IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00049 COA

OSHEA EUGENE BRASSELL

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW C. BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AZKI SHAH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE McCRORY

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 20 YRS IN CUSTODY OF M.D.O.C.

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Oshea Brassell was convicted of aggravated assault and sentenced to twenty years in prison. He appeals his conviction, contending that the admission of the victim's statement in its entirety in evidence after it had been used for impeachment purposes was in error. We disagree and affirm.

FACTS

Brassell and his victim were patrons at a Sardis nightclub. In the early evening of December 17, 1993, the victim accidentally bumped into Brassell. At closing time, the victim was standing outside the club when Brassell confronted him, telling his victim not to talk about him. Apparently enraged because he felt that the victim had been harassing him all night, Brassell shot and wounded his victim. Later, the victim gave a statement to the police.

At trial on charges of aggravated assault, Brassell brought up the statement in his cross-examination of the victim. In his direct testimony, the victim testified that he was standing with two other individuals when Brassell attacked him outside the nightclub. However, as Brassell's attorney pointed out on cross-examination, the statement given by the victim did not contain such information and placed the other individuals in a car at the time of the attack. Brassell's attorney showed the statement to the victim, asked him to read it to himself, and then to tell the jury whether he included this information in his statement to police. Ostensibly, Brassell's attorney raised the statement for purposes of impeachment. He did not introduce any part of the statement in evidence.

On re-direct and over the defense's objections, the prosecution asked the victim whether he had given the police Brassell's name and then sought to introduce the statement in its entirety. Among his objections, Brassell argued that admission of the statement was improper bolstering of the witness' testimony. The trial court overruled the objections and admitted the statement.

DISCUSSION

The question before this Court is whether questions about a witness' statement on cross-examination which attack the witness' credibility make the entire statement itself admissible on re-direct examination to rehabilitate the witness. The objection to such evidence is that it constitutes inadmissible hearsay. We conclude that, in the circumstances of this case, it is admissible.

Rule 801 of the Mississippi Rules of Evidence provides:

> A statement is not hearsay if:
>
> . . . .
>
> The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication . . . .

M.R.E. 801(d)(1)(B). The comment to the rule recognizes that, under traditional practice in Mississippi, prior statements of a witness have been inadmissible for substantive purposes. *Id.* cmt. (citing *Moffett v. State*, 456 So. 2d 714, 719 (Miss. 1984)). The pre-rules practice has been overtaken by this rule that allows introduction of prior consistent statements as substantive evidence to rebut a charge against the witness of recent fabrication. *Id.* Similar cases considering issues in the context of this provision have relaxed the prior strict rule against admissibility of the statement expressed in *Moffett* and relied upon by Brassell.

In this case we are not technically faced with a charge of recent fabrication but, instead, a more general challenge to the witness' credibility. This technical distinction is of no import. The rule addresses the situation presented here in which the witness was attacked with proof that purportedly showed that his testimony had recently changed. Moreover, even accepting a very narrow construction of the rule, the admissibility afforded by Rule 801 has been extended beyond the rebuttal of impeachment implying recent fabrication. In one case, a prior statement was introduced because of the charge that the testimony had been influenced by a dream, not because of recent fabrication. *Jones v. State*, 606 So. 2d 1051, 1059 (Miss. 1992).

In a pre-rules case, the supreme court allowed the admission of a statement when it had been used earlier to discredit a witness, finding that the door to introduction of the statement itself had been opened. *Jackson v. State*, 423 So. 2d 129, 131 (Miss. 1982). "We are of the opinion that . . . the appellant's attorney opened the matter of the former statement in an effort to discredit the [prosecution] witness . . . and that, even though the court sustained objection to introduction of the instrument itself, permitting the district attorney to read the instrument (which was substantially identical to the testimony of [the witness]), did not constitute reversible error." *Id.* Following adoption of the rules, the court has continued to apply the principle that when a party raises an issue with a witness which the other party could not have raised, he opens the door to examination of the witness on that issue. *Doby v. State*, 557 So. 2d 533, 539 (Miss. 1990). Here, the defense elicited testimony showing a contradiction with part of the statement made by the victim. The prosecution was entitled to admit the entire statement to prevent misleading of the jury. *See* M.R.E. 106 cmt. This also distinguishes our situation from that in *Moffett*, which had no issue of the defense opening the door to the use of the evidence.

So that there is no confusion concerning this Court's holding, we must point out the narrow parameters of the admissibility of statements like the one here. The precise fact situation presented in this case is important. This is not a case in which the prior statement was sought to be admitted on direct examination purely to bolster the witness' testimony. *See, e.g., Owens v. State*, 666 So. 2d 814, 816-17 (Miss. 1995). Nor is this a case in which the text of the statement was sought to be admitted as a part of the impeachment process. *See, e.g., Conner v. State*, 632 So. 2d 1239, 1260-61 (Miss. 1993), *cert. denied*, 115 S. Ct. 314 (1994). The statement in this case was admitted for rehabilitation of a witness in the face of the statement's use to impeach the veracity of the witness' testimony—a circumstance contemplated by interpretations of Rule 801 and cases concerning the manner in which an accused can open the door to a line of questioning as presenting no error.

THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT OF CONVICTION OF

AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PANOLA COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.