

*McCabe's App.
Brief*

NO. 35544-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS J. McCABE,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Richard A. Strophy, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting hearsay evidence against Appellant McCabe over defense objection.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. “Prior inconsistent statements” of a prosecution witness are inadmissible unless the defense implies or expressly asserts that the testimony of the witness was the result of “recent fabrication or improper influence or motive.” Once such an assertion is made, evidence of a prior consistent statement is admissible only if that statement was made prior to when the motive to fabricate arose. The prior consistent statement is then relevant to rebut the claim of recent fabrication by showing that the witness said the same thing even before there was a motive to do so. In McCabe’s case, the defense claim was not one of “recent fabrication,” but rather that the witness—Amy Stabley-Cate—would “say anything” to avoid imprisonment, and that she had a motive to make up her statements to police because they were made shortly after an alleged robbery in which Stabley-Cate acknowledged that she shared criminal liability by transporting the co-defendants as well as the victim to the park where the incident occurred, after having heard the three co-defendants discuss “rolling” or “jacking” the victim. Did the trial court err in admitting the statements Stabley-Cate under ER 801(d)(1)(ii) regarding prior consistent out-of-court statements?

Assignment of Error No. 1.

C. STATEMENT OF THE CASE

1. Procedural history:

A jury convicted Nicholas McCabe of second degree burglary. Clerk's Papers [CP] at 51. The State charged McCabe in an information filed in the Thurston County Superior Court on August 25, 2006, as a principal or accomplice of robbery of Randall Moore on August 23, 2006, in violation of RCW 9A.56.210(1), along with co-defendants Johnnie Thomas and Billot Miller. CP at 4.

a. Defense motion to exclude Officer Anderson's testimony regarding Stabley-Cate's out-of-court statements.

During the trial the prosecution moved to introduce under ER 801(d)(1) statements made by Amy Stabley-Cate to Olympia police officer Brenda Anderson in order to rebut an inference that her trial testimony was fabricated in order to take advantage of a grant of immunity, and that the statement she gave on August 23 to Officer Anderson is different from her testimony on November 1. 3Report of Proceedings [RP] at 407, 4RP at 418.¹

¹ The Verbatim Report of Proceedings consists of five volumes of transcripts [RP], which are referred to in this Brief as follows:

1RP October 30, 2006 Trial

2RP October 31, 2006 Trial

3RP November 1, 2006 Trial

The State argued that because of vigorous cross examination of Stabley-Cate, implying recent fabrication of her story due to the grant of immunity given to her on November 1, triggered application of the hearsay exception under ER 801(d)(1). 4RP at 419-20.

Thurston County trial court Judge Richard A. Strophy ruled that there “has been a sufficient attack on the credibility of Stabley-Cate by cross-examination and the inferences case by such, the nature of the examination, with respect to fabrication, in light of the grant of immunity,” permitted the prosecution to introduce testimony regarding how Stabley-Cate’s statement to police was consistent with her testimony at trial, “and that there was no testimony inconsistent or statement inconsistent with it at the time she gave her statement to police.” 4RP at 430. Pursuant to the court’s ruling, the State recalled Officer Anderson, who testified regarding the taped statement that Stabley-Cate made on August 23. 4RP at 434. Officer Anderson stated that Stabley-Cate made a number of statements, including the following:

"Johnnie and I were driving up State and we, I guess, and then we saw Miller and a couple of other people, and we knew"—
correction—

"Johnnie and I were driving up State and we, or I guess, and then we saw Miller and a couple other people we knew at the bank, so we pulled into the bank."

"Um, I guess they said they were going to try to take this old guy's money or something, and so..."

"What they said, 'We're going to take this guy's money,' or, 'We're going to take this guy for his money,' or something."

"And we were driving, we -- they told me to go to Priest Point Park, so I turned up near the Shell."

"I think it was, um, mainly, um, Johnnie. He was saying, 'Give me the money,' and then Miller and them were like agreeing and everything like that."

"He's saying, 'No,' just repeatedly, 'No, I'm not giving you my money, I want it.' And then they're like okay, we'll just drop you off here, then, and he's like okay, and then he tries to get out of the car."

"Miller gets out first, walks to the door, the guy who's behind me, and the guy tries to get out, and he can't get out, and then the -- I think Johnnie -- then Johnnie gets out of the car, and then the guy sitting behind Johnnie gets out of the car."

"He's heading down the hill, the three of them are following him and asking him for money, and he's saying, 'No, I don't want -- I don't want -- I don't want to give you my money.'

"And they follow him, and then this other car rolls up, and I think they're friends of Johnny's or the guy -- the guy driving is probably Johnny's friend, and I think he figured they probably needed help, so he popped the trunk and gets out of the car and shows Miller there's a bat in the trunk."

"Miller grabs the bat, starts running down – or walking down the hill toward the other two that are down there talking to the other guy.

"He – the guy who gave Miller the bat pulled his car up next to mine and then gets out of the car and walks down to where they are. I think – well, before that, I think they started being rough and holding him down and grabbing for his money, and the other guy –"

"Well, no. Miller – Spange had the guy holding him down. I think Johnnie was punching him or kicking him or doing whatever, and then Miller comes with the bat, just I think more just threatening him than anything."

"And then while Spange is holding him down, Miller and Johnnie are grabbing the money out of his pockets and taking all of his stuff."

"And then, um, I – and then after they got all of his stuff, all of the money and stuff, they came back to the car. They all got in the car. I drove away. The car behind me drives away. They're following me. Then as they're – as we're in the car, they had distributed the money evenly. I think Johnnie got 20, and I think they all got 20, maybe. And then – and they were looking through his bags of stuff and they were throwing it out the window."

4RP at 434-443.

b. Jury instructions.

Counsel did not take exceptions to requested instructions not given or objected to instructions given. 4RP at 530-31. CP at 32-50.

c. Verdict.

The jury found McCabe guilty of second degree robbery as charged in

the information. CP at 51.

d. Sentencing.

The trial court imposed a standard range sentence of seventeen months RP (11.9.06) at 8. CP at 59.

Timely notice of appeal was filed on November 9, 2006. CP at 65.

This appeal follows.

2. Substantive facts:

a. Moore's version of events.

A 42-year-old homeless man named Randall Moore withdrew \$100.00 from a US Bank cash machine in downtown Olympia, Washington on the afternoon of August 23, 2006. 1RP at 17-18, 42. Moore used some of the money to buy pills. 2RP at 68, 70. Moore later returned and withdrew another \$100.00. 1RP at 19. He had been drinking and was under the influence of three different types of drugs, including Valium and Vicodin. 1RP at 18, 20, 33, 34. Moore wanted to buy crack cocaine and he got into the backseat of compact car containing three or four other people. 1RP at 20, 21, 34. Moore did not know any of the people in the car, which picked him up about one block from US Bank on Fourth Street. 1RP at 21, 22. The driver took him to Priest Point Park in Olympia. 1RP at 22. Moore testified that at the park someone demanded his money, and that he refused to hand it over.

1RP at 25. He stated that \$140.00 was taken from him “by force” and they took his wallet too. 1RP at 25, 38. Moore told other people at the park that he had been robbed and the police later arrived. 1RP at 28. Moore stated that he identified the people when the police arrived. 1RP at 28. He was taken to St. Peter’s Hospital and kept in “the mental ward” until the following morning. 2RP at 72. Moore testified that he got a black eye as a result of the incident. 2RP at 71-72. He did not see anyone with a baseball bat. 2RP at 73.

Moore did not make an in-court identification of McCabe. 1RP at 28-29, 2RP at 80.

b. Law enforcement’s version of events.

Witnesses told police that there were two cars at Priest Point Park at the time they saw Moore. 2RP at 97. One car was a white four door sedan with front end damage on the driver’s side, and the second was a newer model gold-colored four door sedan. 2RP at 97, 3RP at 185. When the cars drove by, witnesses heard Moore yelling and saw him coming down a hill toward them. 2RP at 96.

Police later found two cars matching these descriptions at a Shell station near the “east Y” in Olympia. 2RP at 99, 104. The cars at the Shell station were a white Kia Sephia and a Geo Prism. 2RP at 107, 3RP at 195.

Co-defendant Johnnie Thomas was contacted at the Shell station. 2RP at 167. David Maybin and Joann Cook were in the Geo Prism and Thomas was associated with the Kia. 3RP at 195, 196. Amy Stabley-Cate was located in the driver's seat of the Kia. 3RP at 197.

Billot Miller and Nicholas McCabe were initially contacted by law enforcement while walking eastbound along Fourth Avenue and were held until Moore arrived. 2RP at 146. Moore was transported to the scene to make an identification of the persons detained on Fourth Avenue. 2RP at 112, 155. Matthew Rennschler of the Olympia Police Department testified that Moore identified Miller and McCabe as being involved in the alleged robbery. 2RP at 120, 121.

Thomas had \$61.00 when he was contacted by police at the Shell station. 3RP at 202. He stated that he got \$100.00 from Stabley-Cate's mother for car repairs. 3RP at 202. He denied taking part in a robbery, and said that it was committed by others. 2RP at 204-05. Thomas told police that he was in the passenger seat of the Kia at the park at the time of the robbery, and that Stabley was driving the car. 3RP at 206.

Police found a US Bank ATM receipt from 19:37 on August 23, 2006 inside the Kia. 3RP at 218. Exhibit 7. Police also found methamphetamine in a black pouch on the passenger seat of the car. 3RP at 241-42. A second

US Bank ATM receipt dated August 23, 2006, was found in Thomas's pocket. 3RP at 220. Exhibit 8.

Thomas told Olympia police officer Brenda Anderson that two others wanted to "jack" or "roll" Moore, and at the park they surrounded him to prevent him from leaving, then pushed him, knocked him to the ground and took the contents of his pockets, including his wallet. 3RP at 227-29. Thomas said the money was divided and that he got a portion. 3RP at 229. Thomas said that Maybin showed up in the gold-colored car during this time, and both cars left together and went to K and J Mini Mart, where the two other people were dropped off. 3RP at 232. Stabley-Cate and Thomas then went to Bigelow Park, and then to the Shell station located near the "east Y" where they were contacted by police. 3RP at 233.

c. Thomas' version of events.

Thomas testified that he and Stabley-Cate picked up McCabe and Miller, and also Moore, at the US Bank in order to sell drugs to Moore. 4RP at 453. They drove to Priest Point Park. 4RP at 453. Thomas showed Moore the drugs and Moore said that was not what he wanted. 4RP at 453. He stated that Moore insisted on receiving the drugs first, and that he insisted on getting the money first. 4RP at 454. Maybin's car arrived at that time, and Thomas told Maybin that Moore "was making [him] mad." 4RP at 454.

Thomas stated that Moore threw \$60.00 at him, and Thomas then pushed him and Moore fell down. 4RP at 455. He stated that Miller then came running down the hill with a baseball bat. 4RP at 455. He stated that he picked up the drugs that Moore had thrown back at him and went up the hill back to the car. 4RP at 455. Both cars then left the park and went to the Mini Mart to get gas. 4RP at 456. McCabe and Miller got out of the car at the Mini Mart. 4RP at 456. Thomas stated that he gave a different version of the story to police when he was arrested, blaming “everything” on Miller and McCabe, telling police that he “just stood and watched look out.” 4RP at 459.

d. Miller’s version of events.

Miller stated that the incident was a drug transaction, and that Moore and Thomas became upset with each other. He stated that Thomas gave the drugs to Moore, and Moore threw the money at Thomas. 4RP at 498. Miller stated that he grabbed the bat from Maybin’s car in order to give it to Thomas. 4RP at 500. He stated that by the time he had the bat, Thomas had pushed Moore down. 4RP at 500. Miller stated that he dropped the bat and he and McCabe “get Johnnie off Dude.” 4RP at 500.

e. Maybin and Cook’s versions of events.

Maybin testified that he and Joann Cook drove to Priest Point Park in his Geo Prism on August 23. 3RP at 257. At the park he saw “four or five

guys off kind of standing almost in the middle of the road.” 3RP at 258. He stated that he stopped because Cook told him that someone had “tapped” on his car as he drove by. 3RP at 258. He did not recognize any of them except Thomas. 3RP at 259. He said that one of them was black, one was a “Mexican guy or Indian, had a Mohawk[,]” and one was an older guy with a beard and flannel shirt. 3RP at 260. Maybin stated that he opened his trunk and retrieved a baseball which he gave to a black person who was not Thomas. 3RP at 262. That person returned later and tossed the bat back to Maybin, who put it back in his trunk. 3RP at 271. Maybin left the park following the Kia. He testified that Thomas, the person with Mohawk and the person to whom he gave the bat were also in the Kia. 3RP at 265, 266. They drove to the Mini Mart and everyone except Thomas and Stabley-Cate got out of the car. 3RP at 267, 312. Maybin then followed the Kia to Bigelow Park. 3RP at 268. Maybin and Cook stated that all four of them smoked methamphetamine while driving around in the Kia. 3RP at 287, 297, 313, 320.

Maybin’s car had a burned out taillight, so they sent to the Shell station to buy a replacement where they were contacted by police. 3RP at 269, 313.

In his written statement to police, Maybin stated that he gave the bat

to Thomas, who he called “Pockets.” 3RP at 282.

f. Stabley-Cate’s version of events.

Stabley-Cate identified McCabe, Miller and Thomas as the persons whom she took to Priest Point Park in the Kia. 3RP at 327. She stated that McCabe, who she called “Spange,” as having had a Mohawk haircut at the time. 3RP at 329. Stabley-Cate testified that prior to going to the park, Miller, Thomas, and McCabe talked about Moore, who was by the ATM, and that “they were going to try and take his money.” 3RP at 332-34. Moore got into the back seat of her car and sat between McCabe and Miller and she drove them to Priest Point Park. 3RP at 336-37. She stated that Moore wanted to buy drugs and that she thought the others were planning to sell him drugs. 3RP at 364.

Stabley-Cate stated that at the park “everyone” in the car demanded Moore to “give me the money.” 3RP at 340. She said that all four got out of the car, that Moore was trying walk away and that they walked after him, demanding his money. 3RP at 342. During this time the second car arrived. 3RP at 342. She stated the male in the second car opened the trunk and Miller got a baseball bat from the trunk. 3RP at 344. She stated that Thomas and McCabe were with Moore at that time, and that Moore was on the ground. 3RP at 345. She stated that they took his money while holding him

down, and that they “were working as a team.” 3RP 351-52. All three then returned to her car. Thomas got in the front seat, and McCabe and Miller got in the back. 3RP at 352. At the Mini Mart, McCabe and Miller got out of the car. She then drove to Bigelow Park with the second car following. 3RP at 353-54. She bought gas for the other car. 3RP at 353. She denied smoking methamphetamine with the other three in her Kia. 3RP at 355, 361-62.

Stabley-Cate testified that she was granted immunity by the State on November 1, 2006. 3RP at 369.

Counsel for McCabe asked Stabley-Cate the following on cross-examination regarding the grant of immunity, which was introduced as Exhibit 9:

Q. You would say anything to get out of these charges and not be charged; am I correct?

A. I wouldn't say anything, no.

Q. Why did you sign that?

A. Because I was drove here by police, and they told me to sign the papers.

Q. Did the police force you to sign the papers?

A. Nobody forced me to sign the papers. I was just—I had to be here today.

3RP at 370.

Counsel for McCabe asked essentially the same thing during re-cross-examination:

Q. And you agreed with Mr. Bruneau that if you testified in this case, you will not be charged, correct?

A. Uh-huh.

Q. You will not go to jail, correct?

A. Uh-huh.

Q. So you would say anything, again, to avoid going to jail, correct?

A. I wouldn't say anything to avoid going to jail.

Q. Okay. But you were afraid, weren't you, going to jail?

3RP at 394.

Counsel for Miller examined Stabley-Cate regarding the grant of immunity:

Q. You got a grant of immunity, and that basically is a contract or a piece of paper signed by you and Mr. Bruneau, right?

A. Yeah.

Q. And that was signed today?

A. Uh-huh.

Q. Are you afraid that if you disagree with what is in your taped statement that you were shown by Mr. Bruneau when he was asking you questions on direct examination, are you afraid if you disagree with that, that you may be prosecuted?

A. No.

Q. You have no fear?

A. I have a little bit of fear, but I'm not completely---

Q. Is when you're testifying right now and I'm asking you questions, you understand, right, that you have to tell the truth?

A. Yeah.

3RP at 379-80.

Counsel for Miller also asked:

Q. In the grant of immunity, Exhibit Number 9, and this is the exhibit—or this is the grant of immunity that and you Mr. Bruneau signed?

A. Yeah.

Q. I'm going to draw your attention to the second paragraph there. There's two sentences:

basically in the paragraph, the second sentence. Basically, what that tells you is that you have to testify truthfully, right?

A. Yeah.

Q. And if you -- and completely, and if you don't, you would be subject to prosecution to the full extent allowed by law?

A. Uh-huh.

Q. Right?

A. Uh-huh.

Q. And that's a concern to you, right?

A. Yeah. Right. Yeah.

Q. In fact, you didn't even want to come to court?

A. No.

Q. Because you were afraid?

A. I wasn't afraid. I just didn't really want to come.

Q. For other reasons, as well, then?

A. Uh-huh.

Q. So when you signed this, you understood that meant that you had to testify truthfully, right?

A. Uh-huh.

Q. And so what you're testifying right now is the truth?

A. Uh-huh. It's what I believe is the truth.

Q. And the truth is, is that you didn't really see what happened at the park except for the first part and the last part?

A. Uh-huh.

Q. Because you really weren't paying attention to what happened?

A. Yeah.

3RP at 381-83.

D. ARGUMENT

1. **THE STATEMENTS BY STABLEY-CATE TO LAW ENFORCEMENT ON AUGUST 23, 2006, WERE NOT ADMISSIBLE AS A "PRIOR CONSISTENT STATEMENT."**

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “[T]he out-of-court statement of an in-court witness is generally hearsay.” *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003). ER 801(c). Unless otherwise provided by rule or statute, hearsay is inadmissible. ER 802.

Generally, “the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements similar to and in harmony with his or her present testimony on the stand.” *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983), *overruled in part on other grounds by, Gaglidari v. Denny’s Rests.*, 117 Wn.2d 426, 445, 815 P.2d 1362 (1991). There is a limited exception contained in ER 801(d)(1)(ii). Under that rule, the prior consistent statements of a witness may be admitted in response to claims that the witness recently fabricated his or her story. *See State v. Pendleton*, 8 Wn. App. 573, 574-75, 508 P.2d 179, *review denied*, 82 Wn.1d 1007 (1973).

A witness’s prior consistent statement is not admissible to prove that in-court allegations are true. *State v. Bargas*, 52 Wn. App. 700, 702, 763 P.2d 410 (1988), *review denied*, 112 Wn.2d 1005 (1989). Prior consistent statements are generally inadmissible because they have negligible probative value; mere repetition does not make something true. *State v. McDaniel*, 37 Wn. App. 768, 771, 683 P.2d 231 (1984). Mere repetition generally is not a valid test of veracity. *McDaniel*, 37 Wn. App. at 771.

Out-of-court statements of the witness may be admitted to rebut a suggestion of recent fabrication. The fact that the witness told the same story before is relevant to the witness's credibility; it rebuts the alleged fabrication.

ER 801(d)(1) provides that a statement is not hearsay if:

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) 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, or (iii) one of identification of a person made after perceiving the person;

“If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness’s story given while testifying.” *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004). Cross-examination that creates an inference that the witness was motivated to fabricate her allegation by some event may justify admission of evidence of prior consistent statements. *Bargas*, 52 Wn. App. at 703-03.

The rule, however, is limited. It does not apply—and prior consistent statements are not admissible—if a defendant has simply attacked a witness’ credibility. *See State v. Harper*, 35 Wn. App. 855, 858, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984). This is because a general attack on credibility is not the same as a claim of “recent fabrication.” *Harper*, 35 Wn.

App. at 858. “Cross examination alone does not justify admission of prior consistent statements; the questioning must raise an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later.” *Bargas*, 52 Wn. App. at 702-03.

Further, without a claim of “recent fabrication,” prior consistent statements are inadmissible, because such statements are irrelevant and improper “bolstering” of a witness’ testimony. *See State v. Smith*, 82 Wn. App. 327, 332, 917 P.2d 1108 (1996), *review denied*, 112 Wn.2d 1005 (1989). “[M]ere repetition does not imply veracity,” so the fact that the witness has maintained a consistent story does not prove anything except consistency, generally legally irrelevant to any issue at trial, but still likely to hold sway in a jury’s mind. *See State v. Purdom*, 106 Wn.2d 745-749-50, 725 P.2d 622 1986); *Harper*, 35 Wn. App. at 858-89.

The proponent of the proposed testimony must demonstrate that the prior statement of the witness was made before the witness's motive to fabricate arose in order to show the testimony's veracity and for ER 801(d)(1)(ii) to apply. *McDaniel*, 37 Wn. App. at 771.

Prior consistent statements only become admissible and relevant because the prior consistent statement, made before any motive to fabricate, rebuts the claim that testimony was false. The prior consistent statement

becomes evidence “which counteracts a suggestion that a witness changed his story” in response to some external pressure by showing his story was the same prior to the external pressure. *Harper*, 35 Wn. App. at 858. As a result, evidence that the witness’ stories have been consistent under those circumstances “is highly relevant to shedding light on the witness’ credibility.” *Harper*, 35 Wn. App. at 858. On the other hand, evidence “which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force.” *Id.*

Therefore, unless there is a claim of recent fabrication, “a witness’ testimony cannot be corroborated or bolstered by presenting to the fact finder evidence that the witness made the same or similar statements out of court.” *Harper*, 35 Wn. App. at 857; *see, e.g., State v. Dictado*, 102 Wn.2d 277, 687 P.2d 174 (1984), *disapproved in part on other grounds by State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) (where cross-examination focused on inconsistencies between the witness’ statements and a meeting in July where pressure was suggested to have been asserted, admission of prior consistent statements made in June was proper).

In the present case, the State cited *State v. Thomas* in support of its argument that Stabley-Cate’s August 23 statements should be admitted. Defense attorneys for McCabe, Miller, and Thomas referred to the grant of

immunity during cross-examination and asked Stabley-Cate if she would “say anything” to avoid going to jail. 3RP at 370, 394.

This varies sharply from the facts of *Thomas*. In *Thomas*, defense counsel elicited testimony from the witness indicating she had changed her statements after receiving promises of leniency in exchange for testifying against the defendant, and that she was motivated to lie to the police in order to minimize her own involvement in the offense. *Thomas*, 150 Wn.2d at 866.

ER 801(d)(1)(ii) does not support the admission of hearsay evidence in the present case. There was no evidence Stabley-Cate changed her story in response to external pressure. Although she was asked if it was correct that she “would say anything” to get out the charges or not be charged [3RP at 370, 394], and was asked if she was afraid of being prosecuted if she “disagree[d] with what is in [her] taped statement that [she was] shown by Mr. Bruneau,” [3RP at 380], the defense cross-examinations of Stabley-Cate did not create a plausible inference that she had changed her story, as was the case in *Thomas*.

Moreover, Stabley-Cate’s prior consistent statements are inadmissible unless they were “made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements.” *State v. Makela*, 66 Wn. App. 1644, 169, 831 P.2d 1109, *review denied*, 120

Wn.2d 1014 (1992). This is yet another limit relating to the motive to lie; a person aware of the potential legal consequences of statements has a possible motive to fabricate, if those consequences may be in their factor. It is clear that Stabley-Cate's statement was not admissible as a "prior consistent statement" at trial. The statement was *not* made under circumstances where Stabley-Cate was unlikely to have foreseen the legal consequences of her statement. She knew she was in serious trouble: Stabley-Cate testified that she heard Miller, McCabe and Thomas say that they were going to "jack" Moore and she knew that they were going to do "something bad." [3RP at 332, 362]. She drove the three co-defendants and Moore to Priest Point Park and testified that she heard them demand that Moore give them his money. [3RP at 338.] She did not warn Moore about what she stated that she had heard the others discuss regarding "jacking" him. [3RP at 362]. She stated that she saw the three co-defendants act "as a team," holding Moore down and taking his money. [3RP at 352]. After leaving the park, she saw Miller and McCabe get out of her car at the Mini Mart and walk away. [3RP at 353]. She acknowledged that she knew that she "was part" of the alleged offense. [3RP at 363]. She was aware that there was methamphetamine in her car when the police searched it at the Shell station. [3RP at 357, 361]. She testified that she was afraid of being charged with robbery and possession

of methamphetamine. [3RP at 372].

Therefore, her statement was *not* admissible as a prior consistent statement. Yet it was admitted and indeed used a bolster Stabley-Cate on the crucial issue of credibility.

The trial court erred by ruling that ER 801(d)(1)(ii) was triggered by the cross-examination and reversal is required.

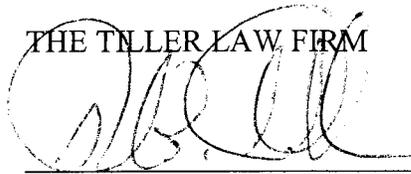
E. CONCLUSION

For the foregoing reasons, Nicholas McCabe respectfully requests that this Court reverse and remand this matter for new trial.

DATED: June 11, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS J. McCABE,

Appellant.

COURT OF APPEALS NO.
35544-2-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Nicholas J. McCabe, Appellant, James C. Powers, Deputy Prosecuting Attorney, and Patricia A. Pethick, Attorney at Law, by first class mail, postage pre-paid on June 11, 2007, at the Centralia, Washington post office addressed as follows:

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