

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER PEREZ,

Defendant-Appellant.

UNPUBLISHED

June 27, 2000

No. 214720

Tuscola Circuit Court

LC No. 98-007287 FC

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to five concurrent terms of thirty to fifty years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first contends that the trial court erred in refusing to allow him to admit certain written portions of the victim's preliminary examination testimony containing statements inconsistent with her trial testimony. The decision whether to admit evidence is within the discretion of the trial court and we will not disturb this decision absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The right of cross examination represents a primary interest secured by a defendant's right of confrontation. US Const, Am VI; Const 1963, art 1, § 20. The right to cross examine is not without limit, however; neither the confrontation clause nor due process confers an unlimited right to admit all relevant evidence or cross examine on any subject. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Although the proper scope of cross examination lies within the trial court's sound discretion, *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995), the credibility of a witness constitutes an issue of the utmost importance in every case, and the defendant is guaranteed a reasonable opportunity to test the truth of a witness' testimony. *People v McIntire*, 232 Mich App 71, 103; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). Preliminary examination testimony may be used to impeach a witness' inconsistent trial testimony, but cannot be used as substantive evidence. *People v Donald*, 103 Mich App 613, 617; 303 NW2d 247 (1981).

Defendant requested that the trial court admit into evidence certain written portions of the preliminary examination transcript that he claimed contained statements made by the victim inconsistent with her trial testimony. According to defense counsel, use of the victim's prior inconsistent statements, concerning the number of times oral sex occurred or the nicknames defendant used that made her nervous, was permitted under MRE 613(b) because at trial the victim denied having made these prior statements.¹

We are not persuaded that defendant was precluded from confronting and impeaching the victim regarding her prior inconsistent statements. *Adamski, supra*. Our review of the record shows that defendant was afforded a reasonable opportunity to cross examine and challenge the victim's credibility, and that defendant did so extensively. *McIntire, supra*. The record reveals that defendant not only confronted the victim with many of her prior inconsistent statements, but also successfully impeached her at trial with these prior statements. MRE 613(b).² The jury had ample evidence of the victim's prior inconsistent statements to consider in evaluating her credibility. Therefore, we conclude that the trial court did not abuse its discretion in refusing to admit portions of the actual preliminary examination transcript as requested by defendant. *Starr, supra*.

Defendant next argues that the trial court erred in allowing testimony regarding the victim's prior consistent statements to investigators. It is generally improper to bolster a witness' testimony by referring to the witness' prior consistent statements. *People v Jolly*, 193 Mich App 192, 195; 483 NW2d 679 (1992), rev'd on other grounds 442 Mich 458; 502 NW2d 177 (1993). A prior consistent statement is not hearsay, however, if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an *express or implied* charge against the declarant of recent fabrication or improper influence or motive [MRE 801(d)(1) (emphasis added).]

To be admissible under this rule, the consistent statements must have been made before the motive to fabricate arose. A consistent statement that predates the motive to fabricate squarely rebuts the charge

¹ MRE 613(b) states in pertinent part as follows:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

² MRE 613(b) does not contemplate admission of the actual text of a prior inconsistent statement. Defendant cites no authority for this proposition, and we need not search for precedents to support defendant's position. *People v Lynn*, 223 Mich App 364, 368-369; 566 NW2d 45 (1997).

that the testimony is contrived. *People v Rodriguez (On Remand)*, 216 Mich App 329, 331; 549 NW2d 359 (1996); see also *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987) (prior consistent statement allowed to show that the witness told the same story before the influence was brought to bear).

Defendant contends on appeal that there was no charge of recent fabrication or influence. The record shows to the contrary that from his counsel's opening argument through closing argument, defendant attempted to persuade the jury that the victim was improperly influenced to testify against defendant and that her trial testimony was recently fabricated with the help of the prosecutor and police investigators.³ The victim's statements to investigative officers that were consistent with her trial

³ During his opening statement, defense counsel suggested,

But the problem with that, quite frankly, is the evidence is going to show that while this incredible witness that the prosecution is going to bring before you, who has spent the last six months speaking with the people that she lives with, and others about her testimony here today, she has some real problems.

The victim testified on cross examination that during the week before trial she met with the prosecutor and the investigative officer several times. She affirmed that the three of them "practiced like [they] were in court," using the actual courtroom on one occasion. When defense counsel asked her, "So, you've had lots of chances to practice this?," the victim responded, "Yes." The investigative officer was also questioned on cross examination regarding "go[ing] over [the victim's] testimony with her."

Furthermore, during his closing argument defense counsel argued in relevant part as follows:

And at that moment [during the preliminary examination] she came up with three new ones. Hasn't been disclosed before, because if you're going to issue seven Counts, why not 10? They hadn't heard about the three other ones until court that day, and that's the five [counts of CSC I] that we face today, one count of anal sex, four counts of oral sex.

What do you think the government felt? You know what egg on the face means? You know what it must be like to arrest a man, throw him in jail, bring him to Court with your star witness, and have five of the seven [original counts] thrown out immediately? It's humiliating.

It was then, and it is now. That's important to me. Because I believe they wanted to make sure that didn't happen again. What the heck does he mean by that? After that fiasco.

(continued...)

testimony predated any courtroom practice she engaged in with the prosecutor, the investigative officers or Family Independence Agency personnel. Thus, the victim's admitted, prior consistent statements were made before any influence of the prosecutor or others arose. *Rodriquez, supra; Smith, supra*. Moreover, the investigative officers, as third parties, were not prohibited from testifying with respect to the victim's prior consistent statements. Both third party witnesses as well as the victim testified in court and were subject to defendant's cross examination regarding the prior consistent statements and any alleged influence the third parties might have exerted over the victim. *People v Brownridge*, 225 Mich App 291, 302; 570 NW2d 672 (1997), rev'd in part on other grounds 459 Mich 456; 591 NW2d 26 (1999).

Accordingly, we conclude that the requirements of MRE 801(d)(1)(B) were satisfied and that therefore the trial court's admission of the victim's prior consistent statements was appropriate. Although it appears that the trial court permitted the investigative officers to testify regarding the victim's prior consistent statements on grounds other than a charge of improper influence or recent fabrication, we will affirm where the trial court reaches the right result, albeit for the wrong reason. *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999).

Lastly, defendant avers that the trial court erred in denying his motion for a mistrial on the basis of prosecutorial misconduct. A mistrial should be granted only when an irregularity is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. We review for an abuse of discretion a trial court's decision regarding a motion for mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

This Court decides prosecutorial misconduct issues on a case-by-case basis, examining the pertinent portion of the record and evaluating a prosecutor's remarks or conduct in context. *People v*

(...continued)

I'm troubled by what last occurred as I hope you would be. There has been, in my estimation, a concerted effort to polish, to clean up, clear up, fix, whatever words you want to use, the testimony of that kid so that when it came here, boy it was to a T, wasn't it.

You remember that testimony? Did it sound rehearsed? Do you ever remember her answering a question before he [the prosecutor] even finished it? I do. And they don't deny it.

* * *

And you know, the one thing that [the prosecutor] doesn't say to you is they also brought [the victim] into his courtroom and practiced with her. They practiced, Seven year old. Looked to me like they did a pretty good job.

Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). A defendant’s right to a fair trial can be jeopardized when the prosecutor interjects issues broader than the accused’s guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

In this case, the jury was excused from the courtroom during the victim’s testimony and defense counsel placed on the record his objection to the presence of a box containing a 2½foot long “bong” pipe and adult videos and magazines seized from defendant’s home. Defense counsel asserted that while the victim testified, the investigative officer pulled items out of this box and laid them on the courtroom floor. Arguing that these actions were purposeful and inappropriate, defense counsel requested a mistrial.

The facts of the instant case are distinguishable from those involved in the cases cited by defendant.⁴ In those cases, the inappropriate items were actually displayed and viewed by the jury, sometimes for a considerable period of time. In this case, the record contains no indication that any of the jurors actually noticed or were aware of the videos, magazines or pipe before the court had the items removed from the courtroom. Thus, we find no evidence of prejudice and no indication that defendant was denied a fair and impartial trial. *Griffin, supra*. We conclude that the trial court did not abuse its discretion in denying defendant’s motion for mistrial. *Id.*

Affirmed.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot

⁴ *People v Johnson*, 83 Mich App 1; 268 NW2d 259 (1978); *People v James*, 36 Mich App 550; 194 NW2d 57 (1971); *People v Brisco*, 15 Mich App 428; 166 NW2d 475 (1968).