

No. 1-11-1399

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 9745
)	
JEREMY WILLIAMS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Piece concurred in the judgment.

ORDER

¶ 1 *Held:* Where the victim's identification of defendant in preliminary hearing was erroneously admitted as a prior consistent statement, defendant's convictions were reversed and the case was remanded for a new trial.

¶ 2 Following a bench trial, defendant Jeremy Williams was convicted of robbery and two counts of aggravated battery. After finding defendant was subject to mandatory Class X sentencing due to his prior felony convictions, the trial court imposed a sentence of two concurrent five-year terms for aggravated battery and an additional concurrent extended term of

90 months for robbery. On appeal, defendant contends the trial court erred in allowing the State to introduce the victim's identification of him as the offender in a preliminary hearing as a prior consistent statement admissible to rebut a charge of recent fabrication. We reverse and remand for a new trial.

¶ 3 At trial, Mario Cortes testified that at about 9:30 p.m. on April 27, 2010, defendant stole his cell phone and other property on a CTA train. Cortes stated he was riding the train alone when defendant and several other people approached him. Defendant asked if he could borrow Cortes's cell phone to make a call, and Cortes declined to give him the phone and put it in his pocket.

¶ 4 Cortes testified defendant removed the phone from his pants pocket and took \$5 and a bus card from another pocket. Defendant struck Cortes in the face three times and got off the train. The police contacted Cortes and he identified defendant in a lineup the next day.

¶ 5 On cross-examination, defendant's counsel asked Cortes if he was stating "today" that defendant, whom he had identified in court, was the person who attacked him and took his property. Cortes responded yes. When Cortes said he had identified defendant on the day of the crime, defense counsel asked if he spoke to an Officer Rodriguez, and Cortes said he did. Cortes was asked if he told Officer Rodriguez that a person named Javelle Holmes sat next to him on the train. Cortes denied making that statement or implicating someone other than defendant, though he acknowledged that a group of people had approached him.

¶ 6 Defense counsel again asked Cortes about the "person who took your things [-] the person who you are saying today was Mr. Williams [-]" and asked how long the interaction lasted.

¶ 7 On redirect examination, the prosecutor asked Cortes if he knew a person named Javelle Holmes; Cortes said he did not and that defendant was his assailant. Cortes was asked about his testimony at a May 20, 2010, preliminary hearing, and the following colloquy occurred:

"MS. KEENAN [assistant public defender]: Judge, I am going to object to prior consistent statements. It bolsters the witness.

THE COURT: Overruled. Go ahead."

¶ 8 The State asked Cortes if he testified at the preliminary hearing that defendant asked for his cell phone and removed the item from Cortes's clothing. When the court asked, "Why am I hearing that[?]", the prosecutor responded, "Because she is suggesting that the first time that [Cortes] testified that the defendant both took his property and hit him was today." The court allowed the State to continue, and Cortes said he testified at the preliminary hearing that defendant was his attacker.

¶ 9 On recross, Cortes said he pointed out the offender to police shortly after the crime but denied that he pointed because he did not know the suspect's name. Cortes said he identified defendant.

¶ 10 Before Cortes testified, the State presented the testimony of Jose Maldonado who stated that he was approached by defendant and a group of people at about the same time Cortes was assaulted. Defendant asked to use Maldonado's cell phone, and Maldonado handed it to defendant, after which defendant got off the train with it. Maldonado followed defendant off the train and asked for his phone back, and defendant struck him in the head while they were on the train platform. On cross-examination, the public defender asked Maldonado if he told an officer that "Jarron Holmes" struck him, and Maldonado said he did not, reiterating that defendant was his attacker.

¶ 11 Chicago police officer Harold Rodriguez testified that on the night in question, he responded to a call of a man being attacked at the Pulaski pink line train station. He and several other officers were directed by a police helicopter flying overhead to a group of men on a nearby

street. Rodriguez testified he performed a pat-down search of defendant and retrieved a bus card, \$5 in cash and "a couple of cell phones." Rodriguez traced one of the phones to Cortes.

¶ 12 The day after the incident, Rodriguez interviewed Cortes, who said Javelle Holmes¹ stole his phone and punched him in the face. The officer testified that Holmes and several others were arrested for the incident involving Cortes, and defendant was charged.

¶ 13 Chicago police detective Luis Carrizal testified that he conducted a lineup the day after the offense in which Cortez identified defendant as his assailant. When asked on cross-examination if Cortes had told Officer Rodriguez that "Javeel Holmes" had attacked him, Carrizal responded, "[T]here was something like that documented in the case report, yes."

¶ 14 In closing argument, defense counsel argued that Cortes told the responding officers "Javeel Holmes sat next to him on the train, and that Javeel Holmes struck him two times on the left side of the face" but identified defendant in court as his assailant. Defense counsel argued Officer Rodriguez's testimony impeached Cortes because the officer was told that Holmes, not defendant, committed the crime. The prosecution interjected that Cortes had consistently identified defendant as the person who took his property, though he told Officer Rodriguez that Holmes struck him. The prosecutor explicitly stated that Cortes testified "to the preliminary hearing judge *** that it was the Defendant, it was the person, the Defendant, who had actually punched him."

¶ 15 The following exchange then took place:

"MS. KEENAN [assistant public defender]: Judge, I'm just going to renew my objection to the preliminary hearing transcript. I objected at the time that it was improper, and I'm just going to renew that.

¹ Javelle is referred to both as "Javeel" and "Jevelle" in the record.

THE COURT: Well, it was offered because, at the time, the [p]rosecutor said that you were suggesting its [the] first time he ever said the things he was saying in court, and she was trying to show that because there was an allegation of a recent fabrication that there was, indeed, these prior inconsistent statement [sic]."

¶ 16 After the prosecutor resumed and concluded his argument, the court found defendant guilty, noting that Cortes's cell phone was found in defendant's possession. At sentencing, the State informed the court that defendant was subject to mandatory Class X sentencing based on his prior felony convictions in 2004, 2005 and 2006.

¶ 17 This court entered a previous order affirming the judgment. *People v. Williams*, 2013 IL App (1st) 111399-U (April 17, 2013). Defendant filed a timely petition for rehearing, which we allowed, and he asks this court to reconsider its determination that the trial court correctly permitted the State to introduce Cortes's testimony at the preliminary hearing identifying defendant as the offender. He argues that the evidence was admitted in error because his counsel had not in fact asserted Cortes's recent fabrication or a motive for Cortes to lie.

¶ 18 Prior consistent statements of a witness are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). Such evidence is inadmissible because it unfairly enhances the credibility of the witness based simply on the repetition of an account. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52 (citing *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985) (the "danger" in such statements is that "repetition lends credibility to testimony that it might not otherwise deserve"))).

¶ 19 As exceptions to the above rule, prior consistent statements are admissible in two circumstances: (1) where there is a charge that the witness has a motive to testify falsely; or (2) where there is a charge that the witness has recently fabricated the testimony. *People v. Heard*,

187 Ill. 2d 36, 70 (1999). Under the first exception, the prior consistent statement is admissible if it was made before the motive to testify falsely came into existence. *Id.* Under the second exception, a prior consistent statement is admissible if it was made prior to the alleged fabrication, because it shows that the witness told the same story before the time of the alleged fabrication. *Donegan*, 2012 IL App (1st) 102325, ¶ 52. Absent an abuse of discretion, this court will not reverse a trial court's evidentiary ruling on a prior consistent statement. *Id.*

¶ 20 Defendant contends, and we agree, that no charge of recent fabrication was made that would allow Cortes's prior identification to be admitted. Although defense counsel asked Cortes if he was stating "today" that defendant was his assailant, that query was not alleging recent fabrication but rather was using the word to emphasize that Cortes had previously identified a different person as his assailant.

¶ 21 Where, as here, contradictory evidence is introduced, this without more "does not constitute an implied charge of fabrication or motive to lie." *People v. McWhite*, 399 Ill. App. 3d 637, 642 (2010). Instead, such evidence is routine impeachment, which is not a sufficient basis to allow the use of a prior consistent statement. *People v. Wetzel*, 308 Ill. App. 3d 886, 895 (1999). Our supreme court has reasoned as follows:

"[W]hen a witness is impeached by the fact that he has contradicted himself by relating the matter in a different way before trial, the admission of other evidence that he had made a pretrial statement at another time consistent with his testimony shows only that he had been making different statements about the same matter at different times, and this would in no way rebut the evidence of his unreliability which is imported by proof of the prior inconsistent statement." *People v. DePoy*, 40 Ill. 2d 433, 439 (1968).

¶ 22 Here, Cortes' statement at the preliminary hearing that he identified defendant as the robber does not rebut the evidence of his unreliability that Cortes initially told Officer Rodriguez someone else was the robber. As such, the preliminary hearing statement was admitted in error. See *Wetzel*, 308 Ill. App. 3d at 895.

¶ 23 Whether this error was harmless presents a closer question, but ultimately we conclude that it was not. Generally, the improper admission of evidence is harmless if the State can establish beyond a reasonable doubt that the error did not contribute to the verdict. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). With regard to prior consistent statements specifically, we have held that their erroneous admission is reversible error where the witness's in-court testimony is crucial. *People v. Smith*, 139 Ill. App. 3d 21, 34 (1985) (citing *People v. Tidwell*, 88 Ill. App. 3d 808, 812 (1980)). Additionally, we have considered whether the statement itself had a bearing on defendant's guilt or innocence. *People v. Miller*, 302 Ill. App. 3d 487, 493 (1998).

¶ 24 In the case *sub judice*, notwithstanding the fact that this was a bench trial, we conclude that because Cortes' testimony was the only evidence linking defendant to the crime, and the court allowed the State to rely on his prior consistent statement as substantive evidence in closing argument over defendant's objection, the error in admitting that statement was reversible. See *McWhite*, 399 Ill. App. 3d at (finding that where bench trial was short, trial judge relied on prior consistent statement as substantive evidence, and the statement was made by the only witness to the crime, error was reversible). Accordingly, we reverse defendant's convictions and remand for a new trial.

¶ 25 Finally, we note that although defendant does not raise a sufficiency argument, the evidence was sufficient to sustain the verdict against defendant and, therefore, that a new trial will not violate principles of double jeopardy. See *People v. Jackson*, 2012 IL App (1st) 102035, ¶ 21. Given this disposition, we need not consider defendant's remaining contention on appeal

1-11-1399

that one of his two aggravated battery convictions should be vacated because both of those counts were based on the same physical act and therefore violate the one-act, one-crime rule.

¶ 26 Reversed and remanded.