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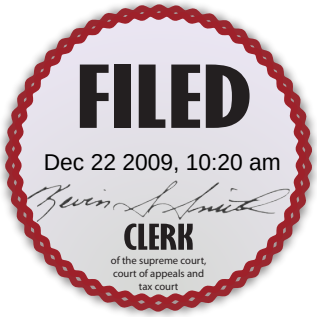

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IN THE
COURT OF APPEALS OF INDIANA

MARCUS BOOKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0906-CR-493
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G04-0808-FA-190817

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Marcus Booker appeals his convictions for one count of class A felony burglary, four counts of class B felony robbery, and four counts of class B felony criminal confinement. We affirm.

Issues

Booker raises two issues, which we restate as follows:

I. Whether the evidence is sufficient to sustain his criminal confinement conviction as to victim Michael Landis; and

II. Whether the trial court abused its discretion in admitting evidence of witness Saaima Baig's prior consistent statement.

Facts and Procedural History

The facts most favorable to the verdict follow. In the summer of 2008, Booker went to Computer Overdrive to sell a broken computer. There, Booker met Alexander Merrifield, an employee of Computer Overdrive, and Merrifield's roommate Logan Worden, who was learning from Merrifield to repair computers and install software. Booker went to the store several times to sell electronic equipment. On these occasions, Booker was always with two persons, an African-American man and a Hispanic man. Booker also came to Merrifield's Indianapolis residence several times to sell electronic equipment. Merrifield's fiancée, Saaima Baig, and Michael Landis shared the residence with Merrifield and Worden. Baig was sometimes present when Booker came to the home, and she recognized him as a grade-school classmate.

On July 16, 2008, at approximately 9:00 p.m., Booker, the African-American man, and the Hispanic man went to Merrifield's residence so that Booker could sell him an Xbox. They entered the residence to negotiate a price for the Xbox. At the time, computers and other electronic equipment were in plain view.

Around 4:00 a.m. the next day, Merrifield and Baig were asleep on a sofa bed in the living room. Merrifield woke up because a man was holding a pillow over his face and yelling at him to stay calm and do everything he said. Merrifield recognized the man's voice as Booker's. Merrifield asked, "Marcus, is that you?" Tr. at 63. Booker told Merrifield to shut up and not to say his name. Merrifield struggled and got the pillow off his face. Booker was wearing a mask, but it briefly fell off his face, allowing Merrifield to see him. Booker hit Merrifield in the face with a flashlight, rendering Merrifield unconscious. When he awoke, Booker and two other intruders, an African-American man and a Hispanic man, were instructing Baig, Logan, and Landis to go into the bathroom. Merrifield was also told to go into the bathroom. The Hispanic man stood guard in front of the bathroom with a knife, and Booker told the victims not to leave or he and his companions would kill them. *Id*. at 99. The victims stayed in the bathroom for "a good hour or so." *Id*. at 129. Booker eventually told them that he and his companions were going to leave, but that they should count to thirty before coming out of the bathroom or he would kill them. Booker also threatened to kill them if they called the police.

Merrifield, Baig, Worden, and Landis came out of the bathroom and found that the Xbox, several computers, an i-pod, a digital camera, a cell phone, cash, a debit card, and

Landis's military ID and dog tags were missing. Baig took Merrifield to the hospital because his eye was swollen shut. Merrifield received stitches in his eyebrow and treatment for an injured tooth. Worden and Landis called the police. Merrifield, Baig, and Worden identified Booker from a photographic array.

On August 13, 2008, the State charged Booker with one count of class A felony burglary, four counts of class B felony robbery, and four counts of class B felony criminal confinement.[1] At the time of trial, Landis was serving in the military in Iraq and did not testify. At the close of the State's evidence, Booker moved for a directed verdict as to the robbery and criminal confinement counts involving Landis. The trial court denied the motion. The jury found Booker guilty as charged. Booker appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Booker argues that the evidence is insufficient to support his conviction for criminal confinement of Landis. Our standard of review is well settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Brasher v. State, 746 N.E.2d 71, 72 (Ind. 2001) (citations omitted).

[1] Booker was also charged with class A misdemeanor carrying a handgun without a license, but that charge was dismissed.

To convict Booker of class B felony criminal confinement, the State was required to prove beyond a reasonable doubt that he, while armed with a deadly weapon, knowingly or intentionally confined Landis without his consent. Ind. Code § 35-42-3-3(b)(2)(A); Appellant's App. at 77. Booker's sole challenge goes to the element of consent. Booker contends that although the evidence shows that Landis was in the bathroom, whether he was held without his consent is unknowable because Landis did not testify.

Landis's testimony is not necessary to establish his lack of consent if the evidence supports a reasonable inference that he did not consent to being held in the bathroom. Here, the evidence shows that the victims were ordered to go into the bathroom; they were told not to leave or they would be killed; and they were held there for about an hour as a man holding a knife stood guard. Merrifield testified that he did not feel free to leave the bathroom. Tr. at 75. We conclude that the evidence supports a reasonable inference that Landis was being held in the bathroom without his consent, and therefore the evidence is sufficient to support Booker's conviction for criminal confinement of Landis.

II. Admission of Evidence

At trial, during the State's case-in-chief, Baig testified that she saw three intruders in the house. *Id*. at 131. She identified one man as Booker. During cross examination, defense counsel questioned Baig about her November 2008 deposition. *Id*. at 140-43. Defense counsel asked Baig whether she recalled saying "anything different about how many total guys [she] saw." *Id*. at 141. Baig replied that she "only physically [saw] about three guys in the house." *Id*. Defense counsel then directed Baig to a specific page and line of her

deposition and asked her what it said. Baig read, "I saw five guys in the house." *Id*. at 142. Defense counsel responded, "But today you say three; is that right?" *Id*. Baig replied, "Physically [there] were three." *Id*.

On redirect examination, the prosecutor questioned Baig about her deposition. The prosecutor asked Baig to read the answer to a question that immediately preceded the comment that defense counsel had asked her to read. Baig read, "[Booker] kept saying that there were a couple of guys at the back door and guys at the front door holding with guns if we tried to run, they would shoot us." *Id*. at 147. The prosecutor asked Baig how many of the intruders she described at her deposition. *Id*. Baig answered that she had described only three individuals. *Id*. at 148. Baig was then released from her subpoena.

Later, the State called Indianapolis Metropolitan Police Detective Robert Challis and questioned him about the interview he had with Baig on July 17, 2008, the day of the incident. The prosecutor wanted to show Detective Challis a transcript of that interview. *Id*. at 177. Defense counsel objected, asserting that Baig's July 2008 statement was inadmissible hearsay. *Id*. 177-78. The prosecutor defended the admission of Baig's statement, saying that its purpose was "rehabilitating Ms. Baig with a prior consistent statement with her trial testimony today." *Id*. at 178. At a sidebar conference, the prosecutor argued, "You can rehabilitate someone through extrinsic evidence. I won't be able to argue it as substantive evidence, but it goes to her credibility. … She said [in her statement to Detective Challis] that there were three to four people at the house, not five." *Id*. at 178-79. The record indicates there was some confusion as to which rule of evidence was applicable. Ultimately, the trial

court overruled Booker's objection, concluding that "admissibility should be judged under 401, 403." *Id*. at 183. The prosecutor then asked Detective Challis three questions about Baig's pretrial statement: (1) whether he took a statement from Baig; (2) whether he asked her how many people were in the house; and (3) what her answer was. To the first two questions Detective Challis answered, "I did[,]" and to the third question he replied, "She said three or four." *Id*. at 183.

Booker asserts that the trial court committed reversible error in admitting Baig's July 2008 statement to Detective Challis. We will reverse a trial court's decision regarding the admission or exclusion of evidence only for an abuse discretion. *Parmley v. State*, 699 N.E.2d 288, 292 (Ind. Ct. App. 1998), *trans. denied*. An abuse of discretion occurs only when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*. We "may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court." *Scott v. State*, 883 N.E.2d 147, 152 (Ind. Ct. App. 2008).

Specifically, Booker argues that Baig's July 2008 statement to Detective Challis constitutes hearsay testimony which is inadmissible under both the Indiana Rules of Evidence and Indiana common law. 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." Ind. Evidence Rule 801(c). "Hearsay is not admissible except as provided by law or by [the rules of evidence]." Ind. Evidence Rule 802.

Prior consistent statements are governed by Indiana Rule of Evidence 801(d)(1)(B), which provides in relevant part as follows:

> 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 … consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose[.]

We observe that "'[w]hen prior statements are used to impeach and rehabilitate a witness they are not hearsay because they are not used to prove the truth of the matter asserted.'" *Bassett v. State*, 895 N.E.2d 1201, 1213 (Ind. 2008) (quoting *Birdsong v. State*, 685 N.E.2d 42, 46 (Ind. 1997)). At trial, the prosecutor stated that the purpose of Baig's July 2008 statement was to rehabilitate her testimony and specifically recognized that it could not be used as substantive evidence, that is, it could not be used to prove the truth of the matter asserted. Because Baig's prior consistent statement was not admitted to prove the truth of the matter asserted, it does not constitute hearsay. Further, our supreme court has held that Rule 801 does not foreclose the use of prior consistent statements for nonsubstantive, i.e.,

rehabilitative purposes. *Id*. at 1213-14. Accordingly, in the instant case, Rule 801 is inapplicable.[2]

"[W]here the Indiana Rules of Evidence do not cover a specific issue, common or statutory law applies." *Id*. at 1213 (citing Ind. Evidence Rule 101(a)); *see also Moreland v. State*, 701 N.E.2d 288, 293 (Ind. Ct. App. 1998) ("Because Rule 801(d) speaks only to the admission of prior consistent statements for their substance, we must look to pre-rule cases for the relevant common law on the rehabilitative use of these statements."); *Flake v. State*, 767 N.E.2d 1004, 1009 (Ind. Ct. App. 2002) (quoting *Moreland*). Thus, the admissibility of Baig's prior consistent statement turns on Indiana common law.

In *Moreland*, the defendant was convicted of child molesting. At trial, the victim, H.V., testified. Moreland used H.V.'s deposition, which contained inconsistent statements, to impeach her. After H.V. testified, the prosecutor called a social worker and police detective, both of whom had interviewed H.V., to testify as to what H.V. had told them about the incident between her and Moreland. Moreland argued that the statements were inadmissible. The *Moreland* court held that the social worker's and the police detective's testimony as to H.V.'s prior consistent statements was not introduced as substantive

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[2] We note, however, that

> [a] determination that the statement is not hearsay because it is offered for a purpose other than proof of the truth of the statement does not render the evidence admissible. The purpose for which the evidence is offered must be relevant, and the potential for unfair prejudice and jury confusion must not substantially outweigh the statement's legitimate probative value.

13 ROBERT LOWELL MILLER JR., INDIANA PRACTICE, INDIANA EVIDENCE § 801.302 at 664 (3rd ed. 2007). Further, "[i]f an out-of-court statement is admitted for a purpose other than to prove the truth of its contents, the jury should be so admonished upon a party's request[.]" *Id*. at 666.

evidence, Rule 801(d) did not apply, and the evidence was properly admitted pursuant to the common law to rehabilitate H.V. after she was impeached with her prior inconsistent statements. 701 N.E.2d at 292-93.

In *Bassett*, the defendant was convicted of the murders of Jamie Engleking, her two children, and another child. One of the State's witnesses, Karen Carroll, testified that she believed that Bassett and Engleking were engaged in an intimate relationship. Following vigorous cross and recross examination, the State asked Carroll whether, in 2001, she had indicated under oath that she believed Engleking and Bassett were having a relationship. She answered in the affirmative. On appeal, Bassett contended that Carroll's pretrial statement was inadmissible hearsay. Our supreme court disagreed, specifically adopting the *Moreland* opinion on this issue, and concluded that the evidence was admissible for non-substantive, i.e., rehabilitative, purposes. 895 N.E.2d at 1213-14.

Based on *Moreland* and *Bassett*, we conclude that the trial court did not abuse its discretion in admitting Baig's prior consistent statement for rehabilitative purposes after she was impeached with her prior inconsistent statement.[3]

Affirmed.

RILEY, J., and VAIDIK, J., concur.

[3] Booker also briefly asserts that Baig's pretrial statement is not consistent with her trial testimony. Appellant's Br. at 14. We disagree. At trial Baig testified that she saw three intruders, and in her pretrial statement she said that she saw three or four intruders. We find the two comments to be sufficiently consistent. *See Cline v. State*, 726 N.E.2d 1249, 1253 (Ind. 2000) ("A prior statement need not be completely consistent to meet the requirements of Indiana Evidence Rule 801(d)(1)(B). Rather, the statement only needs to be 'sufficiently consistent.'") (quoting *Willoughby v. State*, 660 N.E.2d 570, 579 (Ind. 1996)).