

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011

v

CALVIN SYLVESTER WILLIAMS,
Defendant-Appellant.

No. 298152
Wayne Circuit Court
LC No. 09-020320-FC

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's decision to affirm defendant's convictions, but write separately to express respectful disagreement with the majority's conclusion that the trial court properly admitted the complainant's prior statement under MRE 801(d)(1)(B).

At the bench trial, the complainant testified that defendant penetrated her anus with his finger and penis, and penetrated her vagina with his penis. Defense counsel attempted to impeach the complainant's testimony with a statement she had made to the police several hours after the assault. A police investigator had interviewed the complainant and typed the statement in "narrative and question-answer form." The 14-year-old complainant signed the three-page statement, attesting that everything in it was "the truth." In the statement, the complainant twice asserted that defendant "put his finger in my vagina." This evidence contradicted the complainant's denial at the trial that defendant had penetrated her vagina with his finger. Defense counsel used the statement to expose this inconsistency.

Later in the trial, defense counsel presented the testimony of the police investigator who had taken the statement. The investigator confirmed that the complainant stated, "Then he put his finger in my vagina," and verified a second time during the interview that defendant had digitally penetrated her vagina. On cross-examination, the prosecutor asked the police investigator to read the narrative portion of the statement aloud. The narrative portion of the statement bolstered the complainant's trial testimony, except for the two portions in which she alleged digital penetration of her vagina.

The majority holds that the trial court properly admitted the entire narrative statement under MRE 801(d)(1)(B). According to the majority, the statement was "consistent with the declarant's testimony and [was] offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The majority reasons, "the

prosecution demonstrated to the trial court, with the consistent statements she made to [the investigator], that the complainant did not change or fabricate her story in several respects, implicitly leaving the trial court with the impression that there may have been other reasons for the inconsistencies.” *Ante* at 3. In my view, the narrative did not qualify as a prior consistent statement rebutting a charge of recent fabrication and the trial court abused its discretion by admitting it.

“Generally speaking, a witness cannot be corroborated on direct or redirect examination or rebuttal by proof of prior statements consistent with his in court testimony.” 30B Graham, Federal Practice and Procedure: Evidence (interim ed), § 7012, p 138. “Prior consistent statements are not generally admissible as substantive evidence.” *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987). Rather, a prior consistent statement is admissible “to rebut an express or implied charge . . . of recent fabrication, improper influence or motive.” MRE 801(d)(1)(B). In *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000), this Court set forth the following requirements for admitting a statement under MRE 801(d)(1)(B):

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant’s challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

The narrative statement did not meet three of these four criteria. Defendant never argued or implied that the complainant had recently fabricated her trial testimony, possessed a motive to lie, or had been subjected to improper influence. The narrative statement was *inconsistent* with the complainant’s challenged courtroom testimony and was made *after* any possible (although never alleged) motive to falsify arose.

On direct examination, the complainant asserted that defendant had penetrated her vagina with his penis, but not with his finger. Defense counsel confronted the complainant with her statement to police that defendant had also penetrated her vagina with his finger. In establishing a contradiction with the complainant’s direct testimony, defense counsel sought to attack the complainant’s credibility by suggesting that she had exaggerated what occurred. At no time during the trial did defense counsel charge that the complainant had recently fabricated her courtroom testimony, or imply that she harbored any motive for denying digital penetration of her vagina. Counsel simply engaged in routine impeachment designed to cast some measure of doubt on the accuracy of the complainant’s recollection of events.

MRE 801(d)(1)(B) is not a free ticket to bolster a witness’s testimony after she has been impeached. Rather, the plain language of the Rule demonstrates that it supplies a narrow avenue for rebutting a claim that a witness recently changed her testimony. “One may impeach for lack of credibility without going so far as to charge recent fabrication.” *Thomas v United States*, 41 F3d 1109, 1119 (CA 7, 1994). The United States Supreme Court has explained, “Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.” *Tome v United States*, 513 US 150,

157-158; 115 S Ct 696; 130 L Ed 2d 574 (1995). Because defense counsel never even hinted that the complainant had consciously altered her trial testimony or intended to fabricate a new story, the impeachment simply did not trigger MRE 801(d)(1)(B).

Moreover, the narrative statement was *inconsistent* with the complainant's in-court testimony. On direct examination, the complainant *denied* that defendant had digitally penetrated her vagina. In the statement, she asserted that he had done so. Prior consistent statements are admitted to reinforce *consistent* in-court testimony characterized as recently fabricated or portrayed as the product of improper influence. The narrative statement admitted in this case *contradicted* the complainant's courtroom testimony. Consequently, it simply did not meet the third requirement for admission set forth in *People v Jones*, 240 Mich App at 706: that "the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony." Admission of the entire narrative instead permitted the prosecutor to rehash the complainant's testimony through consistent repetition of the assault details. The statement rehabilitated but did not rebut, and consequently had nothing to do with MRE 801(d)(1)(B).

Finally, even assuming that the complainant had a motive to fabricate her trial testimony, that motive arose at the moment she reported the assault to her parents. "[A] consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v Rodriguez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). Thus, her *subsequent* statement to the police could not possibly qualify as a prior consistent statement.

Despite that the challenged evidence constituted inadmissible hearsay, defendant has not established a reasonable probability that the introduction of the narrative statement undermined the reliability of the judge's verdict or altered the result of his trial. Accordingly, I agree that his conviction should stand affirmed.

/s/ Elizabeth L. Gleicher