

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SUZANNE MARIE WATTS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 260139

Midland Circuit Court

LC No. 04-001955-FH

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of first-degree retail fraud, MCL 750.356c, for defrauding Sears by repeatedly returning merchandise that she had never actually purchased. We affirm.

On appeal, defendant argues that the trial court erred in admitting into evidence a previous conviction for second-degree retail fraud. On the first day of trial, during defense counsel's cross examination of defendant's mother, defense counsel inquired about the witness' opinion regarding defendant's honesty. After eliciting testimony that the witness had not known defendant to steal in the past, defense counsel asked the witness whether she would describe defendant as an honest person. The witness answered in the affirmative. On redirect examination, the prosecutor questioned the witness about whether she would be surprised to learn that defendant had stolen in the past and that the prosecutor had a certificate of conviction. Defendant's mother responded that she would be surprised by both circumstances. The prosecutor also asked defendant's sister whether she considered defendant to be honest and whether she had been known to steal. Defendant's sister testified that defendant is honest and that she had not been known to steal. Defendant did not object to either line of inquiry on redirect examination.

However, defendant did object to the prosecutor's request to admit into evidence defendant's 1991 certificate of conviction for second-degree retail fraud. The court admitted the document and instructed the jury that evidence of the prior crime should only "be considered in evaluating the character testimony offered by the Defendant's mother and sister. It is not to be considered as substantive evidence on the charge brought against the Defendant."

Defendant argues that the court erred in allowing the prosecution to rebut opinion evidence offered by defendant's mother and sister on cross examination with reputation evidence

and evidence of a specific instance of conduct (the 1991 certificate of conviction). Defendant preserved her challenge to the admission of the certificate of conviction by raising a timely objection. MRE 103(a)(1). However, defendant did not timely object to the questions posed on redirect examination of defendant's mother and sister. Accordingly, we review the former for an abuse of discretion, *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995), and the latter for plain error affecting substantial rights, MRE 103(d).

Underlying defendant's argument is a fundamental misunderstanding about what is admissible under the relevant rules of evidence, which in turn impacts defendant's perception regarding the purpose for which the evidence was offered. Defendant asserts that the trial court erred in overruling plaintiff's objection to defense counsel's querying defendant's mother about whether defendant had ever been known to steal anything because the question did not relate to defendant's character for truthfulness or untruthfulness, which defendant asserts is the only permissible means of offering character evidence under MRE 404(a). Here, defendant has conflated MRE 404(a) with MRE 608. While MRE 608 limits the admissibility of evidence attacking or supporting the credibility of a witness to that which refers to "character for truthfulness or untruthfulness," MRE 404(a)(1) provides that an accused may offer evidence of a "pertinent trait of character."

After plaintiff objected to defense counsel asking whether defendant had been known to steal (which was overruled by the court), defense counsel then asked defendant's mother about defendant's character for honesty. At this point, defendant's character for truthfulness had not been attacked by plaintiff either in its opening statement or during direct examination of defendant's mother. Because defendant's credibility had not been thus attacked, evidence of her character for truthfulness was not admissible under MRE 608(a)(2). Thus, defense counsel's inquiry into defendant's honesty was only admissible as evidence of a "pertinent trait of character" under MRE 404 and 405.

Accordingly, in context, plaintiff's redirect examination of both defendant's mother and sister was not focused either on defendant's propensity for untruthfulness or on impeaching the witnesses with evidence of defendant's propensity for untruthfulness. Rather, plaintiff's questions were aimed at eliciting evidence rebutting the character evidence presented by defendant on cross examination. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995).

MRE 404(a) provides in pertinent part as follows:

(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same

MRE 405(a) provides as follows:

(a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

(b) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Defendant's argument on appeal also misperceives the nature of the testimony offered on redirect examination. MRE 405 provides for three methods of proving character: reputation evidence, opinion evidence, and specific instances of conduct. On redirect, both defendant's mother and sister were asked to provide further opinion evidence. Specifically, defendant's mother was asked if it would surprise her if defendant had a past conviction evidenced by a certificate of conviction. As for the testimony of defendant's sister, in context the use of the word "known" seems to be asking about the witness' personal knowledge of defendant's past, not defendant's reputation within the community.

Additionally, the prosecutor did not inquire into specific instances of conduct on redirect examination of both defendant's mother and sister, even though he did once refer to the possibility that a certificate of conviction existed. This reference to an unspecified certificate of conviction does not identify a specific event or when the event occurred or the crime for which defendant was convicted.

Because defendant placed a pertinent trait of character in issue, plaintiff was permitted under the rules of evidence to meet this evidence with further opinion evidence elicited on redirect examination.¹ Accordingly, defendant fails to establish error, let alone plain error, in the admission of the challenged redirect testimony of defendant's mother and sister. Both lines of inquiry were admissible under MRE 405(a).²

The trial court did err, however, in admitting into evidence the certificate of conviction of defendant's second-degree retail fraud conviction. "[G]enerally a party may not introduce

¹ Even if defendant's mother and sister did provide reputation evidence on redirect, this would not be error under the evidence rules. MRE 405(a) plainly provides that the prosecution can rebut evidence regarding a pertinent character trait offered by the accused "by testimony as to reputation *or* by testimony in the form of an opinion." (Emphasis added.) The evidence rule does not require a correspondence of method in meeting evidence presented by the accused.

² Alternatively, defendant argues that if her claim of error predicated on the prosecution's redirect examination of defendant's mother and sister is not preserved, then defense counsel should be deemed to have acted ineffectively because he had a duty to learn of defendant's criminal record if he chose to offer character evidence at trial. Defendant has failed to properly present this issue because it was not raised in his question presented. MCR 7.212(C)(5). In any event, we do not believe that defendant has overcome the presumption that counsel's actions were reasonable. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

extrinsic evidence to contradict a witness regarding collateral . . . matters.” *People v Lester*, 232 Mich App 262, 275; 591 NW2d 267 (1998). Rather, the answer given must be accepted. See, generally, *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002). Further, MRE 405(a) only provides for introduction of reputation or opinion evidence under these circumstances. MRE 405(a). The subrule does provide for “inquiry . . . into reports of relevant specific instances of conduct” on cross examination.³ *Id.* Cross examination involves the “questioning of a witness . . . by the party opposed to the party who called the witness to testify.” Black’s Law Dictionary (8th ed). Both defendant’s mother and defendant’s sister were plaintiff’s witnesses.

However, the erroneous admission of the certificate of conviction is harmless in light of (1) the aforementioned limiting instruction given by the court on the use of the document, and (2) the weight of the evidence adduced at trial. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). With respect to the weight of the evidence, the Sears Asset Protection manager testified that he discovered 24 different no-receipt return transactions made under the name of defendant, defendant’s sister, and defendant’s mother. These no-receipt return transactions resulted in the issuance of gift cards valued at a total of \$2,523. Comparing the 58 items returned to the store’s records, the manager testified he discovered that most of the merchandise either had not been sold, that a greater number of items were returned than had been sold, or that items were repurchased after having been returned. This evidence is sufficient to sustain the conviction even in light of the erroneous admission of the certificate of conviction.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

³ Further, even if plaintiff could inquire about specific instances, the relevant subrule does not provide for allowing proof of those specific instances. Compare MRE 405(a) (providing for “inquiry . . . into reports of specific instances”) with MRE 405(b) (providing that “proof may also be made of specific instances”) (emphasis added).