evidence (3d ed, 1984), § 42, p 92. Footnotes omitted.]

See also *People v Vasher*, 449 Mich 494, 509-510; 537 NW2d 168 (1995) (Cavanagh, J, dissenting).

The majority dismisses the violation of the plain dictates of MRE 608(b) because defendant's sole argument on appeal is that admission of the evidence violated MRE 403, and because "evidence that is admissible for one purpose, such as MRE 404(b)[,] is not inadmissible because its use for a different purpose such as MRE 608(b) is precluded." The majority has eviscerated MRE 608(b). See *United States v DiMatteo*, 716 F2d 1361, 1367 (CA 11, 1983), vacated on other grounds 469 US 1101 (1985). First, MRE 103(d) provides that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Here, the trial court's decision to allow the rebuttal evidence was plain error, given its direct contravention of MRE 608(b) and the fact that the outcome of defendant's trial was most likely affected by the highly prejudicial admission of evidence that defendant might have committed another fraud similar to the one for which she was on trial. Second, MRE 608(b) permits impeachment of a witness by specific

instances of conduct, but strictly limits the method by which such evidence is admitted. Therefore, contrary to the majority's claim, the *purpose* for which the evidence was admitted was proper (i.e., impeachment), but the *method* (i.e., rebuttal testimony) clearly contravened the prohibition against extrinsic evidence. While MRE 608(b) affords a trial court broad discretion regarding the purpose for which such evidence may be admitted, it affords no discretion regarding the method for admitting the evidence. See, The New Wigmore, *A Treatise on Evidence*, (Leonard, 1996), § 1.11.6, pp 1:107-1:108 [appellate court should utilize de novo review of trial court's rulings regarding categorical (nondiscretionary) provisions of Rule 608.]

The admission of the extrinsic evidence in this case was not harmless error. On three separate occasions during her closing argument to the jury, the prosecutor cited defendant's alleged failure to report baby-sitting income, and ultimately framed this case as purely a matter of assessing credibility:

> So you have to determine the credibility of the witnesses. Is Miss Gatlin [defendant's caseworker] telling the truth or is the defendant telling you the truth? And you have to do that in light of all the facts and circumstances.

Having made that argument to the jury, I cannot accept the claim that the impeachment evidence did not affect the outcome of the trial. MRE 103.

Accordingly, I would reverse defendant's conviction and remand for a new trial.

/s/ Donald E. Holbrook, Jr.

[1] The prosecutor did not move for admission of this evidence until *after* defendant had exercised her right to testify in her own behalf.