

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENNETH MICHAEL McGEE,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 221298

Wayne Circuit Court

LC No. 98-011698

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, and assault with intent to commit armed robbery, MCL 750.89. Defendant's conviction for assault with intent to commit armed robbery was dismissed as the basis for his felony-murder conviction. Defendant was sentenced to life imprisonment for felony-murder and twenty-five to fifty years' imprisonment for assault with intent to commit murder. We affirm.

I

Defendant argues that he was denied his constitutional right to a fair and impartial trial because the trial court permitted the prosecutor to generally bolster its two main witnesses' credibility with prior consistent statements. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Here, after defense counsel impeached two witnesses' trial testimony with prior inconsistent statements they made during the preliminary examination, the prosecutor read into the record portions of the witnesses' testimony from the preliminary examination that was consistent with their trial testimony. Defendant contends that the testimony was inadmissible as hearsay. It is well established that "hearsay," statements other than those made by the declarant while testifying at the trial and offered in evidence to prove the truth of the matter asserted, are

inadmissible. MRE 801, 802. However, MRE 801(d)(1)(B) states that a statement is not hearsay if: “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . 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” The trial court allowed the prosecutor to introduce these statements over defense counsel’s objections. Thus, we must decide whether the statements were inadmissible under general hearsay rules or properly admissible under MRE 801(d)(1)(B).

In *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999) we opined that the party offering a prior inconsistent statement must establish four elements:

(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.

In the instant matter, the first element was satisfied because the prosecution introduced the statements during the declarants’ testimony.

Next, we must determine whether there was “an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony.” *Jones, supra* at 707, quoting *Bao, supra* at 864. During cross-examination of both witnesses, defense counsel quoted at length from their preliminary examination testimony and referenced statements that the witnesses made to the police. The unmistakable purpose of highlighting the differences between the witnesses’ earlier statements and the witnesses’ trial testimony was to question the accuracy of their testimony. Indeed, during defense counsel’s closing argument, a significant portion was devoted to the inconsistencies. Nevertheless, we do not believe that the attacks on the witnesses’ testimony rose to a level of even an implied charge of improper influence, improper motive, or recent fabrication.¹

Moreover, the prosecutor exceeded the scope of permissible use of prior consistent statements by quoting general consistencies, rather than confining the rehabilitation to the specific areas challenged by defense counsel. See *Jones, supra* at 707, quoting *Bao, supra* at 864. It should also be noted that a prosecutor is not permitted to bolster a witness’ testimony by offering prior consistent statements. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). Thus, we agree with defendant’s contention that the trial court abused its discretion by allowing the introduction of this evidence.

¹ Moreover, because there was no specific allegation of improper motive, influence, or recent fabrication, we are unable to determine whether the fourth element was satisfied.

However, an erroneous admission of evidence is presumed to be harmless, and defendant bears the burden of proving otherwise. *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999), citing MCL 769.26. We only reverse where “‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *Id.* at 495-496, quoting MCL 769.26. The “examination of the entire cause” encompasses evaluating the error in the context of the untainted evidence. *Lukity*, *supra* at 495.

Here, the overwhelming majority of the improperly introduced evidence was cumulative to earlier testimony. At first glance, this would alone support a harmless error conclusion. But to rely solely on the cumulative nature of prior consistent statements would seemingly allow the “exception to swallow the rule.” Indeed, if prior consistent statements are *by definition* cumulative to other testimony, when would their introduction into evidence not be harmless error?

However, we note several additional factors. For example, reviewing the witnesses’ testimony in context we question the weight that could be afforded to the prior consistent statements. The prosecutor simply asked the witnesses if the read portion of their preliminary examination testimony was accurate. There was no attempt to tie the consistent preliminary examination testimony in with the witnesses’ earlier trial testimony, nor did the prosecutor demonstrate during the witnesses’ testimony how the consistencies explained the inconsistencies. In fact, to the extent that the prior consistent statements did not address the inconsistencies, this left the inconsistencies unresolved—a benefit to defendant. In other words, we believe that defense counsel was far more persuasive in highlighting the significant inconsistencies than the prosecution was in drawing attention to the consistencies.

In addition, many of the aforementioned consistencies and inconsistencies involved identification. However, defendant admitted that he did the acts, but in self-defense. The remaining consistencies and inconsistencies concerned less material aspects of the incident. It should also be noted that defendant’s explanation of the events leaves considerable doubt regarding the reasonableness of his use of deadly force. In sum, we find sufficient additional factors to conclude that, when combined with the cumulative nature of the prior consistent statements, defendant has failed to successfully rebut the presumption that the admission of the prior consistent statements was harmless. *Lukity*, *supra* at 495-496.

II

Defendant also raises several other issues. Defendant argues that he was denied a fair trial because the trial court denied his request to impeach witness Johnny Caleb with two prior convictions for home invasion and armed robbery. We review a trial court’s decision to allow impeachment with prior convictions for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 463; 594 NW2d 114 (1999). The trial court opined that the conviction was not necessarily probative of the witness’s credibility, even though there was a theft component. Indeed, armed robbery and home invasion are as assaultive as they are larcenous. Thus, we cannot say that the trial court’s decision to exclude the evidence was without justification or excuse, as necessary to find an abuse of discretion. *Snider*, *supra*, at 419.

Defendant also contends that he was denied a fair trial because the trial court “repeatedly chastised” defense counsel in the jury’s presence and claimed that defense counsel made gratuitous remarks and statements that lacked a factual basis. This Court reviews the record as a whole to determine whether the trial court denied the defendant a fair and impartial trial by unduly influencing the jury. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Further, judicial remarks that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. *Cain v Dep’t of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147, 1155; 127 L Ed 2d 474 (1994). Partiality is not shown by “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display.” *Cain, supra* at 497 n 30, quoting *Liteky, supra* at 555-556. Here, the record reveals that defendant’s attorney did make gratuitous comments and statements lacking a factual basis. We believe that the trial court’s comments were limited and appropriate, and well within the bounds necessary to ensure that defendant received a fair and impartial trial.

Defendant next argues that he was denied a fair trial when the prosecutor denigrated the integrity of his attorney and improperly appealed to the jury’s civic duty to convict. Where there is an allegation of prosecutorial misconduct, we “examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context” to determine whether the defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). The prosecutor’s comments were fair commentary on either the evidence or defense counsel’s closing argument. Therefore, we are not persuaded that defendant was denied his right to a fair and impartial trial.

Finally, defendant contends that the prosecutor denied him a fair trial by unfairly intimidating a defense witness by requesting that the trial court advise the witness of his right against self-incrimination. Here, the prosecutor merely requested that the trial court advise the witness, outside the jury’s presence, of his right against self-incrimination because his proposed testimony would have conceded facts establishing that the witness was a felon in possession of a firearm, contrary to MCL 750.224f. We have opined that the “danger of witness intimidation is addressed by the requirement that the court, rather than the prosecutor, provide the explanation of the witness’ constitutional rights.” *Avant, supra* at 518. It is uncontested that the witness was not present at the crime scene and had no personal knowledge of what occurred there. The witness’ testimony would have simply corroborated defendant’s assertion that he had a claim of right to the gun allegedly purchased from the witness and left at the crime scene. However, because defendant did not claim a right to the other property taken from his victims, even if the witness did testify, it is unlikely that his testimony would have been outcome determinative. Consequently, we do not believe that defendant was deprived of a fair and impartial trial.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens