STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2007
v	No. 271740 Berrien Circuit Court
CHARLES EUGENE WALKER, Defendant-Appellant.	LC No. 06-400638-FH

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for larceny from a person, MCL 750.357, and larceny in a building, MCL 750.360. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11 to 85 to 240 months' imprisonment for larceny from a person and 34 to 96 months' imprisonment for larceny from a building. Because the trial court abused its discretion when it admitted the prior consistent hearsay statement, and the error in admitting the evidence was more probably than not outcome determinative and undermined the reliability of the verdict, we reverse.

I

On November 17, 2005, Tina Ellis, the night auditor at the Executive Inn in Berrien County, observed via security camera monitors, two men enter the motel through the front door. The men proceeded through the lobby toward the guestrooms and then lingered in the hallway. Ellis noted that one of the men had facial hair, and one of the men wore a "hoodie." As Ellis continued to watch the men on the monitor, the man without the "hoodie" approached the employee-only door to the office and opened it. She told him he could not come into the office. The man asked her for a few dollars. When she refused to give him any money, he replied, "this is gonna be a stick up." Ellis remained seated at her desk as the man entered the office and looked through her purse on the chair nearby. He took a pack of cigarettes from her purse. He put a hand on her shoulder to keep her in the chair and called out to the man with the "hoodie" to come inside the office. The man wearing the "hoodie" entered the office as the other man asked where the motel staff kept the money. Ellis told them that the money was in a drawer out at the front desk. The man wearing the "hoodie" subsequently opened the drawer, took the money, jumped over the front desk counter, and ran out the front door. The other man took the videotape out of one of the security camera units and ran out of the building. Ellis explained that the

videotape was visible because it was not fully inserted, and that the camera, facing the lobby, was not recording. She had recently changed the videotapes in the cameras.

Months later, Raymond Henry was arrested for home invasion, armed robbery, and possession of cocaine in an unrelated incident for breaking into the home of defendant's cousin. During an interview with Detective Tom Vaught of the Benton Township Police Department, Henry told Vaught that he was involved in a robbery of the Executive Inn in November 2005. Henry claimed that he robbed the motel with "Noonie." "Noonie" was defendant's street name and Henry advised he would have to get "Noonie's" real name. In exchange for a plea bargain with reduced charges, Henry testified against defendant at trial and implicated him in the robbery of the Executive Inn in November 2005.

II

Defendant argues that the trial court erred when it admitted evidence of Henry's prior consistent statements to Vaught that Henry and defendant robbed the Executive Inn. Defendant objected to the admission of Vaught's testimony regarding Henry's statement implicating defendant in the robbery as inadmissible hearsay at trial, thus, this issue is preserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Whether to admit evidence is within the discretion of the trial court; we reverse a decision only when there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Preliminary questions of law regarding the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If the trial court admits evidence that is inadmissible as a matter of law, it is an abuse of discretion. *Id*.

A witness's prior consistent out-of-court statement may be admitted through the testimony of a third party, even if offered for the truth of the matter asserted, if the requirements of MRE 801(d)(1)(B) are met. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). To offer the statement, the proponent 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.' [*Id*. at 707, quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999) quoting *United States v Collicott*, 92 F3d 973, 979 (CA 9, 1996).]

Defendant contests only the fourth element. He claims that when Henry spoke with Vaught, Henry already had a motive to falsify his statement because he was facing felony charges for a separate incident.

A witness has a motive to falsify an accusation or statement if he is at risk of being charged with a crime when the statement is made to police. *People v Lewis*, 160 Mich App 20, 29-30; 408 NW2d 94 (1987). In *Lewis*, this Court concluded that because a witness made his statement before he was offered a plea bargain and while he could have been charged with murder himself, he had a strong motive to accuse someone else of murder and therefore, the

witness's statement was clearly inadmissible as a prior consistent statement under MRE 801(d)(1)(B). *Id*. Also, in *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001), this Court concluded that the witness, who was with the defendant when a shooting took place, had a motive to falsify when he told his friend the day after the shooting that he was with a "tall, bald guy," who shot a police officer the day before. Because the witness knew within an hour after the shooting that police had traced the car involved in the chase to his stepmother's house and that "his involvement would likely be discovered," by the time he spoke with his friend, the motive to falsify had already arisen. *Id*. Thus, the admission of his friend's testimony regarding his prior consistent statement was error. *Id*.

In the instant case, the record reflects that Henry had a motive to falsely implicate defendant in the robbery of the Executive Inn. Henry had just been arrested for home invasion, armed robbery, and possession of cocaine in an unrelated incident when he implicated defendant in the instant crime. Henry testified at trial that the day he spoke with police, he had been arrested for his first felony and knew it was a "good thing" to offer somebody's name in connection with the Executive Inn incident. Henry described the Executive Inn robbery to police with great detail, explaining that he and defendant committed the crimes after they ran out of cocaine and needed to find money to buy more. When Henry offered this information, he had not received a plea bargain and faced serious felony charges. Henry admitted that he was "scared" and "worried" because he was facing his first felony charges and knew that there was an opportunity to obtain reduced or dropped charges in his home invasion case in exchange for testimony against defendant in this case. This evidence shows that Henry made the statements implicating defendant after the motive to falsify arose. Hence, they do not meet the requirements of MRE 801(d)(1)(B), and were inadmissible hearsay as a matter of law. *McCray, supra* at 642. Therefore, the trial court abused its discretion by allowing Vaught to testify regarding the prior statements. *Lukity, supra* at 488.

We must next determine whether the error was harmless, *McCray, supra* at 643, that is, whether the error in admitting the evidence was more probably than not outcome determinative and undermined the reliability of the verdict. *Lukity, supra* at 495-496. The evidence against defendant was not overwhelming. Ellis was the only eyewitness to the crime and she could not identify defendant as one of the two men who stole the cash from the front desk during her shift. Also, defendant could not be identified as one of the men on the videotape or the still photographs taken from the surveillance camera. Henry's testimony was key to defendant's conviction because he was the only one who placed defendant at the motel at the time of the theft. Yet, Henry admitted on cross-examination that he was a drug addict, that he had smoked crack cocaine the night of the robbery, and that he received a significant reduction in his other pending charges in exchange for his testimony against defendant. In addition, there was some evidence of personal animosity between Henry and defendant because of Henry's arrest for the home invasion of the home of defendant's cousin.

The admission of Vaught's testimony allowed the prosecutor to argue in closing that Henry's consistent statements over time meant that he was credible and that he had not falsely implicated defendant. Henry's prior consistent statement was important to the prosecution's case. The prosecutor argued that the prior consistent statement corroborated Henry's testimony at trial and even explicitly stated that Henry's "truthful statements were the same back then as they were yesterday, and he's been consistent throughout." In light of the absence of

corroborating evidence against defendant and the importance of Henry's testimony, we conclude that the wrongful admission of his prior consistent statement was outcome determinative and undermined the reliability of the verdict. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000); *Lukity*, *supra* at 495-496. Reversal is required. *McCray*, *supra* at 643. Evidence of Henry's statement to Vaught is inadmissible and should not be admitted in any new trial. *Lewis*, *supra* at 30.

III

Because of our resolution of the foregoing, defendant's remaining issues on appeal are moot, and we decline to address those issues with one exception. Defendant argues that the trial court erred when it scored offense variable (OV) 9, MCL 777.39, at ten points because there was only one person in danger of injury or death. We address the issue because it may arise in future proceedings. The interpretation and application of the sentencing guidelines is a question of law which we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We review the sentencing court's scoring of points under the sentencing guidelines for an abuse of discretion, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and its factual findings for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). As long as there is some evidence of record in support, a scoring decision will be upheld. *Hornsby*, *supra* at 468.

MCL 777.39(1)(c) requires the trial court to score ten points if there are two to nine victims. A "victim" is any person placed in danger of injury or loss of life. MCL 777.39(2)(a); *Morson*, *supra* at 261-262. The injury must be a physical injury, financial injury or loss is insufficient.[1] *People v Melton*, 271 Mich App 590, 594-595; 722 NW2d 698 (2006). Because only Ellis was present in the motel's office or lobby when the larceny was committed, there was only one victim. Thus, the trial court abused its discretion when it scored ten points for OV 9 because the motel owner suffered only a financial loss. *Id*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[1] The Legislature amended MCL 777.39, effective March 30, 2007, and it now addresses both financial injury and physical injury.