

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murray, P.J., and Talbot and Servitto, JJ.

PEOPLE OF MICHIGAN,

Plaintiff-Appellant,

v

RAYFIELD CLARY,

Defendant-Appellee,

Supreme Court No. 144696

Court of Appeals No. 301906

Wayne Circuit Court No. 10-6937-FC

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Bruce H. Edwards (P34983)
Assistant Attorney General
Attorneys for Amicus Curiae
Attorney General Bill Schuette
Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. Recognizing this duty, the court rules allow the Attorney General to file a brief as amicus curiae without seeking permission from this Court. MCR 7.306(D)(2).

The Attorney General is interested in this case because the Court of Appeals erroneously granted Mr. Clary a new trial. New trials should only be granted where it can be shown that a defendant did not receive a fair trial on account of a prejudicial constitutional error or a true state evidentiary error that undermines the reliability of the verdict. MCL 769.26; MCR 2.613(A). Neither occurred here.

Unwarranted new trials impose substantial costs on society. Evidence deteriorates or is lost or destroyed, witnesses become unavailable, and memories fade. Even where a new trial is possible, it is painful for victims, relatives and other witnesses to relive their traumatic experiences, to say nothing of the burden placed on our limited judicial resources.

The judgment of the Court of Appeals should be reversed because both of its reasons for granting a new trial were mistaken.

STATEMENT OF QUESTIONS PRESENTED¹

In an order dated June 6, 2012, this Court granted the Wayne County Prosecutor's application for leave to appeal, asking:

1. Whether the prosecutor's impeachment of the defendant's testimony on the basis of the defendant's failure to testify at his earlier trial violated the defendant's Fifth Amendment right against self-incrimination; and
2. Whether the prior consistent statements by the complainant were admissible under MRE 801(d)(1)(B)

STATEMENT OF JURISDICTION

The Attorney General agrees with the Wayne County Prosecutor's statement of appellate jurisdiction.

¹ On October 12, 2012 this Court granted Clary's request to expand the grounds for review so that he could argue a *Doyle v Ohio*, 426 US 610 (1976), error occurred.

COUNTER-STATEMENT OF FACTS

Attorney General Schuette accepts the Wayne County Prosecutor's recitation of facts. But one sequence of the assistant prosecutor's questioning bears emphasizing. On direct examination Clary testified that before his first trial he had filed a notice of alibi that listed several witnesses. (11/17/10 Trial Tr, p 166.) In cross-examining Clary the prosecutor said "let's talk about your alibi notice." (11/17/10 Trial Tr, p 170.) The prosecutor continued:

Q. When you went to trial last time, sir, isn't it true that you and your lawyers decided to withdraw this alibi notice and not go with this story, isn't that what the decision was made last time you were in trial?

A. What story?

Q. Well, sir, last time you were in front of a jury you didn't use this alibi, did you, sir?

A. I didn't get on the stand.

Q. Yeah, but you didn't call any witnesses to—to say that you were somewhere else, did you, sir?

A. No.

Q. And you decided to withdraw this and not use this last trial, correct, sir?

A. Correct.

(11/17/10 Trial Tr, p 171.)

Amicus would additionally point out that Clary's first trial ended in a hung jury with a vote of 11-1 to convict. And just before his second trial, Clary declined a plea offer to serve only 8-20 years for assault with intent to commit murder (the minimum sentence of 8 years was believed to be four years below the bottom of the guidelines range) and two consecutive years for felony-firearm. (11/16/10 Trial Tr,

pp 5-6.) After being convicted at his second trial, Clary received a top of the guidelines' range sentence of 23¾ to 50 years for his conviction of assault with intent to murder and two consecutive years for felony-firearm. (12/7/10 Sent Tr, p 11.)

SUMMARY OF ARGUMENT

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." But, the Fifth Amendment right not to testify at trial belongs to the defendant and only protects against *compulsory* self-incrimination. Where a defendant elects to testify in his own defense at trial, as defendant Clary did at his second trial, he waives his Fifth Amendment privilege and may be cross-examined and his credibility impeached like any other witness on matters made relevant by his direct testimony, including his failure to testify at his first trial. *Raffel v United States*, 271 US 494 (1926).

The Court of Appeals below held that *Raffel* did not apply because Clary did not contradict the testimony of a witness offered at both his first and second trials. This was clear error because Clary contradicted the shooting victim Mr. Santonyo Brown's testimony that Clary was the person that shot him at each trial. Further, *Raffel* remains good law where a defendant was not *Mirandized*. The *Doyle v Ohio* exception to *Raffel* does not apply to Clary because there is no evidence he was ever *Mirandized*.

The Court of Appeals' reliance on *Stewart v United States*, 366 US 1 (1961), was misplaced because that case was based on federal evidentiary law (which is not

binding on state courts) and was not based on the Fifth Amendment. Thus, impeaching Clary with his silence at his first trial did not violate his Fifth Amendment rights.

Moreover, it was not error requiring reversal for the prosecutor to refer to Clary's not testifying at his first trial. Clary *volunteered* this fact to the jury in response to a question that did not ask if he had testified at his first trial. Having opened the door to this topic, the prosecutor was free to follow up on Clary's disclosure. Thus, *if* it was error to ask defendant whether he testified at his first trial, it was invited error, and it is well-established a party may not complain on appeal of errors that he invited or provoked.

As for the second issue on appeal, prior consistent statements are not generally admissible as substantive evidence. But, under MRE 801(d)(1)(B), prior consistent statements are admissible if there is an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony. The Court of Appeals held MRE 801(d)(1)(B) did not apply because it did not appear that defense counsel's attacks on shooting victim Brown's testimony rose to a level of an implied charge of recent fabrication or improper influence or motive. This was clear error because defense counsel, both in her cross-examination of Brown and her closing argument, charged Brown with changing his story. Under such circumstances, the trial court did not abuse its discretion in allowing the prosecutor to admit evidence of Brown's prior consistent statements.

Because no error requiring reversal was identified by the Court of Appeals, this Court should reverse the decision of the Court of Appeals and reinstate Clary's convictions.

ARGUMENT

I. There was no violation of defendant Clary's Fifth Amendment rights.

A. Standard of Review

Whether asking Clary about the fact that he did not testify at his first trial violated the Fifth Amendment presents a question of law. De novo review applies to questions of law. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007), *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

1. Legal standards

The Fifth Amendment and the Michigan Constitution, Const 1963, art 1, § 17, each guarantee a criminal defendant shall not be compelled in any criminal case to be a witness against himself.² See also MCL 600.2159.³ In 1964, the Supreme Court ruled that the Fifth Amendment applied to the states via the Fourteenth Amendment. See *Malloy v Hogan*, 378 US 1, 6 (1964).

² The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself. . . .” Accord Const 1963, art 1, § 17 (“No person shall be compelled in any criminal case to be a witness against himself.”) While the Fifth Amendment protects an accused from being compelled to testify, he may be compelled at trial “to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.” *Schmerber v California*, 384 US 757, 764 (1966).

³ MCL 600.2159 provides:

A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.

“The Fifth Amendment, by its terms, prohibits only compelled self-incrimination.” *Withrow v Williams*, 507 US 680, 707 (1993). The privilege against compulsory self-incrimination does not prevent an accused from testifying. A “defendant waives his privilege against self-incrimination when he takes the stand and testifies.” *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). As a general rule, if a defendant “takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness.” *Brown v United States*, 356 US 148, 154 (1958). Accord *Fitzpatrick v United States*, 178 US 304, 315 (1900). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.” *Harris v New York*, 401 US 222, 225 (1971). “Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.” *Id.*

2. Development of U.S. Supreme Court case law regarding a defendant’s right to silence

In *Raffel*, the United States Supreme Court unanimously held that if a defendant does not take the stand during his first trial, but takes the stand at a second trial, his silence during the first trial may be used during the second trial to impeach inconsistencies. 271 US at 499. The Court in *Raffel* relied on a waiver theory, reasoning that a defendant waives his Fifth Amendment immunity from giving testimony by offering himself as a witness. *Id.* at 496–497. The Court concluded by stating: “The safeguards against self-incrimination are for the benefit

of those who do not wish to become witnesses in their own behalf and not for those who do." *Id.* at 499.

In the exercise of supervisory powers over federal courts, the Court in *Grunewald v United States*, 353 US 391 (1957), found reversible error where a defendant was cross-examined at trial about declining to answer a series of questions posed to him at the grand jury hearing preceding trial.

In another decision involving the Supreme Court's supervisory powers over federal courts, the Court in *Stewart* considered a case where the defendant remained silent at his first two trials, but then decided to testify at the third trial to further his insanity plea. His testimony was described as "gibberish without meaning." *Stewart*, 366 US at 3. On cross-examination the prosecutor questioned Stewart about his earlier silence. The Supreme Court held that this was impermissible because Stewart's testimony was only to the issue of insanity and his earlier silence therefore was not probative as it did not refute any of the state's case and only went to demonstrating his insanity.

In *Griffin v California*, 380 US 609, 615 (1965), the Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's [refusal to testify at his trial] or instructions by the court that such silence is evidence of guilt."

In *Miranda v Arizona*, 384 US 436, 444 (1966), the Supreme Court considered the applicability of the Fifth Amendment's Self-Incrimination Clause to custodial interrogations by the police. The Court held that an accused "has a right to remain silent, that any statement he does make may be used as evidence against

him, and that he has a right to the presence of an attorney, either retained or appointed.”

In *Doyle v Ohio*, 426 US 610 (1976), the Court held that once a criminal defendant received the warnings required by *Miranda*, it is a violation of due process for a prosecutor to cause the jury to draw an impermissible inference of guilt from a defendant’s post-arrest silence. *Doyle* rests on a single proposition: having implied when giving warnings that silence is safe, the government may not reverse course at trial.⁴ The *Doyle* Court found it “unnecessary” to determine the constitutionality of prosecutorial inquiry into silence beyond the initial arrest time frame. *Id.* at 616 n6.

In *Jenkins v Anderson*, 447 US 231, 238-239 (1980), the Court held that impeaching a defendant with his pre-arrest, pre-*Miranda* silence did not violate the Fifth Amendment.⁵ In reaching this conclusion, the Court relied on *Raffel*. The *Jenkins* Court allowed a prosecutor to urge inferences from pre-arrest silence, remarking that ambiguity “is a question of state evidentiary law.” *Id.* at 239 n5.

In *Fletcher v Weir*, 455 US 603, 607 (1982), the Court held that impeachment use of post-arrest, pre-*Miranda* warnings silence does not offend due process. The *Fletcher* Court explained that *Doyle* was a case in which the government had

⁴ This Court recently found *Doyle* violations in *People v Shafier*, 483 Mich 205; 768 NW2d 305 (2009), and *People v Borgne*, 483 Mich 178; 768 NW2d 290 (2009). A new trial was ordered in *Shafier*, but the violation was found to be harmless in *Borgne*.

⁵ See also *People v Cetlinski (After Remand)*, 435 Mich 742, 746; 460 NW2d 534 (1990) (observing that “the critical events took place prearrest and pre-*Miranda* and thus there could be no due process claim that the state unfairly used defendant’s silence or omission against him at trial. . .”).

actually induced silence with *Miranda* warnings, and it noted that any broadening of *Doyle* to a situation in which a defendant had not yet received *Miranda* warnings—even if the defendant was in custody—was unsupported by the reasoning of *Doyle*. See 455 US at 605-606. Thus, there is no *Doyle* error where the defendant was not given *Miranda* warnings.

In *United States v Robinson*, 485 US 25, 34 (1988), the Court held that a prosecutor can refer to a defendant's silence if doing so would be a fair reply to a defense theory or argument, for example, when defense counsel asserts that the government did not give his client an opportunity to tell his side of the story.⁶ The *Robinson* Court held that the prosecutor was entitled to make "a fair response" to defense counsel's argument observed that "the protective shield of the Fifth Amendment should [not] be converted into a sword." *Id.* at 32.

In sum, *Doyle* generally forbids impeachment with post-arrest, post-*Miranda* silence. But, not every comment on a defendant's post-*Miranda*-warning silence is a violation of due process. The *Doyle* rule is subject to two important exceptions. First, *Doyle* itself said impeachment of an exculpatory story with post-arrest, post-*Miranda* silence is allowed in the limited situation where the accused testifies that he had made a post-*Miranda* statement to the police consistent with his trial testimony. 426 US at 619 n11. Second, a prosecutor can refer to a defendant's silence if doing so would be a fair reply to a defense theory or argument, for

⁶ See also *Lockett v Ohio*, 438 US 586, 595 (1978) (rejecting the Fifth Amendment claim of the defendant because her "own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the next witness.").

example, when defense counsel asserts that the government did not give his client an opportunity to tell his side of the story. *Robinson*, 485 US at 34.⁷

In sum, in the Fifth Amendment context, it is constitutionally permissible to impeach a testifying defendant:

- a. with pre-arrest, pre-*Miranda* warnings silence. *Jenkins*,
- b. with post-arrest, pre-*Miranda* silence. *Fletcher*, and
- c. with silence at an earlier trial (so long as he was never *Mirandized*).
Raffel; *Doyle*.

3. *Raffel* remains good law where a defendant is not *Mirandized* and is applicable here.

Raffel was decided in 1926, well before *Miranda*, *Doyle*, and the other cases that address whether a defendant can be impeached with his silence. It is also the case that the continuing vitality of *Raffel* has been questioned in the past. But, in 1980, *Jenkins v Anderson*, 447 US 231 (1980), reaffirmed the *Raffel* decision, specifically stating that no Supreme Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence. The Court stated:

Both Mr. Justice STEVENS, *post*, at 2131, n. 2 and Mr. Justice MARSHALL, *post*, at 2136, suggest that the constitutional rule of *Raffel* was limited by later decisions of the Court. In fact, no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the

⁷ Accord *People v Graham*, 386 Mich 452, 458; 192 NW2d 255 (1971) (testimony of police officer that defendant asserted right to remain silent during interrogation was admissible to impeach defendant's testimony that he had attempted to tell officers his side of story following arrest six hours earlier and that officers had told him to keep quiet).

basis of his prior silence. In *United States v Hale*, 422 US 171, 175, n. 4, 95 S.Ct. 2133, 2136, n. 4, 45 L.Ed.2d 99 (1975), the Court expressly declined to consider the constitutional question. The decision in *Stewart v United States*, 366 US 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961), was based on federal evidentiary grounds, not on the Fifth Amendment. The Court in *Grunewald v United States*, 353 US 391, 421, 77 S.Ct. 963, 982, 1 L.Ed.2d 931 (1957), stated that it was not required to re-examine *Raffel*. In all three cases, the Court merely considered the question whether, as a matter of federal evidentiary law, prior silence was sufficiently inconsistent with present statements as to be admissible. [*Jenkins*, 447 US at 237 n4.]⁸

As this holding makes clear, *Raffel* has not been overruled and remains good Fifth Amendment law. But, as explained above, *Doyle* should be considered an exception to *Raffel* that forbids reference to an accused's silence after he is *Mirandized*. Even then, *Doyle* is a case decided on the Fourteenth Amendment Due Process Clause and not the Fifth Amendment. See, e.g., *Lecan v Lopes*, 893 F2d 1434, 1440 (CA 2, 1990) (holding that the Supreme Court's decision in *Doyle* "carved out an exception" to the rule of *Raffel*).

Here, the Court of Appeals correctly determined that the prosecutor's use of Clary's post-arrest silence did not violate due process because there was no evidence that Clary received the *Miranda* warnings. *People v Clary*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2012 (Docket No. 301906), slip

⁸ Accord *Hayton v Egeler*, 555 F2d 599, 602 (CA 6, 1977) ("*Doyle* did not overrule *Raffel v United States*, 271 US 494; 46 S Ct 566; 70 L Ed 1054 (1926), which allowed impeachment on the basis of a defendant's exercise of a constitutional right to remain silent.")

op, p 5.⁹ This ruling was correct. See, e.g., *United States v Christian*, 404 F App'x 989, 992–93 (CA 6, 2010) (“the record is silent with respect to whether or not Christian received Miranda warnings, and, absent Miranda warnings, comments on a defendant's post-arrest silence do not violate due process.”).

Having properly determined that *Doyle* did not apply, the Court of Appeals turned to the question whether *Raffel* applied. The panel concluded *Raffel* was distinguishable because “defendant in this case did not contradict the testimony of a witness offered at both his first and second trial.” Slip op, p 8. But, as the Wayne County Prosecutor has pointed out, “the shooting victim Santonyo Brown testified at the first trial that defendant shot him and also testified at the second trial that defendant shot him.” (Appellant’s Br, p 12.) Thus, the Court of Appeals’ ground for distinguishing *Raffel* is belied by the record and the rule of *Raffel* applies. So it was not error to question Clary regarding his failure to testify at his first trial.

⁹ This Court has granted Clary permission to add an issue allowing him to argue a *Doyle* violation occurred as a result of his receiving *Miranda* warnings at his arraignment. Amicus takes no position regarding this issue, which the Court of Appeals did not address, other than to note that *Doyle* may not be as broad as Clary is contending. The actual holding of *Doyle* is: “We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.” 426 US p 620. The *Doyle* Court found it “unnecessary” to determine the constitutionality of prosecutorial inquiry into silence beyond the initial arrest time frame. *Id.* at 616 n 6. Here, Clary was not impeached with the fact that he was silent “at the time of his arrest.” Rather, the prosecutor’s cross-examination related solely to Clary’s not testifying at his first trial; not his post-arrest pre-trial silence. See *McKee v Kentucky*, 720 SW2d 344, 346 (Ky App 1986) (“an examination of the entire transcript reveals that he was asking about the appellant's silence at the first trial only, not the post-arrest pre-trial silence. No violation of “fundamental fairness occurred.”)

The Court of Appeals panel also relied on *Stewart*, in concluding it was error to ask Clary about the fact that he did not testify at his first trial. The panel rejected the prosecutor's assertion that *Stewart* was a federal evidentiary case, as opposed to a constitutional one, because the opinion commenced with a specific reference to the Fifth Amendment. *People v Clary*, slip op, p 8, n3. But, the Supreme Court itself said that "[t]he decision in *Stewart v United States*, 366 US 1 (1961), was based on federal evidentiary grounds, not on the Fifth Amendment." *Jenkins*, 447 US at 237 n4. Accordingly, the Court of Appeals erred in relying on *Stewart* given that federal evidentiary rulings from the United States Supreme Court are not binding on state courts. *People v Finley*, 431 Mich 506, 514; 431 NW2d 19 (1988).¹⁰

4. Clary volunteered the information that he did not testify at his first trial.

On cross-examination, Clary was asked if he had withdrawn his alibi notice that listed several witnesses at his first trial. His response was "I didn't get on the stand." (11/17/10 Trial Tr, p 171.) The prosecutor immediately followed up by saying "Yeah, but you didn't call any witnesses to—to say that you were somewhere else, did you, sir?" (*Id.*) Clary answered that he did not. (*Id.*)

¹⁰ United States Supreme Court cases not based on constitutional grounds are not binding on state court and the failure to follow them cannot serve as a basis for granting a defendant habeas relief. See *Early v Packer*, 537 US 3, 10 (2002) (per curiam). Supreme Court decisions interpreting federal common law are also not binding on state courts. See *id.* (holding inapplicable precedents "based on [the Court's] supervisory power over the federal courts, and not on constitutional grounds"). Under 28 USC 2254(d), state courts are only required to follow clearly established federal law as determined by the Supreme Court of the United States.

The prosecutor did not ask Clary if he had testified at his first trial. Instead, given that several alibi witnesses had been identified in Clary's notice of alibi that was filed with the court before the first trial, the prosecutor's question was asking why his alibi witnesses had not been called at the first trial. Rather than answering the question, Clary volunteered that he did not testify at his first trial. The prosecutor only asked Clary follow up questions regarding his having not testified at his first trial after he disclosed this fact to the jury. Clary's unresponsive answer was not the prosecutor's fault. Further, a prosecutor is allowed to ask a defendant about his failure to call an alibi witness listed in a notice of alibi. *People v McCray*, 245 Mich App 631, 636-637; 630 NW2d 633 (2001).

A defendant cannot open the door to an issue and then seek to close it right behind him. Having opened the door to a subject, a party "open[s] the door to a full and not just a selective development of that subject." *United States v Helina*, 549 F2d 713, 719 (CA 9, 1977). "[W]hen a party opens the door to evidence that would be otherwise inadmissible, that party cannot complain on appeal about the admission of that evidence." *United States v Gilbertson*, 435 F3d 790, 797 (CA 7, 2006) (citation omitted).

Clary should not be allowed to complain about discussion of a subject he introduced into the proceeding. Having opened the door to this topic, Clary is not free to turn around and argue the follow up questioning was improper. This is because "[a] party who opens a door cannot be heard to complain that the adverse party strolled through the doorway." See *United States v Joost*, 133 F3d 125, 128

(CA 1, 1998). Thus, the prosecutor was free to ask follow up questions regarding Clary's disclosure.

If error occurred, it was invited. And it is well-established that a party may not complain on appeal of errors that he invited or provoked. A "[d]efendant cannot complain of [the] admission of testimony which [the] defendant invited or instigated." People v Whetstone, 119 Mich App 546, 554; 326 NW2d 552 (1982). "Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." People v McPherson, 263 Mich App 124, 139; 687 NW2d 370 (2004) (citing People v Jones, 468 Mich 345, 352; 662 NW2d 376 (2003)). In other words, error requiring reversal cannot be error to which the aggrieved party contributed to by plan or negligence. People v Guerra, 256 Mich App 212, 224; 663 NW2d 499 (2003).

II. The trial court did not abuse its discretion in allowing the prosecution to introduce prior consistent statements in response to cross-examination of the prosecution's witness.

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). This only occurs "when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Analysis

1. Legal standards

Hearsay is an out-of-court statement offered to establish the truth of the matter asserted, and is generally inadmissible unless it falls into a hearsay exception. MRE 801(c); MRE 802. "Prior consistent statements are not generally admissible as substantive evidence." *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987); *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). But, a prior consistent statement is not considered hearsay if:

[t]he 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 . . . [MRE 801(d)(1)(B)].

2. Defense counsel's cross-examination of the victim suggested recent fabrication.

Defense counsel asked the victim, Mr. Brown, why he went over to the house on Wyoming, and Brown answered "to smoke." (11/17/10 Trial Tr, pp 63-64.) Defense counsel then directed Brown's attention to the preliminary examination transcript, where Brown testified "That's why I was out so late. I went to go visit my brother." (11/17/10 Trial Tr, p 64.) When counsel asked "To smoke or to visit?" Brown answered "To smoke and to visit." (*Id.*) Defense counsel then directed Brown's attention to his police statement, where he said he was going to the house to "chill" and asked "Did you lie to the police in your first statement?" (11/17/10 Trial Tr, pp 65-66.)

Counsel then directed Brown's attention to testimony at a "previous hearing," and asked "So you testified that the first thing you saw was the gun, correct?" and Brown answered "That would be one of them blurt out moments. Like I said, at the

time then and at the time now, I have more time to think about it.” (11/17/10 Trial Tr, pp 67-68.) Counsel asked “So your story changes as you think about it?” (11/17/10 Trial Tr, p 68.)

Counsel also questioned defendant about his previous testimony that, as to the car coming toward him down Wyoming, “I didn’t think nothing of it.” (11/17/10 Trial Tr, p 69.) When Brown answered that if he hadn’t seen the defendant “he wouldn’t be sitting up here.” (*Id.*) Defense counsel then gratuitously editorialized “if you weren’t changing your story, I couldn’t ask these questions.” (11/17/10, Trial Tr, p 69.)

On redirect examination, the prosecution used Brown’s police statement and preliminary examination testimony—consistent with his trial testimony—to rebut this suggestion of recent fabrication under MRE 801(d)(1)(B). (11/17/10 Trial Tr, pp 72-77.) Defense counsel objected, claiming improper rehabilitation. (11/17/10 Trial Tr, pp 74-76.) The trial court overruled the objection “since that was addressed on cross.” (11/17/10 Trial Tr, p 76.)

The prosecutor’s decision to rebut defense counsel’s editorializing was well-advised. Because defense counsel went right back at it in her closing argument:

Now, we heard multiple stories from the complaining witness. He’s testified on more than one occasion, and every time he testifies, we learn something new and something changes. . . . Every time he comes to testify he comes up with new things, he keeps coming up with new things. Well, if it’s the truth, it stays the truth, those things don’t change. . . . Hindsight is always 20/20. But closer in time when it happened, he gave his story, he told us his story, and now he’s changed it to improve it, to try to make himself more believable, to make the story sound better. [11/18/10 Trial Tr, pp 30-31.]

The trial court did not abuse its discretion in admitting the testimony.

3. The Court of Appeals clearly erred in concluding that the attacks on Brown's testimony did not constitute an express or implied charge of improper influence, motive, or recent fabrication.

The Court of Appeals recognized that MRE 801(d)(1)(B) provides that some statements, including the prior statement of a witness, are not hearsay if certain criteria are met. Yet, it ultimately said the trial court abused its discretion in allowing the prosecution to introduce portions of Brown's written police statement and testimony because "mere contradictory testimony cannot give rise to an implied charge of fabrication" and "there was no allegation of improper motive, influence or recent fabrication." *Clary, supra*, slip op, p 10. The Court of Appeals concluded that MRE 801(d)(1)(B) was not applicable because it did "not appear that defense counsel's attacks on Brown's testimony rose to a level of an implied charge of improper influence, motive, or recent fabrication." *Id.*

While "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited," *Tome v United States*, 513 US 150, 157 (1995) (analyzing FRE 801(d)(1)(B), the federal counterpart to MRE 801(d)(1)(B)), there is no question here that defense counsel implicitly, if not expressly, suggested Brown was fabricating his trial testimony.¹¹

As shown above, defense counsel highlighted that Brown's story changed from his initial police statements and prior testimony to the statements he made in

¹¹ See *People v VanderVliet*, 444 Mich 52, 60 n7; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994) (noting that the Court finds caselaw on the federal rules of evidence helpful and, in some cases, persuasive).

court during the second trial and thus implied that Brown fabricated parts of his testimony. In response, the prosecution was allowed to introduce prior consistent statements and testimony to rebut the fabrication charge. MRE 801(d)(1)(B) allowed the prosecutor to ask Brown questions regarding his prior consistent statements in order to diffuse defense counsel's suggestion that Brown changed his story every time he testified.

The Court of Appeals conclusion that the evidence was inadmissible is flawed in two ways. First, it ignored the abuse of discretion standard. Second, and more fundamentally, it is inconsistent with the record.

Despite paying lip service to the abuse of discretion standard, the panel's analysis proceeded to disregard this broad standard and effectively applied a de novo standard of review. The Court of Appeals failed to consider that this Court has held on numerous occasions that a trial court's "decision regarding a close evidentiary question ordinarily cannot be an abuse of discretion specifically because it is a close question." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000); *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The Court of Appeals failed to honor this deferential standard of review and, instead, substituted its own judgment for that of the trial court. Such a clean-slate evaluation was not permitted. It is not enough to recite the correct standard of review. The panel was obligated to actually apply it. Had the Court of Appeals focused on the abuse of discretion standard, it would have carefully reviewed the record for reasons that

might have supported the trial court's decision. Such a search would have proved quite fruitful.

As for MRE 801(d)(1)(B), the Court of Appeals started off on the right foot, recognizing that the rule provides that some statements, including the prior statement of a witness, are not hearsay if certain criteria are met. But the panel then got off track by failing to properly review the record. A fair review of the record demonstrates that defense counsel was intent on charging fabrication with regard to Brown's testimony. This intent became expressly evident during:

- (1) counsel's cross-examination, "if you weren't changing your story, I couldn't ask these questions," (11/17/10 Trial Tr, p 69), and
- (2) closing argument, "Every time he comes to testify he comes up with new things, he keeps coming up with new things. . . . he gave his story, he told us his story, and now he's changed it to improve it, to try to make himself more believable, to make the story sound better." (11/18/10 Trial Tr, pp 30-31.)

In sum, the Court of Appeals was mistaken in its conclusion that defense counsel's attacks on Brown's testimony did not rise to the level of an express or implied charge of recent fabrication or improper influence or motive. The trial court did not abuse its discretion in finding that introduction of the prior consistent statements was permitted rehabilitation. See, e.g., *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993) ("Defendant impeached the girl's credibility by introducing portions of the prior statements to show how they were inconsistent with her trial testimony. Under these circumstances, the prosecution must be allowed to explore the extent of the inconsistencies by showing how those same statements were consistent with the girl's trial testimony."). Accord *United States v Reliford*, 58 F3d 247, 250 (CA 6, 1995) ("It was proper for the court to admit the

witness's prior consistent statements after the defense attorney had challenged his recollection.").

Whether the trial court's ruling would be found to be right or wrong on de novo review, it did not abuse its discretion in making the judgment call that Brown's rehabilitative testimony was admissible. The trial court's allowance of Brown's prior consistent statements did not fall outside the range of reasonable and principled outcomes.

Because Clary did not demonstrate that the trial court's decision fell outside the range of reasonable and principled outcomes, the Court of Appeals erred in granting him a new trial on the basis of the admission of Brown's prior consistent statements.

CONCLUSION AND RELIEF REQUESTED

Because no error requiring reversal occurred during Clary's trial, *Amicus Curiae* Attorney General Bill Schuette respectfully urges this Court to reverse the judgment of the Court of Appeals and reinstate Clary's convictions.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Bruce H. Edwards

Bruce H. Edwards (P34983)
Assistant Attorney General
Attorneys for Amicus Curiae
Attorney General Bill Schuette
Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

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