STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2012
v	No. 303837 Oakland Circuit Court
ALEX JEROME PERRY, JR., Defendant-Appellant.	LC No. 2010-234338-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Alex Jerome Perry, Jr. appeals his jury conviction for armed robbery,[1] carjacking,[2] larceny of a firearm,[3] and possession of a firearm during the commission of a felony.[4] The trial court sentenced Perry to serve 13 years and 10 months to 40 years in prison for his armed robbery conviction, 13 years and 10 months to 40 years in prison for his carjacking conviction, three years to seven years and six months in prison for his larceny of a firearm conviction, and to two years in prison for his felony-firearm conviction. We affirm.

I. STATEMENT OF FACTS

At about 2:30 a.m. on September 12, 2010, Tracey Mills parked in the parking lot at North Park Towers Apartments where she lived. She did not see anyone outside when she parked and was startled when she noticed two men at the well-lit entrance of the apartment building. She identified one man as Perry and the other as his codefendant, Damitrice Deshawn Vann. When Mills swiped her fob to gain access to the building, Vann knocked her hand down and pointed a gun to her forehead. Mills tried to run away, but she was wearing high heels and fell. When she fell, Mills' purse, keys, and her .380 semi-automatic handgun, for which she had a concealed weapons permit, fell to the ground. Mills testified that Vann grabbed her keys, and Perry grabbed her purse and gun. The two men ran to her car, Vann got in the driver's seat, and they left quickly.

[1] MCL 750.529.

[2] MCL 750.529a.

[3] MCL 750.357b.

[4] MCL 750.227b.

Mills immediately contacted the police and reported the incident. Mills described both men as thin, black males around 25 years old; one was taller, about 6'2," and the other was shorter. Mills reported both men as wearing baseball caps and that the taller man had the gun and was wearing a black leather jacket, blue jeans, and a black baseball cap. Mills indicated that the man without the gun was wearing a black Starter jacket and blue jeans.

Detective Ryder interviewed Perry, who denied involvement in the incident. Perry also testified on his own behalf at trial. He claimed that he was at home at the time of the crime.

Mills testified that during the evening of September 12, 2010, she saw Vann in the food court area of the Motor City Casino, where she worked, and immediately identified him as one of her attackers. Mills further testified that on September 19, 2010, at about 1:00 a.m., she saw Perry place a food order at a computer kiosk, go to the counter and speak with Mills' supervisor, and then rush out of the food court area without his food. Someone else returned to pick up the order. Mills kept the receipt for the order, which had Perry's name on it, and provided it to Southfield Police Detective Mark Ryder. Mills subsequently identified Perry in a photographic lineup.

On September 21, 2010, Mills made a written statement about Perry coming to the casino on September 19, 2010. During cross-examination at trial, defense counsel asked Mills about her written statement, particularly her description of Perry's behavior in the casino. Mills responded, "I don't know if I can say what my supervisor told me, but that's the information I got from my supervisor." Mills went on to testify that her description of Perry's behavior was based on what she saw and what her supervisor told her. Defense counsel emphasized the shift, or discrepancy, in Mills' two answers with the question, "So now it's what you saw and what you were informed of?" On redirect examination, the prosecution moved to have the September 21, 2010 written statement admitted as a prior consistent statement to rebut the inference that Mills' trial testimony was a recent fabrication. The trial court admitted the statement over Perry's objections.

II. HEARSAY

A. STANDARD OF REVIEW

Perry argues that he was denied a fair trial when the trial court admitted Mills' September 21, 2010, written statement because it was improper hearsay. We review a trial court's decision to admit evidence for an abuse of discretion.[5] If evidence is admitted in error, "[t]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error."[6]

[5] *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

[6] *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

B. LEGAL STANDARDS

Hearsay, which is an out-of-court statement offered to establish the truth of the matter asserted, is generally inadmissible unless it falls into a hearsay exception.[7] A statement is not hearsay if it is a prior consistent statement, as provided in MRE 801(d)(1)(B), which states:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if—
>
> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) 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 . . . .

When a statement is offered as a prior consistent statement, the party offering the statement must establish four requirements:

> (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.[8]

C. APPLYING THE STANDARDS

Here, there is no dispute that the first requirement is met. The second requirement, however, that there was an express or implied charge of recent fabrication, is disputed. Perry claims that defense counsel never challenged Mills' trial testimony as a recent fabrication. Conversely, the prosecution contends that defense counsel challenged Mills' testimony about Perry's behavior in the casino as a fabrication. However, even if Perry challenged Mills' trial testimony as a recent fabrication, the third requirement is not met because there is no indication that the written statement was consistent with the challenged in-court testimony. Mills' testimony that her description was based on what she saw and what her supervisor told her is not consistent with her written statement, which does not set forth the source of any information on which she made the statement. Thus, the written statement was not properly admitted as a prior consistent statement. Moreover, mere contradictory testimony cannot give rise to an implied charge of fabrication.[9]

Although we conclude that the trial court abused its discretion when it admitted Mills' written statement as a prior consistent statement, "in the context of the untainted evidence," it is

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[7] MRE 801(c); MRE 802.

[8] *Jones*, 240 Mich App at 707 (quotation omitted).

[9] See *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).

not "more probable than not that a different outcome would have resulted without the error."[10] Mills identified Perry as one of the men who robbed her and took her car. The area where the robbery took place was well-lit at the time of the crimes. Mills recognized Perry immediately when she saw him at the casino on September 19, 2010. And Mills identified Perry in a photographic lineup without any trouble. This evidence was "untainted" by the admission of the challenged written statement and on the basis of this evidence, it is not "more probable than not that a different outcome would have resulted without the error."[11] Thus, the error does not require reversal.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Perry argues there was insufficient evidence to establish his identity as the perpetrator of the crime. This Court reviews de novo claims of insufficient evidence.[12]

B. LEGAL STANDARDS

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[13] Identity is an essential element in a criminal prosecution.[14] "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew."[15] Additionally, "positive identification by witnesses may be sufficient to support a conviction of a crime."[16]

C. APPLYING THE STANDARDS

Here, there was sufficient evidence of Perry's identity as the person who committed the crime to enable the jury to convict him beyond a reasonable doubt. Mills identified Perry as the person sitting on the steps when she arrived home on September 12, 2010, and as one of the people who robbed her. "Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime."[17] Additionally, Mills provided descriptions of the two men to officers on the night of the incident. Mills recognized Perry

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[10] *Lukity*, 460 Mich at 495.

[11] *Id*.

[12] *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

[13] *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citation omitted).

[14] *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

[15] *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

[16] *Id*.

[17] *Id*.

immediately when she saw him at the Motor City Casino on September 19, 2010. Mills identified Perry in a photographic lineup. Taken in a light most favorable to the prosecution, a rational jury could determine, based on the evidence, that Perry was the person who committed the crimes against Mills and that the prosecution proved all the elements of the crime beyond a reasonable doubt.[18]

We affirm.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

[18] *Wolfe*, 440 Mich at 516.