

Response to McCabe

No. 35544-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS J. McCABE,

Appellant



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

The Honorable Richard A. Strophy, Judge
Cause No. 06-1-01529-4

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT1

 1. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY
 CONCERNING THE STATEMENTS MS. STABLEY-CATE
 MADE TO LAW ENFORCEMENT ON AUGUST 23, 2006, AS
 A PRIOR CONSISTENT STATEMENT.....1

D. CONCLUSION.....6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997)1, 6

State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984)2

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004)2, 3

Decisions Of The Court Of Appeals

State v. Bray, 23 Wn.App. 117, 594 P.2d 1363 (1979)5

State v. Harper, 35 Wn.App. 855, 670 P.2d 296 (1983),
review denied, 100 Wn.2d 1035 (1984).....2

State v. Makela, 66 Wn.App 164, 831 P.2d 1109,
review denied, 120 Wn.2d 1014 (1992).....4, 5

Statutes and Rules

ER 801(c)1

ER 801(d)(1)5

ER 801(d)(1)(ii)1, 2, 3, 4, 6

Other Legal Authorities

5B K. Tegland, Wash. Prac. § 801.25 (5th ed. 2007)3

A. ISSUE PERTAINING TO MR. MCCABE'S ASSIGNMENT OF ERROR

1. Whether the trial court erred in admitting the statements of Ms. Stabley-Cate under ER 801(d)(1)(ii) regarding her prior consistent statements.

B. STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts Mr. McCabe's Statement of the Case.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY CONCERNING THE STATEMENTS MS. STABLEY-CATE MADE TO LAW ENFORCEMENT ON AUGUST 23, 2006, AS A PRIOR CONSISTENT STATEMENT.

Decisions regarding the admission or exclusion of evidence "lie largely within the sound discretion of the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Such evidentiary rulings "will not be reversed on appeal absent a showing of abuse of discretion." Id. Abuse of discretion occurs "only when no reasonable person would take the view adopted by the trial court." Id.

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

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (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

“Evidence which counteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness's credibility.” State v. Harper, 35 Wn.App. 855, 858, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984).

Thus, unless there is an express or implied charge of recent fabrication or improper influence or motive, “a witness's 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. . . .” Id. at 857. “The proponent of the testimony must show that the witness's prior consistent statement 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.” State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004) (emphasis in original). While “mere cross examination of the witness cannot alone justify admission of prior consistent statements,” a vigorous cross-examination may trigger ER 801(d)(1)(ii). State v. Dictado, 102

Wn.2d 277, 290, 687 P.2d 172 (1984); *see* 5B K. Tegland, Wash. Prac. § 801.25 (5th ed. 2007).

In Thomas, defense counsel implied on cross-examination that a crucial witness for the State had a motive to fabricate testimony due to a favorable plea agreement. Thomas, *supra*, at 865-66. Defense counsel also pointed out inconsistencies in the witness's testimony and the fact that she had divorced the defendant in order to testify against him at trial. Id. at 866. The Court held that this inquiry by defense counsel was sufficient to trigger ER 801(d)(1)(ii) and allowed the State to introduce the witness's prior consistent statements to rebut the attacks on the witness's credibility which arose from the suggestive implication of recent fabrication. Id. at 867.

In the present case, the cross-examination of Stabley-Cate by Mr. McCabe ("McCabe") was more penetrating and accusatory than that in Thomas. Stabley-Cate testified on direct examination that she had driven McCabe, Mr. Moore, Miller, and Thomas to Priest Point Park. [Vol. III RP at 336-37]. She also testified on direct that, prior to driving to Priest Point Park, McCabe, Miller, and Thomas intended to steal Mr. Moore's money. [Vol. III RP at 334-35]. Stabley-Cate testified that the three defendants "were working as a team" in committing the robbery and that

two of the defendants had physically held Mr. Moore down on the ground and rifled through his pockets during the robbery. [Vol. III RP at 351-52].

McCabe referred to Stabley-Cate's grant of immunity during cross-examination. [Vol. III RP at 369]. McCabe then asked Stabley-Cate *four times* whether she would "say anything" to avoid being charged with robbery or going to jail. [Vol. III RP at 369, 370, & 394]. Through these four questions, McCabe strongly implied that Stabley-Cate's in-court testimony was influenced by the State's grant of immunity, and that she had capitulated to the State solely to avoid prosecution. Additionally, counsel for Miller referenced Stabley-Cate's grant of immunity while simultaneously asking her two times whether she was testifying truthfully at trial. [Vol. III RP at 382].

Through his vigorous cross-examination, McCabe impliedly charged Stabley-Cate with recent fabrication of testimony and/or that she was improperly influenced by the State's grant of immunity. Stabley-Cate's prior statement to Officer Anderson was not hearsay, and was properly admitted as a prior consistent statement under ER 801(d)(1)(ii). McCabe argues that prior consistent statements are inadmissible unless they were made under circumstances "indicating that the witness was unlikely to have foreseen the legal consequences of [her] statements." [McCabe's Brief at 22, citing State v. Makela, 66 Wn.App 164, 169, 831

P.2d 1109, *review denied*, 120 Wn.2d 1014 (1992)]. However, McCabe fails to show just exactly how Stabley-Cate attempted, at the time she gave her statement to Officer Anderson, to “[fortify] herself to meet [the] expected impeachment” of her testimony by McCabe over one month later at trial. State v. Bray, 23 Wn.App. 117, 125-26; 594 P.2d 1363 (1979). Stabley-Cate gave her statement to Officer Anderson on the evening of August 23, 2006—within a few hours of the incident. Stabley-Cate was a young, unsophisticated witness. She did not foresee the legal consequences of her statement to Officer Anderson and had no motivation to lie in that statement. The rule in Makela, *supra*, does not preclude the admission of Stabley-Cate’s prior consistent statement at trial.

Before admitting the prior consistent statement of Stabley-Cate through the testimony of Officer Anderson, the trial court made a thorough and complete exposition of its reasons on the record. [Vol. IV RP 427-432]. The trial court based its decision on its reading of ER 801(d)(1), pertinent case law, and the comments of Professor Tegland. [Vol. IV RP at 430]. The trial court held that Stabley-Cate’s credibility had been sufficiently attacked through inferences cast vis-à-vis her grant of immunity. [Vol. IV RP at 430]. The trial court’s ruling was logical and well-supported by the cross-examination of Stabley-Cate. It cannot be plausibly asserted that “no reasonable person would take the view adopted

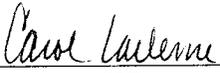
by the trial court.” Castellanos, supra, at 97. An implied charge against Stabley-Cate of recent fabrication or improper influence or motive occurred during cross-examination.

The trial court properly admitted Officer Anderson’s testimony concerning the statement that Stabley-Cate made to Officer Anderson on August, 23, 2006, as a prior consistent statement under ER 801(d)(1)(ii). Stabley-Cate’s statement was not hearsay because it was her prior consistent statement made to police offered by the State to rebut McCabe’s implied charge that she was fabricating her in-court testimony or was improperly influenced by the grant of immunity. The trial court’s ruling was not an abuse of discretion.

D. CONCLUSION.

For the above stated reasons, McCabe’s conviction should be AFFIRMED.

Respectfully submitted this 10th of September, 2007.



Carol La Verne, WSBA# 19229
Attorney for Respondent

