Table of Contents

WHEN PRIOR CONSISTENT STATEMENTS OF A WITNESS MAY BE ADMITTED INTO EVIDENCE

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INTRODUCTION

It has been said that a falsehood does not become less so by mere force of repetition. (People v McDaniel, 81 NY2d 10 [1992], People v McClean, 69 NY2d 426 [1987]). Put another way, a warthog adorned in layers of makeup is still a warthog. Hence, the law generally disfavors the introduction into evidence of a witness' prior consistent statements to bolster his/her testimony at trial.

The prior statement of a witness, sworn or unsworn, also constitutes HEARSAY if it is offered to prove the truth of what it asserts. This is no less so because the declarant (i.e., the person who made the out-of-court statement) is on the witness stand and subject to cross examination. (See NY Advisory Evidence Rule 8.00 [2], nycourts.gov/evidence and People v Buie, 86 NY2d 501 [1995]).

While one of the primary concerns about hearsay is the inability to cross examine the declarant, when the prior statement is offered to prove the truth of its contents, it is generally deemed INADMISSIBLE even when the declarant testifies at trial unless it meets a recognized EXCEPTION to the RULE AGAINST HEARSAY (Advisory Evidence Rule 8.01 [1] [a]), Nucci v Proper, 95 NY2d 597 [2001]) or is offered for some purpose other than its truth (i.e., a NON-HEARSAY PURPOSE). (See Advisory Rule 8.01 [3]).

In People v Huertas, 75 NY2d 487 (1990), for example, the rape victim's prior description of her attacker was admissible not to establish that the defendant was the rapist but to enable the jury to assess her OPPORTUNITY TO OBSERVE her assailant and TO EVALUATE THE RELIABILITY OF HER MEMORY when she identified him several days later.

See also People v Ricco, 56 NY2d 320 [1982]: statement admissible to show the declarant's STATE OF MIND; People v Waters, 90 NY2d 826 [1997]: statement admissible to establish its effect on the listener's state of mind.

PRIOR CONSISTENT STATEMENTS TO REBUT A CLAIM OF RECENT FABRICATION

Evidence Advisory Rule 8.31 (1) states that except as otherwise provided herein, the prior statement of a testifying witness which is CONSISTENT with the witness' testimony is NOT ADMISSIBLE EVIDENCE BUT

2. a statement of a witness made prior to his/her trial testimony at a time when there is NO MOTIVE TO FABRICATE and IS CONSISTENT THEREWITH is ADMISSIBLE to AID IN ESTABLISHING THE WITNESS' CREDIBILITY when a party CREATES THE INFERENCE OF or DIRECTLY CHARACTERIZES THE WITNESS' TESTIMONY AS A RECENT FABRICATION.

To trigger the EXCEPTION (thus permitting introduction of the PRIOR CONSISTENT STATEMENT [PCS]), it is NOT ENOUGH for the witness' testimony to be challenged as being MERELY INCONSISTENT with a prior statement/testimony or confused on account of limited perception or faulty recall. Rather, the testimony must be attacked by the adversary (whether on cross examination or by extrinsic evidence) as constituting a CONTRIVANCE, FALSE STORY or RECENT FABRICATION that has been made up to meet the exigencies of the situation. (People v Singer, 300 NY 120 [1949]). Consequently, "recent" is not so much a matter of time as it is of opportunity.

As stated in Advisory Rule 6.20 (1), a claim of RECENT FABRICATION is made when a party is accusing a witness of making up a false story (and not just being mistaken or confused) TO MEET THE EXIGENCIES OF THE CASE, and (2) when there is a GOOD-FAITH BASIS for introducing evidence thereof, it may either be elicited on CROSS EXAMINATION or presented by EXTRINSIC PROOF tending to establish the falsity of the story and the reason(s) behind it (e.g., bias, interest, hostility, expectation of a benefit).

When a witness has a motive to fabricate, his/her very truthfulness is called into question and thus, it is NOT considered COLLATERAL but rather an essential fact that can be established by any competent and relevant evidence such as testimony from another witness who Is familiar with the falsehood. (See, for example, People v Thomas, 46 NY2d 10 [1978], People v Chin, 67 NY2d 22 [1986] and NY Advisory Evidence Rule 6.13: Impeachment by Bias, Hostility, Interest).

FIGHTING BACK WITH PRIOR CONSISTENT STATEMENTS

3. When a party CREATES THE INFERENCE OF OR DIRECTLY CHARACTERIZES the witness' testimony as a RECENT FABRICATION, a PRIOR CONSISTENT STATEMENT of the witness MADE AT A TIME WHEN THERE WAS NO MOTIVE FABRICATE IS ADMISSIBLE TO AID IN (RE)ESTABLISHING THE WITNESS' CREDIBILITY.

This rule is a matter of FAIRNESS to enable a witness whose trial testimony has been called out as FALSE to establish that he/she gave the same account before there was any motive to make up a story thus reinforcing (i.e., rehabilitating) his/her trial testimony.

In People v Katz, 209 NY 311 (1913), the Court of Appeals held, in this Grand Larceny 1st degree case, that a statement of the defendant's accomplice implicating him in a complicated scheme to steal stocks, which was dictated a year before the accomplice had any contact with prosecutors, was admissible to rebut the defendant's claim that he falsely accused him in exchange for a promise of immunity.

The Court held that the PCS was admissible not to prove or disprove any fact in issue but simply to CORROBORATE (i.e., rehabilitate) the accomplice's trial testimony which had been attacked as a false accusation motivated by self interest in anticipation of favorable consideration from the prosecution. As the Court observed, "where a witness' testimony rests under the imputation of a recently formed motive to testify, it may be shown that he made similar statements at a time when the imputed motive did not exist." (Citing, inter alia People v Vane, 12 Wend 78, Rex v Parker, 3 Doug 242 [1783]).

TIMING IS EVERYTHING

In People v McClean, 69 NY2d 426 (1987), the Court of Appeals held that statements made to police by two co-defendants who implicated the defendant as the gunman in an armed robbery of a variety store should NOT have been admitted (to rebut a claim that their trial testimony was fabricated to obtain preferential treatment from the prosecution) because their written statements were made AFTER they were arrested and pressured by the police to identify the one with the gun or risk "a long ride" in prison.

Initially, the accomplices were mum when asked about the identity of the gunman. Then the police told one that the other had flipped on him and that he should seriously consider giving up the gunman or face a significant prison sentence. He rolled over and gave a written statement implicating the defendant as did the second accomplice.

Although no plea bargain had been reached at that point, the court noted that the statements were made in the hope of obtaining some consideration for their cooperation and hence, a motive to fabricate had arisen. (In contrast, see People v Baker, 23 NY2d 307 [1968]).

Similarly, in People v Davis, 44 NY2d 269 (1978), the Court held that it was ERROR to admit a police report (describing a purchase of heroin from the defendant for $19.00) after the defense challenged the officer's testimony as a recent fabrication. On cross examination, it was established that the officer previously testified (at the preliminary hearing and in the grand jury) that he'd purchased the drugs with a single ($20.00) bill (rather than multiple bills required for $19.00).

The Court reasoned that the police report should not have been admitted (as a PCS) because the defense theory was that the charges had been made up from the start and thus, any statements in a post-arrest police report necessarily could NOT have been made BEFORE the motive to fabricate. Hence, in the court's view, it was IRRELEVANT (and constituted improper bolstering).

The Court was also troubled by the fact that the alleged bills were not vouchered, nor were they retained as evidence. Also, the back-up, surveillance officer testified that he did not observe any exchange of money whatsoever.

PRACTICE NOTE

It is worth emphasizing that mere impeachment by a PRIOR INCONSISTENT statement or claim of misperception or bad memory are NOT ENOUGH to warrant the introduction of a PCS. In this context, it is only when the witness' trial testimony is directly or indirectly CHARACTERIZED AS A FALSEHOOD that the PCS may be admitted to rebut such claim. (See Crawford v Nilan 289 NY 444 [1942], People v Forest, 50 AD2d 760 [1st Dep't 1975]).

Consequently, if counsel elects to challenge a witness' testimony as a recent fabrication (as opposed to a mistaken or unreliable accounting), it is well worth making sure that there are no prior consistent statements made before any motive to fabricate, lest the impact of the attack be undone by proof that "he/she was saying the same thing all along."

IN THE CIVIL REALM

In Nelson v Friends of Associated Beth Rivka School for Girls, 119 AD3d 536 (2d Dep't 2014), the Second Department reversed the judgment in favor of the defendant in this personal injury action (alleging negligent supervision) because the trial court erroneously refused to allow the plaintiff to introduce a prior consistent statement ("I fell off the monkey bars") referenced in the emergency room (ER) record, to rebut the defendant's contention that the child plaintiff's trial testimony (that she fell from the monkey bars) had been suggested by her parents.

The defendants agreed that the child was too young to be on the monkey bars, but two teachers testified that at the time if the accident, she was climbing a small ladder that was intended for younger children.

When defense counsel intimated in jury selection that the child had been improperly coached, plaintiff's counsel moved in limine to permit entry of the ER record into evidence. The trial court denied the motion and defense counsel pursued the same tact on cross examination, asking the child if she knew that she was going to talk about the monkey bars and whether she was told what to say about her fall. (During her deposition, the child said that she could not remember what she was doing when she was injured).

The court denied the plaintiff's renewed application at the close of proof to introduce the ER record and the jury found for the defendant.

On appeal, the Second Department noted that while the testimony of an impeached witness may not be bolstered by evidence of a prior consistent statement (citing Crawford v Nilan, supra), where, as here, the witness is accused of having been coached to make up a story, an out-of-court statement made before a motive to falsify existed should be admitted to rebut the claim of recent fabrication. (Citing People v Singer, supra). The court also deemed the ER record to be admissible as containing a statement that was germane to diagnosis and treatment. (Citing People v Ortega, 15 NY3d 610 [2010]).

The court held that the error was NOT HARMLESS because the object from which the child fell was central to the plaintiff's claim, and the case turned on the jury's assessment of the child's credibility as compared to that of the two teachers who testified for the defense. Introduction of the ER record, in the court's view, would have had a substantial influence on bringing about a different verdict. (Citing Cherico v City of New York, 88 AD2d 889 [1st Dep't 1982]).

EVIDENCE OF PROMPT OUTCRY IN SEXUAL ASSAULT CASES

Another exception to the rule against admission of prior consistent statements permits the introduction of evidence that the victim of a sexual assault promptly (i.e., at the first suitable opportunity under the circumstances) reported the assault to another person (e.g., family member, friend, or law enforcement). (See Advisory Evidence Rule 8.31 [4]).

Advisory Evidence Rule 8.37 states that evidence that the victim of a sexual assault promptly reported the matter to another person is admissible:

1. For the purpose of ASSESSING THE CREDIBILITY OF THE COMPLAINANT with respect to the commission of the offense; or
2. When relevant, and to the extent necessary, to EXPLAIN THE INVESTIGATIVE PROCESS AND COMPLETE THE NARRATIVE OF EVENTS LEADING TO THE DEFENDANT'S ARREST.

Unlike prior consistent statements admitted to rebut a claim of recent fabrication, admission of prompt outcry evidence (which must be limited to fact and nature of the complaint only), does NOT require that the complainant's testimony first be impeached or impugned as false before being admitted. (See People v Rosario, 17 NY3d 5021 [2011]). Rather, as a matter of policy, such evidence is admissible to dispel a jury's perceived natural inclination to disbelieve a crime victim who did not report the crime in a timely manner. (See People v McDaniel, 81 NY2d 10 [1993]).

It is not uncommon, however, for prosecutors in sexual assault and/or child abuse cases to call expert witnesses to explain certain victim behaviors (e.g., delayed reporting, covering for the offender) that might otherwise cast their credibility into serious question. (See Evidence Advisory Rules 7.06, 7.08, 7. 10, People v Taylor, 75 NY2d 277 [1990]). Consequently, the absence of prompt outcry evidence may not be as damning to the People's cases as it once may have been.

PROMPT OUTCRY AND PRIOR CONSISTENT STATEMENTS

In People v McDaniel, 81 NY2d 10 1993), the Court of Appeals addressed the admissibility of the statements of a child sex assault victim both as evidence of a prompt outcry and as prior statements offered to rebut a claim of recent fabrication.

The Court held that the child's statements to her disbelieving mother (made the morning after the defendant allegedly sexually assaulted the 11-year-old victim on two occasions one week apart) were properly admitted as evidence of prompt outcry. However, statements made to the police and prosecutor (which also included allegations of rape) should not have been allowed (to rebut the defense's claim of recent fabrication) because they were made AFTER she had told her father (whom the defense described as the defendant/boyfriend's rival for the mother's affections) what had happened to her. Consequently, a motive to fabricate had already existed.

On direct examination, the victim told the prosecutor that she had told her mother that her boyfriend had "bothered her and tried to molest her" the morning after each incident. She was also allowed to testify over objection that she had told the police and prosecutor that the defendant had rubbed her breasts and vagina.

On cross examination, the victim was confronted with certain inconsistencies including her failure to mention a rape when she first spoke to the detective, not mentioning the first incident and telling a pediatrician that she was only touched over her clothing.

On redirect examination, the prosecutor elicited testimony that the child had told her mother each time that the defendant had touched her vagina with his penis and that she told the police about being raped as well. The defendant was found guilty of forcible and statutory rape, sexual abuse and endangering the welfare of a child.

The AD held that it was error to admit the prior consistent statements (to the police) but harmless in view of the overwhelming evidence of guilt.

The Court of Appeals agreed that it was error but disagreed that it was harmless since the other evidence (from the victim's seven-year-old friend, and adult relative who woke up and observed the clothed defendant in the living room with the victim) was not compelling.

The Court held that while the child's statements to her mother were properly admitted as evidence of prompt outcry, the other statements should not have been allowed because she had already spoken to her father (who could have influenced her story) and was also pressured by the police and prosecutor during their interview with her.

Citing People v McClean supra, the Court stated that: 1. untrustworthy testimony does not become trustworthy by force of repetition, 2. sworn testimony is preferred over unsworn statements and 3. trials should not devolve into contests over who obtained the latest version of a witness' story. (69 NY2d at 428).

911 CALLS

In People v Seit, 86 NY2d 92 (1995), it was held to be ERROR (albeit harmless) to deny the defendant's offer to admit a 911 call made by his son describing an altercation between the defendant and his tenant involving a gun which resulted in the victim being shot in the face and then in the back three times.

The defendant's initial story was that the victim was shot by accident as he (defendant) tried to wrestle his gun away from him. His trial defense, however, was that he acted in self-defense (shooting the victim with his own .25 caliber pistol) because he believed that the victim was reaching for a gun.

The defendant's son testified that he believed that the victim was reaching for a gun and the prosecutor's cross examination tended to suggest that this claim in this regard was a recent fabrication tailored to suit his father's justification claim. Consequently, in the court's view, it was error to disallow the 911 call wherein he stated that somebody had a gun.

The error was deemed harmless, however, because other witnesses, including the defendant's daughter-in-law, testified that they overheard the son tell 911 that the victim had a gun, thus refuting the implication that his testimony was a recent fabrication.

The dissenting justice (Hon. Joseph W. Bellacosa) argued that exclusion of the 911 tape was NOT harmless because it constituted objective evidence in support of the defendant's claim of self-defense which could have created a reasonable doubt of the defendant's guilt. (The dissenter also took umbrage with the prosecutor's false representation to the trial court that the 911 tape had not been introduced into evidence at the first trial which resulted in a hung jury).

A DIFFERENT THEORY OF ADMISSIBILITY

In People v Buie, 86 NY2d 501 (1995), the Court of Appeals held that the admission of the burglary victim's 911 call describing the break-in, theft of his brief case, and foot pursuit of the burglar (whom he described in detail in real time) was proper as a PRESENT SENSE IMPRESSION and did NOT amount to improper bolstering of his trial testimony even though it had NOT been challenged as a recent fabrication.

When the police arrived minutes later, they found the defendant, bloody and sweating, in a neighbor's garage. The victim identified him to the police but did NOT do so at trial. (Hence, the fact of his arrest scene identification was introduced).

The Court concluded that the 911 call qualified, first, as a PRESENT SENSE IMPRESSION (i.e., a spontaneous description of events made contemporaneously with the observations. See Advisory Evidence Rule 8.29; People v Brown, 80 NY2d 729 [1993]).

Although there was no claim of recent fabrication, the Court held that the 911 call was properly admitted because, unlike after-the-fact reports of crime, the description provided therein was made contemporaneously to the observations and, as such, was inherently reliable. The declarant was also subject to cross examination.

The concurring justice (Hon. Richard D. Simons) argued that the 911 call should not have been admitted as a present sense impression because there was no need for it in view of the victim's in-court testimony. He also concluded that the statements made during the call did not become more reliable just because they were made during a foot chase of a burglar who had just broken into, and stolen property form the victim's home. If anything, they constituted improper bolstering of the victim's trial testimony by repeating the same story in a more emotional and dramatic (i.e., prejudicial) way.

VICTIM'S PRIOR DESCRIPTION OF RAPIST ADMISSIBLE FOR NON-HEARSAY PURPOSES

In People v Huertas, 75 NY2d 487 (1990), the Court of Appeals held that the victim was properly permitted to testify to the description of the perpetrator that she gave the police (12 days after being raped) because such evidence was relevant to the jury's assessment of her OPPORTUNITY TO OBSERVE the assailant and of the RELIABILITY OF HER MEMORY when she identified the defendant.

The victim was walking home to her apartment when the defendant approached from across the street and walked to a nearby playground where he raped her and then took off into the night. She observed his face initially under "decent" lighting conditions, then, after he held her under a dark awning, he took her to the park which was dimly lit. Later that night at the hospital, the victim described her attacker to the police.

Twelve days later, the victim spotted the defendant at the same corner and tracked down a police officer who arrested him in a nearby pool hall.

The trial court permitted the victim, over defense objection, to testify to the description of the perpetrator that she had given to the police at the hospital. Among other things, the court pointed to the CJI on "One Witness Identification" which states, in pertinent part, that the jury may, when evaluating the witness' capacity to observe, consider the DESCRIPTION OF THE PERPETRATOR given to the police and whether it MATCHED THE DEFENDANT'S PHYSICAL CHARACTERISTICS.

In upholding the AD's affirmance of the judgment of conviction, the Court of Appeals reasoned that while a detailed description of the perpetrator would not, in itself, prove the accuracy of a subsequent identification, the FACT THAT SUCH A DESCRIPTION WAS GIVEN would tend to suggest that the conditions under which the observations were made were such as to enable the witness to make such observations (whether accurate or not). Moreover, such testimony enabled the jury to MAKE A

COMPARISON between the victim's description of the perpetrator and the defendant's actual appearance when he was identified shortly thereafter.

As the court observed, the PROBATIVE FORCE of the victim's description is NOT based on the truth (i.e., accuracy) or inaccuracy of the description but rather, resides in the extent to which it enables the jury to evaluate the victim's OPPORTUNITY TO OBSERVE at the time of the crime and the RELIABILITY OF HER MEMORY at the time of the corporeal identification.

Among other things, this case illustrates the extent to which courts will go to admit prior consistent statements (which can't help but buttress the victim's trial testimony) in cases involving vulnerable victims in sexual assault and child abuse cases. (See, for example, People v Ludwig, 21 NY3d 221 [2014] where a child's belated report of sexual abuse by the defendant was deemed to have been properly admitted via testimony from the child and two relatives to explain the investigative process and completing the narrative of events leading to the defendant's arrest).

See also People v Gross, 26 NY3d 689 (2016) and People v Cullen, 24 NY3d 1014, (2014).

FINAL THOUGHT:

While witnesses should generally not be allowed to tell a jury what they previously told the police or others about the crime or the alleged perpetrator, defense counsel should be sure to guard the gate against any back-door attempts to introduce such testimony when there has been no claim that the witness' trial testimony constitutes a contrivance reflecting a motive to falsify. Impeachment alone, as noted above, does NOT open the door to such evidence which amounts to nothing more than reinforcement by repetition.

If counsel does challenge the witness' testimony as a recent fabrication, any prior consistent statement offered into evidence should be scrutinized the make sure that it was made BEFORE there was a motive to make up a story. If made afterward, the statement stands under the same cloud of suspicion as the trial testimony and, therefore, should be vigorously opposed. If it is allowed in anyway, then counsel must point out that consistent or not, the stories are tainted by bias, interest, or animus and as such, are not worthy of belief.

In the case of a prompt outcry, counsel should be sure to argue (if such evidence is admitted) that being quick to pull the trigger does not ensure accuracy (especially where there is already bad blood between the victim and the accused), and if the victim's prior description of the perpetrator is allowed (as in People v Huertas, supra), every discrepancy between the description and the defendant's actual appearance should be laid bare.

The victim should also be carefully cross examined to expose any limitations with respect to the opportunity and ability to observe the perpetrator (e.g., lighting conditions, duration of observation, state of sobriety) and recall the event so that the reliability of any identification can be called into question.