STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2010
v WINFRED ROGER PHILLIPS, Defendant-Appellant.	No. 288414 Macomb Circuit Court LC No. 2008-001083-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v ISAIAH MAYWEATHER, Defendant-Appellant.	No. 288415 Macomb Circuit Court LC No. 2007-005303-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

GLEICHER, J. (*concurring*).

I concur in the results reached by the majority, but write separately to express my disagreement with a portion of the majority's analysis, specifically the majority's conclusion that the trial court properly admitted testimony impeaching Barbara Hamilton.

The prosecutor questioned Hamilton, defendant Isaiah Mayweather's sister, concerning whether he made any incriminating statements in her presence. Hamilton denied that she and Mayweather had discussed the party store robbery and shootings, or that Mayweather had admitted to participating in the crimes. The prosecutor later inquired of two witnesses, parole agent Daniel Nash and Eastpointe Police Lieutenant Leo Borowsky, about prior statements Hamilton had made to them. Nash and Borowsky recalled that during their conversations with Hamilton, she related that on the day after the robbery and shootings, Mayweather (1) apologized to "her for what he had done and for the shame he [had] brought to the family," (2) explained that he had committed the robbery because he needed food and diaper money for his newly born twins, and (3) admitted that he had participated in the robbery and shootings and that he felt bad

about them. Mayweather's counsel timely objected to Nash's and Borowsky's testimony on hearsay grounds.

Mayweather contends that the trial court denied him a fair trial by improperly permitting Nash and Borowsky to relate the substance of Hamilton's prior inconsistent statements under the guise of impeachment. The majority opines that defendant failed to preserve an objection to the impeachment evidence "because Mayweather objected to the admission of Hamilton's testimony solely on hearsay grounds." *Ante* at 11. In my view, hearsay constituted the proper basis for the objections to the introduction of Hamilton's prior statements. Through Nash and Borowsky, the prosecutor sought to prove the truth of the matters asserted in Hamilton's out of court statements: that Mayweather had confessed to his participation in the robbery and shootings. Hamilton's prior inconsistent statements qualify as inadmissible hearsay that does not fall within any exception to the rule against hearsay. MRE 801, MRE 802. Because defense counsel proferred a proper objection, this Court should review defendant's appellate evidentiary argument to determine whether the errors more probably than not undermined the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The majority correctly recognizes that *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), supplies pertinent guidance. *Ante* at 11-12. In *Stanaway*, a criminal sexual conduct case, the prosecutor questioned the defendant's nephew about whether the nephew had relayed to a police officer an incriminating statement made by the defendant. *Id*. at 688-689. The nephew denied having told the police officer that the defendant made any incriminating statements. *Id*. at 688-689. The prosecutor then called the police officer, who related the substance of the nephew's statement, over a hearsay objection. *Id.* at 689-690. The Supreme Court held that the police officer's testimony represented "improper impeachment" because

> [t]he substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801. [*Id*. at 692-693.]

The Supreme Court observed that the "only relevance" of the nephew's testimony "was whether he made the statement regarding his uncle's alleged admission. The witness had no direct knowledge of any of the alleged incidents and was out of town at the time they would have occurred." *Id*. at 692.

In *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997), the Supreme Court explained that the rule set forth in *Stanaway* prohibits impeachment when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." In *Kilbourn*, unlike in *Stanaway*, the witness whose testimony was at issue supplied relevant testimony concerning "a number of events that took place before the shooting, and indeed was a key actor in some of these events." *Id*. at 683-684. The *Kilbourn* witness's testimony also directly conflicted with that of another witness regarding issues unrelated to the impeached witness's out of court statement. *Id*. at 684.

This case more closely parallels *Stanaway* rather than *Kilbourn*. Hamilton lacked any knowledge of the robbery and shootings. Her credibility thus had no relevance to any issue other than whether defendant had confessed his role in the crimes.

The majority posits, "Hamilton provided substantive testimony connecting Mayweather to the Intrepid where the 7-up receipt was recovered. This testimony was unrelated to her statements to Nash and Lieutenant Borowsky, and was also relevant to the issue of identity. Therefore, Hamilton's credibility was pertinent on other grounds, and therefore, the trial court did not commit plain error when it admitted the impeachment evidence." *Ante* at 12. This conclusion reflects a fundamental misapprehension of the holdings in *Stanaway* and *Kilbourn*. Neither case stands for the proposition that otherwise inadmissible hearsay transforms into permissible extrinsic impeachment when a witness testifies regarding something other than the hearsay statement. In both *Stanaway* and *Kilbourn*, our Supreme Court emphasized that extrinsic impeachment is permitted where a witness supplies testimony *for which her credibility is relevant to the case*. *Stanaway*, 446 Mich at 692-693; *Kilbourn*, 454 Mich at 684. Otherwise, a prosecutor could create a subterfuge for the substantive use of inadmissible hearsay merely by questioning the witness with respect to any undisputed issue in the case. *Stanaway*, 446 Mich at 693.

"The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). "The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement true. Rather, the attack rests on the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements." 1 McCormick, Evidence (6th ed), § 34, p 151. Stated differently, the purpose of impeachment by prior inconsistent statement is to demonstrate the witness's unreliability and lack of credibility. Here, the prosecutor had no conceivable need to attack Hamilton's credibility. Her testimony about defendant's use of the Dodge Intrepid was undisputed, and actually strengthened the prosecutor's case. That Hamilton supplied uncontested, "pertinent" evidence regarding the Intrepid did not open the door to the substantive admission of her prior statements to Nash and Borowsky. "If testimony does no damage, impeachment evidence has no probative value." 27 Wright & Gold, Federal Practice & Procedure: Evidence, § 6093 p 626. Because the prosecutor had no reason to challenge Hamilton's credibility other than with regard to her prior statements, the "impeachment" evidence offered by Nash and Borowsky lacked relevance to any issue of consequence in the case. "A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *Kilbourn*, 454 Mich at 682. Given that the prosecutor improperly introduced the extrinsic evidence of defendant's confession in the guise of impeachment, I would find that the trial court erroneously overruled defense counsel's hearsay objections.

Whether the introduction of defendant's confession more probably than not undermined the reliability of the verdict poses a far more difficult question. Indisputably, Mayweather's admissions constituted both highly powerful and decidedly prejudicial evidence. "It is hard to imagine any piece of evidence that could have had a greater prejudicial impact than such a supposed naked confession of guilt." *United States v Ince*, 21 F3d 576, 581 (CA 4, 1994). Our

Supreme Court has instructed that when ascertaining whether an error qualifies as outcome determinative, "the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Here, apart from the admissions described by Nash and Borowsky, the evidence linking Mayweather to the robbery and shootings consisted of (1) eyewitness identification testimony by store manager Sinan Hanna, who identified Mayweather with certainty at trial and recounted in detail his repeated and close contacts with Mayweather on September 27, 2007, (2) Patricia Pitts, who identified Mayweather and his codefendant with certainty from a video recording of the robbery and shootings, and (3) the police discovery in the Intrepid used by defendant a store receipt dated in the late morning of September 27, 2007, which other testimony established had been placed in the store's cash register before the robbery and shootings. Although a close question, I conclude that when evaluated in light of the weight and strength of the untainted evidence, the admission of defendant's confessions amounted to harmless error.

/s/ Elizabeth L. Gleicher