

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRICE LAVOHN WINSTON,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 229919

Ingham Circuit Court

LC No. 00-075440-FC

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

PER CURIAM.

The jury convicted defendant of armed robbery, MCL 750.529, and the court sentenced defendant as a second habitual offender, MCL 769.10, to ten to thirty years' imprisonment. We affirm.

Defendant asserts that the trial court erred when it admitted hearsay. Defendant says the trial court should not have permitted the prosecution to introduce a prior consistent statement of a witness because, defendant says, he never alleged the witness fabricated his testimony and because the witness had an improper motive to lie when the statement was made. We disagree.

This Court generally reviews evidentiary matters for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, this issue is reviewed for plain error affecting substantial rights because defendant failed to preserve it. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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." MRE 801(c). The admission of a prior consistent statement through a third party is not hearsay and is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). MRE 801(d)(1)(B) provides 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 party offering the prior consistent statement must establish that (1) the declarant testified at trial and was subject to cross-examination, (2) there was an express or implied charge of recent fabrication, improper influence, or improper motive to the declarant's testimony, (3) the prior statement was consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement was made before the alleged motive to fabricate arose. *Jones, supra* at 707, citing *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).

The first and third elements are not in dispute here. The second element is met because defendant implied that the witness falsely accused him because the two men did not get along and because the witness "cut [a] deal" or received leniency from the prosecutor for implicating defendant and testifying against him at trial. Therefore, defendant implied that the witness' testimony resulted from improper influence or motive. MRE 801(d)(1)(B); *Jones, supra* at 707.

Defendant cites *People v Lewis*, 160 Mich App 20; 408 NW2d 94 (1987), to support his position that the witness had a strong motive to lie when he made the statement to a co-conspirator and accomplice. Defendant's reliance on *Lewis, supra*, is misplaced because the witness in *Lewis* made the prior statement to the police at a time when the witness had a strong motive to lie – before he was offered a plea bargain and at a time when he could have been charged with murder. *Id.* 29-30. Here, the witness' prior statement was made to an *accomplice and co-conspirator* a few hours after the robbery, while the witness was still free from police scrutiny or investigation. *Lewis, supra* at 30; *Jones, supra* at 708-709. The witness' prior consistent statement implicating defendant in the robbery was not hearsay because it was made before the witness developed any motive to fabricate his testimony in exchange for leniency. *People v Fisher*, 220 Mich App 133, 155; 559 NW2d 318 (1996). The trial court did not abuse its discretion, and defendant failed to show that the introduction of the prior consistent statement was plain error. *Carines, supra* at 763.

Defendant also argues that he was denied a fair trial because the prosecutor improperly vouched for the credibility of two of its witnesses. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Carines, supra* at 763; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). No error requiring reversal will be found where, as here, the prejudicial effect could have been cured by a timely instruction. *Watson, supra* at 586.

Allegations of prosecutorial misconduct are reviewed case by case, *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998), to determine whether a defendant has been deprived of a fair and impartial trial. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). A prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify truthfully. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Here, defendant is not entitled to a new trial because any prejudice could have been cured by a timely instruction had defendant objected to the alleged misconduct. *Watson, supra* at 586; *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000). Furthermore, the prosecutor's remarks simply indicated that the witnesses promised to testify truthfully as part of their plea agreements – not that the prosecutor had special knowledge of what the truth was or that the witnesses, indeed, testified truthfully. The prosecutor did not express his personal opinion with respect to the testimony, but simply commented on the fact that the witnesses

promised to tell the truth. Further, any prejudice was likely dispelled when the court instructed the jury that it was responsible for determining the witnesses' credibility and that the attorneys' arguments were not evidence.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper