

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v .

RAYFIELD CLARY
Defendant-Appellee.

No. 144696

L.C. No. 10-006937
COA No. 301906

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Statement of Questions

I.

The United States Supreme Court has held that it is not error to disclose that a defendant, offering himself as a witness in a second trial, had not testified as a witness in his own behalf at a first trial. The defendant was cross-examined regarding the fact that he did not testify at the first trial, and that fact was commented on by the prosecutor in closing argument. Did the Court of Appeals err in finding that questions of the defendant and comments by the prosecutor regarding defendant's silence at the first trial were error?

Defendant answers: "NO"

The People answer: YES"

II.

Prior consistent statements are admissible to rebut claims of recent fabrication or improper motive. The witness was confronted with allegedly prior inconsistent statements, and defense counsel said to the witness "if you weren't changing your story, I couldn't ask these questions." Was the use of prior consistent statements reversible error?

Defendant answers: YES"

The People answer: "NO"

Statement of Facts

When arrested, defendant did not tell the police that at the time of the crime he was elsewhere than where that event occurred. And at the first trial—which resulted in a hung jury—he presented no defense, arguing that the victim, who said the defendant shot him, had misidentified him. At that trial, defendant had filed an alibi notice, listing five individuals as witnesses, but withdrew the notice, and neither called any witnesses nor testified.

But at the second trial defendant took the stand and testified to an alibi of sorts. He said that he knew of the victim from the neighborhood, the victim being, or so he said he thought, the brother of a woman he was interested in.¹ On the day of the shooting he was at “Technofest” in Detroit, along with Virgil Finnie, Craig Hartison, Gregory Green, a woman named Sharee, Dwayne Dotson, and Caleb Mackey.² He received a call from the victim, who asked him to come and smoke some weed with him, defendant having told the victim the night before that he had some weed.³ Defendant later called the victim back to say he was on his way to the house.⁴ His cousin was driving, and they were stuck in traffic for 30 minutes, then stopped at a Coney Island for some food. Defendant’s cousin let him off at a gas station near the victim’s house, so defendant could pick up some materials to make some “blunts” with the marijuana.⁵ When he arrived at the house, he saw police officers outside; he was stopped, and after some questions were asked he walked on, because he was in

¹ 87A.

² 91A.

³ 92A.

⁴ 92A.

⁵ 93-94A.

possession of marijuana.⁶ The first time he heard about the shooting was when he was arrested.⁷ On questioning on *direct* examination, defendant said that at the first trial he had filed an alibi notice, and gave the names of those on the notice. When asked by his attorney, “what happened to those people?” he answered “they didn’t show up, I guess.”⁸

On cross-examination, the prosecutor asked “last time you were in front of a jury you didn’t use this alibi, did you, sir?” and defendant *volunteered* “I didn’t get on the stand.”⁹ The prosecutor asked defendant whether he told the police his alibi, and defendant said first that he told them that whatever it was, he didn’t do it; then when asked “as soon as you found out you were accused of shooting Mr. Brown on May 31st, you then went to the police and said, ‘Wait a minute, I didn’t do that because I was with these other people.’ Didn’t you tell the police that, sir?” and the defendant answered “Yes, I did”; then when asked to whom he spoke, defendant changed his answer and said “I wasn’t interrogated, so actually I didn’t tell the police that.”¹⁰ The prosecutor then asked “now you’re trying to tell this jury this same story but you didn’t think it was important enough to tell the police?” and defendant answered “I exercised my Fifth Amendment Right.”¹¹ When asked, concerning the first trial, “You didn’t tell that jury the same story you’re telling this jury, did you, sir?” defendant answered “I did not get on the stand,” a fact he had *earlier* volunteered. The

⁶ 95-98A.

⁷ 99A.

⁸ 102A.

⁹ 107A.

¹⁰ 108-109A.

¹¹ 109A.

prosecutor asked, "If that was the truth and that was so important, why didn't you tell the last jury?" and defendant responded that "... I just didn't. I didn't think it would have mattered if I would have got on the stand last time, so that's why I didn't get on the stand."¹²

In closing argument, the prosecutor argued, without objection,¹³ that

Well, ladies and gentlemen, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury? Why wouldn't you tell everybody in the world after you were arrested? In fact, when he was arrested on June 18th, some, what, two weeks after, he doesn't come forward and tell the police. He doesn't contact the Prosecutor's Office. He doesn't come forward to anybody and say, "Hey, wait a minute, you got the wrong guy and here's why." He doesn't even tell his other jury. But it's the truth.¹⁴

The Court of Appeals held this to be reversible error.

Defense counsel asked the victim, Mr. Brown, who identified defendant as the shooter at both trials, why he went over to the house on Wyoming, and Brown answered "to smoke." When asked if he was going there to smoke or visit his brother, Brown said he was going to smoke, "as everybody in the house, so that can lead to anything. He was the only person that was up. They were sleep so he didn't know I was coming to see them, so I was really come smoke with him at my people's house."¹⁵ Defense counsel then directed Brown's attention to the exam transcript, where Brown testified "That's why I was out so late. I went to go visit my brother." Brown replied to this that "My brother stays at the house, so if I was coming to meet him to smoke, that's what I was initially

¹² 110-111A.

¹³ Defendant did object, as he notes, on constitutional grounds to the cross-examination itself.

¹⁴ 125-126A.

¹⁵ 68A.

going over for.” When counsel asked “To smoke or to visit?” Brown answered “To smoke and to visit.”¹⁶ Counsel then directed Brown’s attention to his police statement, where he said he was going to the house to “chill.”¹⁷ Brown explained that “Eric is with Ebony. Ebony is pregnant so Eric was with Ebony. Eric is nobody, not a part of the house. If I said his name, it’s because I said his name. I’m in pain so I just tried to get it over with.”¹⁸ He said that his statements were “the truth. It’s just the scattered truth.”¹⁹ 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.”²⁰ Counsel asked “*So your story changes as you think about it?*” and Brown answered “No, my story don’t change, it’s just a more specific truth.”²¹ Counsel also questioned defendant about his previous testimony that, as to the car coming towards him down Wyoming, “I didn’t think nothing of it.” When Brown answered that what went through his head was “thing [sic] about drive-by,” and that if he hadn’t seen the defendant “he wouldn’t be sitting up here,” counsel responded “*if you weren’t changing your story, I couldn’t ask these questions.*”²²

¹⁶ 68A.

¹⁷ 69-70A.

¹⁸ 70A.

¹⁹ 70A.

²⁰ 71-72A

²¹ 72A.

²² 73A.

The prosecution then used the witness's police statement and exam testimony that was consistent with his testimony. The Court of Appeals reversed.

This court granted the People's application for leave to appeal.

Argument

I.

The United States Supreme Court has held that it is not error to disclose that a defendant, offering himself as a witness in a second trial, had not testified as a witness in his own behalf at a first trial. The defendant was cross-examined regarding the fact that he did not testify at the first trial, and that fact was commented on by the prosecutor in closing argument. The Court of Appeals erred in finding that questions of the defendant and comments by the prosecutor regarding defendant's silence at the first trial were error.

Standard of Review

The issue here was preserved, and that whether the examination of the defendant was violative of the Fifth Amendment by way of the due process clause is reviewed as a question of law.

Discussion

A. Introduction

When arrested, defendant did not tell the police that at the time of the crime he was elsewhere than where that event occurred. And at the first trial—which resulted in a hung jury—he presented no defense, arguing that the victim, who said the defendant shot him, had misidentified him. At that trial, defendant had filed an alibi notice, listing five individuals as witnesses, but withdrew the notice, and neither called any witnesses nor testified.

But at the second trial defendant took the stand and testified to an alibi of sorts. He said that he knew of the victim from the neighborhood, the victim being, or so he said he thought, the brother of a woman he was interested in.²³ On the day of the shooting he was at “Technofest” in Detroit,

²³ 87A.

along with Virgil Finnie, Craig Hartison, Gregory Green, a woman named Sharee, Dwayne Dotson, and Caleb Mackey.²⁴ He received a call from the victim, who asked him to come and smoke some weed with him, defendant having told the victim the night before that he had some weed.²⁵ Defendant later called the victim back to say he was on his way to the house.²⁶ His cousin was driving, and they were stuck in traffic for 30 minutes, then stopped at a Coney Island for some food. Defendant's cousin let him off at a gas station near the victim's house, so defendant could pick up some materials to make some "blunts" with the marijuana.²⁷ When he arrived at the house, he saw police officers outside; he was stopped, and after some questions were asked he walked on, because he was in possession of marijuana.²⁸ The first time he heard about the shooting was when he was arrested.²⁹ On questioning on *direct* examination, defendant said that at the first trial he had filed an alibi notice, and gave the names of those on the notice. When asked by his attorney, "what happened to those people?" he answered "they didn't show up, I guess."³⁰

On cross-examination, the prosecutor asked "last time you were in front of a jury you didn't use this alibi, did you, sir?" and defendant *volunteered* "I didn't get on the stand."³¹ The prosecutor

²⁴ 91A.

²⁵ 92A.

²⁶ 92A.

²⁷ 93-94A.

²⁸ 95-98A.

²⁹ 99A.

³⁰ 102A.

³¹ 107A.

asked defendant whether he told the police his alibi, and defendant said first that he told them that whatever it was, he didn't do it; then when asked "as soon as you found out you were accused of shooting Mr. Brown on May 31st, you then went to the police and said, 'Wait a minute, I didn't do that because I was with these other people.' Didn't you tell the police that, sir?" and the defendant answered "Yes, I did"; then when asked to whom he spoke, defendant changed his answer and said "I wasn't interrogated, so actually I didn't tell the police that."³² The prosecutor then asked "now you're trying to tell this jury this same story but you didn't think it was important enough to tell the police?" and defendant answered "I exercised my Fifth Amendment Right."³³ When asked, concerning the first trial, "You didn't tell that jury the same story you're telling this jury, did you, sir?" defendant answered "I did not get on the stand," a fact he had *earlier* volunteered. The prosecutor asked, "If that was the truth and that was so important, why didn't you tell the last jury?" and defendant responded that "... I just didn't. I didn't think it would have mattered if I would have got on the stand last time, so that's why I didn't get on the stand."³⁴

In closing argument, the prosecutor argued, without objection,³⁵ that

Well, ladies and gentlemen, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury? Why wouldn't you tell everybody in the world after you were arrested? In fact, when he was arrested on June 18th, some, what, two weeks after, he doesn't come forward and tell the police. He doesn't contact the Prosecutor's Office. He doesn't come forward to anybody and say, "Hey, wait a

³² 108-109A.

³³ 110A.

³⁴ 110-111A.

³⁵ Defendant did object, as he notes, on constitutional grounds to the cross-examination itself.

minute, you got the wrong guy and here's why." He doesn't even tell his other jury. But it's the truth.³⁶

The Court of Appeals held this to be error. But defendant testified at this trial; no constitutional right was infringed by the questioning and comment here, as revealed in *Raffel v United States*,³⁷ a unanimous decision from the United States Supreme Court.

B. *Raffel v United States*, and the Error of the Court of Appeals

(1) The *Raffel* decision

Raffel remains good law, and was misunderstood by the Court of Appeals here. *Raffel* was charged with conspiracy to violate the National Prohibition Act. As here, defendant was tried a second time after the jury in the first trial failed to reach a verdict, and, as here, he did not testify in the first trial, where a prohibition agent testified that *Raffel*, after the search of a drinking place, had admitted that the drinking establishment was his. At the second trial *Raffel* testified, and denied making this statement, contradicting the testimony of the agent. He was asked "questions by the court which required him to disclose that he had not testified at the first trial, and to explain why he had not done so." The question certified to the Supreme Court was "Was it error to require the defendant, *Raffel*, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?"³⁸ The court answered that it was *not*, and that the questioning did not violate any constitutional right of the accused:

The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand

³⁶ 125-126A.

³⁷ *Raffel v United States*, 271 US 494, 46 S Ct 566, 70 L Ed 1054 (1926).

³⁸ *Raffel*, 46 S.Ct. at 567.

in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. . . . He may be examined for the purpose of impeaching his credibility. . . . His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference, and the jury may be so instructed. . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.³⁹

While conceding without deciding that if the defendant had *not* taken the stand in the second trial, the fact that he had also done so in the first trial could not be placed in evidence, not because any constitutional right of the accused would be violated but because “probative of no fact in issue,” the Court found the questions relevant in the case before it. Further, continued the Court, if the waiver of the privilege that occurs by taking the stand is to be qualified in some way, the

only suggested basis for such a qualification is that the adoption of the rule contended for by the government might operate to bring pressure on the accused to take the stand on the first trial, for fear of the consequences of his silence in the event of a second trial, and might influence the defendant to continue his silence on the second trial, because his first silence may there be made to count against him. . . . But these refinements are without real substance. We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence. . . . When he does take the stand, he is under the same pressure: To testify fully, rather than avail himself of a partial immunity. And the accused at the second trial may well doubt whether the advantage lies with partial silence or with complete silence. Even if, on his first trial, he were to weigh the consequences of his failure to testify then, in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or, at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment

³⁹ *Raffel*, 46 S.Ct. at 567-568 (citations omitted)..

which the accused must experience in determining whether he shall testify or not.

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. . . . We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, other than that in which the defendant preserves it by refusing to testify.⁴⁰

(2) The error of the Court of Appeals

The Court of Appeals distinguished *Raffel* in a puzzling fashion, saying that

[u]nlike the defendant in *Raffel*, defendant in this case did not contradict the testimony of a witness offered at both his first and second trial. Instead, at his second trial, defendant offered an exculpatory story when he testified that he and the victim met at a store and planned on smoking marijuana together, but, the victim was shot by another person before defendant arrived at the house. According, the *Raffel* rule does not apply and it was error for the prosecutor to refer to defendant's silence during his first trial.⁴¹

But *of course* defendant “contradict[ed] the testimony of a witness offered at both his first and second trial.” The shooting victim, Santonyo Brown, testified at the first trial that defendant shot him,⁴² and also testified at the second trial that defendant shot him.⁴³ Defendant at the second trial testified that he did *not* shoot Brown, directly contradicting Brown's testimony, something recognized by the Court of Appeals itself in its opinion: “Brown identified defendant as the shooter.

⁴⁰ *Raffel*, 46 S.Ct. at 568.

⁴¹ 16A (emphasis supplied).

⁴² T, 10-12-10, 38-39.

⁴³ 50-51A.

Defendant agreed with most of Brown's testimony *but denied shooting Brown.*"⁴⁴ *Raffel*, then, can hardly be distinguished from the present case on the ground that "defendant in this case did not contradict the testimony of a witness offered at both his first and second trial," as this simply is not true.

The Court of Appeals also found this case "analogous to the situation presented in *Stewart v United States*,"⁴⁵ a case the People submit is not analogous at all. *Stewart* is not a constitutional case, but one of federal evidentiary law. As to this point the Court of Appeals said that it was "not certain how the prosecutor can assert that *Stewart* is a federal evidentiary case, as opposed to a constitutional one, when Justice Black commenced *Stewart* with a specific reference to the provisions of the Fifth Amendment."⁴⁶ But that the opinion mentions the Fifth Amendment hardly means that the *holding* of the case was based on the Fifth Amendment, and indeed, even the reference to the Fifth Amendment at the beginning of the opinion must be taken in context: "The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' To protect this right Congress has declared that the failure of a defendant to testify in his own defense 'shall not create any presumption against him.'"⁴⁷ The Court was thus considering the additional statutory protection provided by Congress. But the People's view of the case in this regard is in the end unimportant.

⁴⁴ 9A (emphasis supplied).

⁴⁵ 16A, referring to *Stewart v United States*, 366 US 181, 81 S Ct 941, 6 L Ed 2d 84 (1961).

⁴⁶ 16A, fn 3.

⁴⁷ 81 S Ct at 942.

The Court itself has described *Stewart* as an evidentiary case: “The decision in *Stewart v. United States*, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961), was based on federal evidentiary grounds, not on the *Fifth Amendment*. . . . 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.”⁴⁸ The People are thus not certain how the Court of Appeals can assert that *Stewart* is a constitutional case, as opposed to a federal evidentiary one.

In any event, *Stewart* is hardly analogous to the present case. There defendant did not testify at the prior trials but did at the one under review, as in *Raffel*, and the Court observed that “a defendant may choose to remain silent at his first trial and then decide to take the stand at a subsequent trial. When this occurs, questions arise as to the propriety of comment or argument in the second trial based upon the defendant’s failure to take the stand at his previous trial.”⁴⁹ The case involved an insanity defense, and after convictions at each of two prior trials were set aside, defendant took the stand to help demonstrate that “his memory and mental comprehension were defective,” and his testimony was “aptly described” as “gibberish without meaning.”⁵⁰ After a cross-examination designed to draw out that this testimony was feigned, the prosecutor asked defendant about the fact that he had not previously taken the stand (and received a nonsensical answer—“I am always the stand; I am everything, I done told you”).⁵¹ The Court majority found *Raffel*

⁴⁸ *Jenkins v. Anderson*, 447 U.S. 231, 237, 100 S.Ct. 2124, 2128, 65 L.Ed.2d 86 (1980) (emphasis supplied).

⁴⁹ 81 S Ct at 941.

⁵⁰ 81 S Ct at 942.

⁵¹ 81 S Ct at 943.

distinguishable, as there Raffel had “sat silent at his first trial in the face of testimony by a government agent that Raffel had previously made admissions pointing to his guilt,” where “[o]n a second trial, Raffel took the stand and denied the truth of this same testimony offered by this same witness.” On these facts, said the Court, “Raffel’s silence at the first trial was held properly admitted to impeach the specific testimony he offered at the second trial,” but Stewart’s testimony being only gibberish, the result was that “there was no specific testimony to impeach.”⁵² That is hardly the case here. No error, let alone constitutional error—the Court of Appeals applying the harmless-error standard for constitutional error—occurred here.

Also relevant here is *Grunewald v United States*.⁵³ There the government cross-examined defendant not concerning the fact that he did not take the stand at an earlier trial of the matter, but that he had asserted the Fifth Amendment when called before the grand jury, rather than giving the grand jury the testimony as to facts that he was giving the petit jury. Writing for the Court, Justice Harlan found *Raffel* distinguishable on these facts as a matter of *evidence*, the Court not rendering any constitutional holding. The Court found simply that the Fifth Amendment plea before the grand jury did not involve “such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes.” Rather, “the trial court, in the exercise of a sound discretion, should have refused to permit the line of cross-examination.”⁵⁴ Neither *Grunewald* nor *Johnson*, then, undermine *Raffel*, and neither is analogous to the present case.

⁵² 81 S Ct at 944.

⁵³ *Grunewald v United States*, 353 US 397, 77 S Ct 963, 1 L Ed 2d 931 (1957).

⁵⁴ 77 S Ct at 982.

(3) A note on *Griffin v California*

*“Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today.”*⁵⁵

Defendant argued in the Court of Appeals that *Raffel* has lost its vitality in light of *Griffin v California*,⁵⁶ which holds that one who does *not* take the stand may not have the fact used against him in *that* trial. But this is a different situation from that in *Raffel*, where the Court had conceded—if only for the sake of argument—that where the defendant does not take the stand no reference to that fact may be made so as to argue for his guilt. And the last case to cite *Raffel* in a majority opinion recognizes its *continuing* vitality. In *Jenkins v Anderson*⁵⁷ the defendant was cross-examined regarding his prearrest silence, and the Supreme Court found no constitutional impediment to so doing. The majority quoted from *Raffel* with approval:

This Court’s decision in *Raffel v United States* . . . recognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence. . . . The *Raffel* Court explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights.⁵⁸

And in response to the concurring opinion of Justice Stevens and the dissenting opinion of Justice Marshall, both suggesting that *Raffel* had been limited by later decisions, the Court said that “In fact,

⁵⁵ *Maffie v United States*, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

⁵⁶ *Griffin v California*, 380 US 609, 85 S Ct 1229, 14 L Ed 2d 106 (1965).

⁵⁷ *Jenkins v Anderson*, 447 US 231, 100 S Ct 2124, 65 L Ed 2d 86 (1980).

⁵⁸ 100 S Ct at 2127-2128.

no 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.”⁵⁹

The People recognize, of course, that this court cannot overrule precedent from the United States Supreme Court (and this includes *Raffel*). But by way of context, the People would point out that it is *Griffin* that is suspect, not *Raffel*. *Griffin* bars comment on the defendant’s decision not to testify on the basis that such comments violate the Fifth Amendment. This notion is contrary to the text and history of the Amendment. Pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided:

[S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination....

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, *this would also have been reported to the jury.*⁶⁰ And Justices of the

⁵⁹ 100 S Ct at 2128, fn 4 (the Court stating that precisely the cases cited by defendant now were decided as a matter of evidentiary law, on the question whether the “prior silence was sufficiently inconsistent with present statements as to be admissible”). The only citation by the Supreme Court to *Raffel* since *Jenkins* is in Justice Scalia’s dissent in *Mitchell v United States*, 526 US 314, 338, 119 S.Ct. 1307, 1320, 143 L Ed 2d 424 (1999), where Justice Scalia notes that *Jenkins* recognized the “vitality of *Raffel*.” See also *State v Nott*, 669 P2d 660 (Kan., 1983).

⁶⁰ Langbein, *The Privilege and Common Law Criminal Procedure*, in *The Privilege Against Self-Incrimination* 82, 92 (Helmholz et al. eds.1997).

peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial, after the ratification of the Fifth Amendment.⁶¹

Raffel remains good law, and *Griffin* is suspect. And in any event, no error occurred in the present case.

⁶¹ See See, e.g., Fourth Report of the Commissioners on Practice and Pleadings in New York-Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873), referenced by Justice Scalia in *Mitchell*. See also Justice Scalia's further discussion of the illogic of the *Griffin* decision, concluding that *Griffin* was a "wrong turn" in constitutional jurisprudence, and Justice Thomas's call for a "reexamination" of *Griffin* in his opinion in *Mitchell*.

II.

Prior consistent statements are admissible to rebut claims of recent fabrication or improper motive. The witness was confronted with allegedly prior inconsistent statements, and defense counsel said to the witness “if you weren’t changing your story, I couldn’t ask these questions.” The use of prior consistent statements was not reversible error.

Standard of Review

The standard of review is whether there was error, and, if so, whether defendant can demonstrate that it is more likely than not that the evidence was outcome determinative.⁶²

Discussion

Defense counsel cross-examined the victim about supposed discrepancies between his testimony and prior statements. When he asked Mr. Brown why he went over to the house on Wyoming, and Brown answered “to smoke.” When asked if he was going there to smoke or visit his brother, Brown said he was going to smoke, “as everybody in the house, so that can lead to anything. He was the only person that was up. They were sleep so he didn’t know I was coming to see them, so I was really come smoke with him at my people’s house.”⁶³ Defense counsel then directed Brown’s attention to the exam transcript, where Brown testified “That’s why I was out so late. I went to go visit my brother.” Brown replied to this that “My brother stays at the house, so if I was coming to meet him to smoke, that’s what I was initially going over for.” When counsel asked “To smoke or to visit?” Brown answered “To smoke and to visit.” T2, 64. Counsel then directed Brown’s attention to his police statement, where he said he was going to the house to

⁶² *People v Lukity*, 460 Mich. 484 (1999).

⁶³ 68A.

“chill.”⁶⁴ Brown explained that “Eric is with Ebony. Ebony is pregnant so Eric was with Ebony. Eric is nobody, not a part of the house. If I said his name, it’s because I said his name. I’m in pain so I just tried to get it over with.” T2, 66. He said that his statements were “the truth. It’s just the scattered truth.” T2, 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.” T2, 67-68. Counsel asked “*So your story changes as you think about it?*” and Brown answered “No, my story don’t change, it’s just a more specific truth.” T2, 68 Counsel also questioned defendant about his previous testimony that, as to the car coming towards him down Wyoming, “I didn’t think nothing of it.” When Brown answered that what went through his head was “thining [sic] about drive-by,” and that if he hadn’t seen the defendant “he wouldn’t be sitting up here,” counsel responded “*if you weren’t changing your story, I couldn’t ask these questions.*” T2, 69.

Counsel, then, suggested to the witness—and the jury—that the witness’s “story” “changes as you think about it.”⁶⁵ The prosecution then used the witness’s police statement and exam testimony that was consistent with his testimony to rebut this claim of recent fabrication under MRE

⁶⁴ 69-70A.

⁶⁵ And in closing defense counsel argued that “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. . . . now he’s changed it to improve it, to try to make himself more believable, to make the story sound better.” (136-137A).

801(d)(1)(B).⁶⁶ In a similar case, defense counsel said to a witness “Mr. Price, your memory gets better with time, doesn't it?” The Sixth Circuit said:

On redirect, the court granted the Government's motion to admit written statements Price had given to police on December 24, 1992, and December 26, 1992, as prior consistent statements to rebut an express or implied charge of recent fabrication under Fed.R.Evid. 801(d)(1). The prior written statements were consistent with Price's testimony on the stand recounting the sequence of events at the carjacking. The statements supported Price's testimony that Reliford had looked at him as Reliford got into the victim's car and again as Reliford backed the car and prepared to drive away. It was proper for the court to admit the witness's prior consistent statements after the defense attorney had challenged his recollection.⁶⁷

So here. The defendant has not shown error, much less error that, assessed in the context of the untainted evidence renders it more probable than not that a different outcome would have resulted without the error. The Court of Appeals should not have reversed on this ground.

⁶⁶ 76-82A.

⁶⁷ *United States v. Reliford*, 58 F.3d 247, 249 -250 (CA6, 1995).

Relief

WHEREFORE, the People request this Honorable Court reverse the Court of Appeals.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Timothy A. Baughman", with a long horizontal flourish extending to the right.

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