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Prior Statements in Montana: Part II

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Prior statements in Montana: Part II

Prior consistent statements under M.R.E. 801(d)(1)(B); shouldn't montana cases be consistent?

By Cynthia Ford

Last month, I wrote about prior inconsistent statements under M.R.E. 801(d)(1)(A). For that type of evidence, the rule, the Comment, and the cases are fairly easy. If a witness testifies on the stand differently from what she said outside the courtroom, her out-of-court inconsistent statement is admissible for both impeachment and substantive proof.

This month's subject, prior consistent statements under M.R.E. 801(d)(1)(B), is much less straightforward. Whereas prior inconsistent statements are usually admissible, prior consistent statements are not, and the law about when they might be is quite confusing. The language of the Montana rule differs from the federal version and although the Montana Commission Comment indicates Montana wanted a similar rule with clearer language, the difference has mattered in some cases. Further, the myriad Montana Supreme Court cases attempting to apply this Montana rule are, as we say technically, a mess. It is little wonder that a judge recently called me for some help on this issue, and little wonder that I could not provide much. I hope the research I have done on this issue will help some of you in current cases, and lead to some changes to make the law in this area clearer.

Background

Under the common law, and under the Montana and Federal Rules of Evidence, the general rule about prior consistent statements is exactly the opposite of the rule about prior inconsistent statements. Prior inconsistent statements under M.R.E. 801(d)(1)(A) are admissible without restriction, both for impeachment and substantive purposes. (See the previous issue of The Montana Lawyer for more on this subject, and the difference between the Montana and federal rules on inconsistent statements). The presumption is that the prior consistent statements do not come in. "Under common law, a witness could not be supported by evidence of prior consistent statements because no amount of repetition makes the story more probable. 4 Wigmore Evidence, Section 1124 (3rd ed. 1940)." Montana Commission Comment to M.R.E. 801(d)(1)(B).

However, even at common law, a witness who was accused of lying on the stand for a specific reason could have her other consistent statements admitted at trial if they were made before the alleged reason to lie occurred. The Rules, federal and Montana, carried this approach forward, and allow prior consistent statements to be admitted in some, but only a few, circumstances. When they are admissible, the prior consistent statements (like inconsistent statements) may be considered as substantive as well as rehabilitative evidence.

The M.R.E. Commission Comment to M.R.E. 801(d)(1) cites the federal Advisory Committee Note to F.R.E. 801(d)(1):

> Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the effect of excluding almost all prior statements. Therefore, these prior statements are admitted as substantive evidence. It should also be noted that **the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted**, which is not sensible, for " ... particular circumstances call for a contrary result. The judgment is one more for experience than logic". Advisory Committee's Note, supra 56 F.R.D. at 295. (Emphasis added).

Even though the Montana Evidence Commission quoted with approval the federal Advisory Committee Note to 801(d)(1)(B), the Montana version of the prior consistent statement rule, 801(d)(1)(B) is a bit different from exact wording of the federal rule. Here are the two current versions, with the language that differs from the other in bold:

> F.R.E. 801(d)(1)(B):
>
> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:… (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying**;
>
> M.R.E. 801(d)(1)(B):
>
> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> … the statement is ...(B) consistent with the declarant's testimony and is offered to rebut an

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> express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…**(Emphasis added).

The Montana Evidence Commission consciously changed the language of the F.R.E. version (which was then stylistically different from the 2011 version set out above) explaining:

"Clause 801(d)(1)(B) is not the same as the Federal Rule. It provides " ... consistent with his testimony and his offer to rebut an express or implied charge against him of recent fabrication or improper influence or motive ... ". The clause deletes "recent" and "or" following fabrication so that it reads " ... consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive ... ". The Commission changed the language of the Federal Rule to make the clause clearer."

The Montana Comment indicates that the language of M.R.E. 801(d)(1)(B) conformed to the then-existing state common law on admission of consistent statements, and mentions explicitly the requirement that the consistent statement must have been made before the grounds occurred which impeach the witness. The Comment also notes that the rule expands the common law in one way only, that the prior statement now can be used for substantive evidence in addition to rehabilitation of the witness:

> the common law does allow rehabilitation of a witness who has been impeached on the grounds mentioned in the clause. …**The prior consistent statement is allowed to rehabilitate the witness because it was made prior to the existence of the impeaching evidence; that is, the consistent statement is made and subsequently the impeaching evidence comes into existence**. When a witness testifies consistently with these prior statements, it " ... will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of discrediting influence".
>
> …
>
> Existing Montana law is consistent with and perhaps broader than the clause. The clause does change Montana law to the extent that **it allows prior consistent statements to be admitted as substantive evidence**. (Citations omitted, emphasis supplied).

The Commission mentioned three Montana cases (from 1901,1903 and 1975) discussing the common law rule about prior consistent statements, noting that the first one had not actually applied the rule and the second had specifically declined to do so. The third of the cases, though, did allow the prior consistent statements into evidence. The Commission observed:

> this case is consistent with the language of the clause, although it may also be interpreted as expressing concern over which story is the truth and not when the stories were told. Dicta in that case also indicates that the court should allow rehabilitation by prior consistent statements with any form of impeachment. On these two points it is apparent that this case is broader than the clause.

Thus, the Montana Commission clearly intended to restrict use of prior consistent statements to limited situations where the witness has been impeached only on the specific grounds ("triggers") listed in the rule, not just any form of impeachment. It also intended to implant a chronological requirement for the use of this exception to the general rule prohibiting consistent statements as hearsay. Lastly, the Commission intended the Montana version of the rule to do the same thing as the federal rule, only better.

In its seminal case on this issue, the U.S.Supreme Court took the same view of F.R.E. 801(d)(1)(B): prior consistent statements are admitted sparingly, only when specific types of impeachment have been asserted:

The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditiona[l]" common law of evidence, which was the background against which the Rules were drafted. See Advisory Committee's Notes, supra, at 773. **Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited...**(Emphasis added)

Tome v. U.S., 513 U.S. 150, 157, 115 S.Ct. 696, 701 (1995). (More about Tome below).

The trigger can occur at any stage in the proceeding, whenever the opponent intimates that the witness' testimony is the result of recent fabrication, improper influence, or improper motive

Federal "trigger" cases

The Federal Advisory Committee which first drafted Rule 801(d)(1)(B) observed that, under the then-proposed rule, the blame for admission of a witness' prior consistent statement lies at the door of the party opposing that witness' testimony: "if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." Advisory Committee's Note, supra, 56 F.R.D. at 296.

Thus, a party who wishes to limit the impact of a witness' testimony to the one statement in court should take care to avoid making any "express or implied charge" that the witness has recently fabricated his testimony, or "recently" became subject to an "improper influence or motive." As the federal cases illustrate, making such a charge "opens the door" to admission of the prior consistent statements, thus compounding the testimony of the witness. The door can be opened by argument, as early as opening statement, as well as by cross examination. Once it is opened, opposing counsel can bring in the consistent statements which occurred prior to the fabrication, improper influence or

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improper motive.

Until the door is opened, those statements remain hearsay and are inadmissible.

In a recent 7th Circuit case, the defendant's opening statement told the jury that the codefendant had a plea agreement which rewarded him for testifying for the government. Not only was the prosecutor allowed to bring in the consistent statement of the witness made prior to the plea agreement, he was allowed to do so on direct examination, thus "pulling the teeth" of the subsequent cross-examination.

> Foster clearly implied in his opening statement that Anderson would lie about Foster's involvement in the robbery in order to curry favor with the government. By implying that Anderson's plea agreement gave him an incentive to lie, **Foster opened the door to the admission of Anderson's prior consistent statements on direct examination, before Foster had an opportunity to challenge Anderson's credibility on cross-examination**. See United States v. Cherry, 938 F.2d 748, 756 (7th Cir.1991) (holding witness's prior consistent statement admissible in part because defense counsel implied during opening statement that witness had fabricated her testimony); United States v. LeBlanc, 612 F.2d 1012, 1017 (6th Cir.1980) (holding witness's prior consistent statement admissible where defense counsel implied in his opening statement that witness "should not be believed because of the favorable consideration he received from the government in his plea bargaining agreement"). Anderson's prior consistent statement was not hearsay under Rule 801(d)(1)(B), and the district court did not err. (Emphasis added).
>
> U.S. v. Foster, 652 F.3d 776, 787 (C.A.7 (Ill.),2011).
>
> The Ninth Circuit cases are to the same effect. In U.S. v. Stuart, for example, the defense lawyer called a FBI agent to testify about an inconsistent statement the witness had made in an interview. The 9th Circuit affirmed the trial judge's admission of consistent statements made in the same interview:
>
> The record in this case reveals that, prior to the agent's testimony, Stuart had vigorously cross-examined Van de Water regarding his plea agreement with the Government, thereby calling into question Van de Water's motive in testifying. Therefore, the introduction of prior consistent statements made prior to the plea agreement was proper. United States v. Allen, 579 F.2d 531, 532-33 (9th Cir.1978) (prior consistent statements of a declarant made to an agent may be elicited from the agent under Rule 801(d)(1)(B) where defendant had sharply attacked the credibility of the declarant and implied that the declarant was testifying out of a motive to avoid criminal prosecution).
>
> U.S. v. Stuart, 718 F.2d 931, 934-35 (9th Cir.,1983). See also, U.S. v. Rinn, 586 F.2d 113 (9th Cir., 1978).

Montana "trigger" cases

The Montana rule and most of the Montana cases similarly require the opponent to state or imply that the witness' testimony is the result of recent fabrication, motive or influence before the prior consistent statements can be admitted. However, some of the older cases seem to have missed this requirement and allowed prior consistent statements in, just because some form of impeachment had occurred. These cases violate both the letter and spirit of M.R.E. 801(d)(1)(B), and should be overruled.

The most recent case is State v. McOmber, 340 Mont. 262, 173 P. 3d 690 (2007). McOmber was convicted of solicitation to issue a bad check. His friend, Bill Peltier, testified at trial for the prosecution. He said on the stand that McOmber had been arrested for another charge, and had called Peltier to post bond for him. When Peltier said he didn't have enough money in his account to write a check, McOmber encouraged him to do so anyway, because McOmber would collect enough from other people to cover the check in the morning. Those other people didn't come through, Peltier's check bounced, and Peltier was arrested on a bad check charge. While in jail, Peltier first gave a written statement and then an oral interview. His bad check charge was dropped to a misdemeanor, to which he pled guilty, and McOmber was charged with the felony solicitation.

After Peltier testified against McOmber, the prosecution tried to introduce both his written statement and the transcript of his interview. The defense counsel used the old "gilding the lily" objection, which actually gets to the common law rule that generally prior consistent statements are inadmissible hearsay (which would be a better phrase for your objection). The trial judge overruled the objection, citing M.R.E. 801(d)(1)(A). On appeal, the Supreme Court laid out the general requirements for admission of prior consistent statements:

> Under the rule, there are **four requirements** that must be met for a statement to be admissible as a prior consistent statement:
>
> "(1) the declarant must testify at trial and (2) be subject to cross-examination concerning her statement, and (3) the statements to which the witness testifies must be consistent with the declarant's testimony, and **(4) the statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive**." *State v. Teters,* 2004 MT 137, ¶ 25, 321 Mont. 379, ¶ 25, 91 P.3d 559, ¶ 25. (Emphasis supplied).
>
> State v. McOmber, 2007 MT 340, 340 Mont. 262, 266, 173 P.3d 690, 694-95.

The Court found that the defense indeed alleged that Peltier was fabricating in order to obtain favorable treatment of his own felony charge, and that the charge was in fact dropped to a misdemeanor, so that there was a charge of improper influence

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or motive. Nonetheless, the Court found (harmless) error in the admission of the prior statements, on chronological grounds (see below), holding that the consistent statement was not "prior" to the alleged influence or motive.

State v. Teters, 2004 MT 137, 321 Mont. 379, 385-86, 91 P.3d 559, 564, was a stepfather sexual abuse case. (A lot of the 801(d)(1)(B) cases, state and federal, arise in this context). The victim testified, and the prosecution introduced her prior statement to a social worker. The defendant objected, but lost both in trial and on appeal:

In the present case, defense counsel launched a general attack on J.U.'s credibility by insinuating that she possessed a motive to fabricate her testimony, and that she had been improperly influenced by her mother. Although implied, these charges of improper motive and influence were sufficient to satisfy the fourth requirement of Rule 801(d)(1)(B), M.R.Evid.

In contrast, in State v. Lunstad (1993), the child victim testified about the "private touch" by the defendant. The prosecution then tried to admit the child's four prior consistent statements to a therapist; the defendant objected on hearsay grounds and was sustained. The prosecution then took another tack: when the defendant testified later, the prosecutor directly asked him on cross-examination whether he thought that the victim was lying. (There were no questions about any specific motive or influence for the alleged lies). When he said "Yes," the prosecution re-offered the prior consistent statements made by the victim to her therapist under M.R.E. 801(d)(1)(B). The trial court bit and admitted the statements. The Supreme Court found this to be reversible error:

Here, the State itself opened the door by directly asking Mr. Lunstad if C.H. was lying, and then attempted to bolster C.H.'s credibility by the admission of the very prior consistent statements that the district judge had ruled inadmissible hearsay in the State's case-in-chief. The State cannot use this type of cross-examination to get evidence admitted which it could not get admitted prior to its cross-examination. We hold that it was an abuse of discretion and reversible error to allow the rebuttal testimony, in the form of prior consistent statements, to be presented on these facts.

State v. Lunstad, 259 Mont. 512, 516, 857 P.2d 723, 725-26 (1993). [But see, State v. Hart, 303 Mont. 71, 82, 15 P.3d 917, 924 (2000), a non 801(d)(1)(B) case, where the Court distinguished Lunstad and stated: "We refuse to adopt a bright-line rule regarding the propriety of questioning the defendant about the truthfulness of other witnesses.... we commit the decision on whether to allow this type of questioning in any particular instance to the sound discretion of the district court."]

Effect of error in admitting consistent statements which do not meet the requirements of 801(d)(1)(b)

Montana Approach

State v. Mensing was another sexual intercourse without consent case, this one decided in 1999. Again, the victim testified at trial and the prosecution tried to introduce two additional statements she had given to the investigating officers, both substantially similar to her trial testimony. The defense objected on hearsay grounds, but the trial judge admitted both statements under M.R.E. 801(d)(1)(B). On appeal, the State argued that the defendant had implied fabrication by the victim, citing the defense cross-examination about how many times the victim had met with the prosecuting attorneys and questions pointing out inconsistencies in the victim's testimony. The Supreme Court held that the cross-examination merely attacked the victim's overall credibility, and did not imply any specific motive for fabrication. Therefore, the prior consistent statements were not admissible:

> Here, Mensing only questioned Perry about inconsistencies in her story and implied that her memory was faulty as a result of drinking alcohol and smoking marijuana on the night in question. He did not question Perry regarding whether she had any reason to testify falsely. There was no charge-direct or implied-of a specific motive to fabricate. Our review of the record does not support the State's assertion that Mensing attacked Perry's credibility in a manner sufficient to allow admission of her prior consistent statements.
>
> ¶ 17 We conclude that Mensing made no express or implied charge of fabrication, improper influence or motive against Perry during her cross-examination and, as a result, the officers' testimony regarding her prior statements was not admissible as nonhearsay under Rule 801(d)(1)(B), M.R.Evid. ... Consequently, we further conclude that the District Court abused its discretion in admitting the law enforcement officers' hearsay testimony regarding Perry's prior statements.
>
> State v. Mensing, 1999 MT 303, 297 Mont. 172, 176-77, 991 P.2d 950, 954.

Mensing's conviction was upheld, however, because the Court found the error to be harmless. More startling, it indicated that wrongful admission of prior consistent statements would **always** be harmless error:

> …a defendant is not prejudiced by the introduction of inadmissible hearsay testimony when the hearsay statements are separately admitted through the testimony of the declarant or through other direct evidence. *State v. Veis,* 1998 MT 162, ¶ 26, 289 Mont. 450, ¶ 26, 962 P.2d 1153, ¶ 26. Furthermore, **where the declarant testifies at trial and the defendant is given the opportunity to cross-examine regarding the statements at issue, the improper admission of the declarant's out-of-court statements is considered harmless.** (Emphasis added).
>
> State v. Mensing, 1999 MT 303, 297 Mont. 172, 177, 991 P.2d 950, 954.

(Mensing has been cited only once in Montana, and in a case where the prior consistent statement was held to be admissible.

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However, its language has never been overruled.)

In Veis, cited by Mensing, the Court stated:

> where hearsay testimony has been erroneously admitted, the defendant must have suffered prejudice as a result of the error to be entitled to have his conviction reversed. *See State v. Stuit* (1996), 277 Mont. 227, 232, 921 P.2d 866, 869; *State v. Riley* (1995), 270 Mont. 436, 440, 893 P.2d 310, 313.
>
> ¶ 26 **We have held that a defendant is not prejudiced by hearsay testimony when the statements that form the subject of the inadmissible hearsay are admitted elsewhere through the direct testimony of the "out-of-court" declarant or by some other direct evidence. *See Stuit,* 277 Mont. at 232, 921 P.2d at 869; *State v. Graves* (1995), 272 Mont. 451, 460, 901 P.2d 549, 555; *Riley,* 270 Mont. at 440, 893 P.2d at 313.** Our holdings reflect the fact that when a defendant has the opportunity to cross-examine a declarant because he or she is present at trial and testifies, the dangers that the hearsay rule seeks to avoid are not present and, therefore, hearsay regarding the declarant's out-of-court statement that is admitted during another witness's testimony is harmless. *See State v. Canon* (1984), 212 Mont. 157, 164, 687 P.2d 705, 709 (concluding that the testimony was not hearsay, but stating that even if it had been, there would have been no prejudice because "the defendant had all of the necessary opportunity to protect himself by cross-examination of [the declarant].").
> (Emphasis added).
>
> …
>
> ¶ 28 Here, in the District Court trial both of the boys testified prior to Dugan-Laemmle's testimony. Each of them identified Veis as their abuser. In addition, S.J. identified the letter and list of names that he had written during his therapy and described both the directions he had been given by Dugan-Laemmle when asked to write them and the content of his writings. He testified that in both the letter and the list he explicitly identified Veis as his abuser. Veis had full opportunity to cross-examine both boys. At no point during his cross-examination of S.J. or B.J. did Veis challenge the boys' identification of Veis as their abuser. Accordingly, Dugan-Laemmle's hearsay testimony about the boys' identification of their abuser during therapy was simply cumulative of the boys' own testimony and did not deny Veis the opportunity to confront his accusers.
>
> State v. Veis, 1998 MT 162, 289 Mont. 450, 457-458, 962 P.2d 1153, 1157.

Wow! The language in these two cases, Veis and Mensing, amounts to a judicial rewrite of Rule 801(d), in effect saying all prior statements of a witness are admissible, or at least that there will be no consequence for their admission. This, in turn, directly contravenes the intent of the Montana Evidence Commission which drafted the restrictive language of Rule 801(d), as well as the intent of the Federal Advisory Committee, as expressed in the Notes to F.R.E. 801(d).

Federal approach

Compare this approach with that of the federal courts. In Tome v. U.S., 513 U.S. 150, 157, 115 S.Ct. 696, 701 (1995), the U.S. Supreme Court remanded a father's conviction for sexual abuse of his daughter precisely because of the admission of the victim's prior consistent statements. (This case is discussed in more detail in the next section). On remand, the 10th Circuit held that some of the statements were admissible under Rule 803(4), but that the statements made by the girl to her mother, her babysitter, and a social worker did not meet the requirements of 801(d)(1)(B) in view of the Supreme Court decision, nor did they fulfill any hearsay exception, and were inadmissible. The court went on to hold that the admission of these statements was not harmless, and reversed the conviction.

Montana should enforce 801(d)(1)(B)

If the Montana rule is to actually mean what it says, the Montana Supreme Court should take another look at its enforceability. If a prior consistent statement is not admissible, but there is no potential reversal if it is admitted, it is a rare advocate who would back away from using it, and perhaps a rare judge who would strictly enforce the rule if a possible error is "always harmless."

Chronology requirement: Both the montana and federal versions of 801(d)(1)(b) allude to an additional timing relationship requirement, once the trigger has been pulled

The F.R.E. version states: "consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying**;"

The M.R.E. version is: "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…"** (Emphasis added).

U.S. Supreme Court "Required Chronology" case is clear:

The United States Supreme Court took cert in 1995 to resolve a conflict between the federal circuits on the exact requirements of F.R.E. 801(d)(1)(B). In Tome v. U.S., the witness was 6 years old when she testified, very haltingly, about her father's sexual acts with her. (Observing her demeanor on the stand, the trial judge observed "We have a very difficult situation here.") The parents were divorced and engaged in a custody battle in tribal court. The defendant's theory was that his daughter fabricated her story in order to be able to remain with her mother at the

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end of her summer visit, even though the tribal court order in place gave the accused father physical custody.

The trial judge admitted six prior statements of the young victim, made prior to trial to a babysitter, the mother, a social worker, and three pediatricians. The 10th Circuit affirmed all six admissions, following the flexible "balancing" approach used in the 9th Circuit to the "subsequent" language in 801(d)(1)(B).

The Supreme Court rejected this approach, and held that prior consistent statements are inadmissible unless they predate the alleged reason to alter the testimony:

The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that **a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards**. As Justice Story explained: "[W]here the testimony is assailed as a fabrication of a recent date, ... in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439, 9 L.Ed. 475 (1836) (emphasis added). See also People v. Singer, 300 N.Y. 120, 124–125, 89 N.E.2d 710, 712 (1949).

McCormick and Wigmore stated the rule in a more categorical manner: "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, Evidence § 1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a time prior to the existence of a fact said to indicate bias ... will effectively explain away the force of the impeaching evidence" (emphasis in original)). **The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.**

Tome v. U.S., 513 U.S. 150, 156, 115 S.Ct. 696, 700 (1995). (Emphasis added).

Montana "Required Chronology" cases are not so clear

Although many other states have distinguished or outright disagreed with Tome in interpreting their own versions of the hearsay rule, the Montana Supreme Court has cited it with approval on several occasions.

In State v. Lawrence, 285 Mont. 140, 158, 948 P.2d 186, 197 (1997), where the Supreme Court ultimately held that the disputed evidence was inconsistent with the trial testimony, it first commented about the requirements for admission of consistent statements:

Appellant correctly states that in order to introduce a witness's prior consistent statements, the proponent must first lay the necessary foundation as outlined in Rule 801(d)(1)(B) and State v. Lunstad (1993), 259 Mont. 512, 517, 857 P.2d 723, 726 (holding that a declarant's prior consistent out-of-court statements are **admissible only when those statements were made before the alleged fabrication, improper influence, or motive arose**). See also,Tome v. United States (1995), 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574. (Emphasis added)

Just a year later, though, the Court inexplicably dismissed an argument on appeal based on Tome: "He cites Tome v. United States (1995), 513 U.S. 150... In Tome, the Court interpreted Fed.R.Evid. 801(d)(1)(B), which is different from Rule 801(d)(1)(B), M.R.Evid." State v. Johnson, 288 Mont. 513, 524, 958 P.2d 1182, 1189 (1998). This is an area where Montana trial judges and lawyers need more consistent guidance from the Montana Supreme Court.

The existing Montana cases divide into two camps: those where the witness' consistent statement was made before, and those where the consistent statement was made after, the alleged reason to lie (or at least shade testimony) came into existence.

Cases where the prior statement was admissible non-hearsay, because it predated the alleged reason to lie

In State v. Teters (2004), discussed above, the stepdaughter victim testified at trial about the defendant's sexual abuse of her. The trial judge later allowed evidence of her prior consistent statements through the testimony of a representative of the Utah Dept. of Child and Family Services, who had interviewed the victim. The Supreme Court held this was proper, because the defense counsel had suggested in opening statement that the girl was lying to help her mother in a "messy divorce." The interview occurred well before the spouses separated, so there was no "messy divorce" when the prior statement was made. The chronology (statement, then messy divorce proceedings, then testimony consistent with the statement) thus met the requirement that the prior consistent statement occur prior to the alleged motive to fabricate:

> In *State v. Lunstad* (1993), 259 Mont. 512, 516, 857 P.2d 723, 726, we emphasized that **prior consistent statements are admissible only when a specific motive to fabricate is alleged and the prior consistent statements were made before the time the alleged motive to fabricate arose.**
>
> ¶ 28 Furthermore, the consistent statements were made prior to the time the alleged motivation to fabricate arose. *See Lunstad,* 259 Mont. at 516, 857 P.2d at 726. In his opening statement, defense counsel implied that J.U. had been subject to the improper influence of her mother, who was in the midst of a "messy divorce" from Teters. However, J.U.'s statements to Burdette occurred prior to the parties' separation in April 2001, and well before the commencement of divorce proceedings. Accordingly, **J.U.'s statements were made prior to the alleged motivation to fabricate arose, and are admissible under Rule 801(d)(1)(B),** M.R.Evid. We therefore hold the District Court did not err in admitting Burdette's testimony concerning J.U.'s prior consistent statements of sexual abuse.

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(Emphasis added).

State v. Teters, 2004 MT 137, 321 Mont. 379, 385-86, 91 P.3d 559, 564.

State v. Sheffelman (1991) is another sexual abuse case. Its holding is as messy as its facts. In her opening, the prosecutor alluded to the girl's prior consistent and inconsistent statements and indicated that the girl told her story to prevent her stepfather from returning to the home and continuing the molestation. The prosecution was later able to introduce the prior consistent statements into evidence, over the defendant's objection.

The Supreme Court affirmed the admission of those statements. First, it observed that both the prosecution and defense openings had discussed possible motives for the girl to falsify testimony. On direct examination, the prosecution introduced several inconsistent statements she had made. The defendant cross-examined the girl, and intimated that she had been subject to improper influence from the prosecutor. The prosecution was then permitted to introduce several witnesses who testified about out of court statements the victim had made to them which were consistent with her trial testimony. The Court distinguished between the impeachment of "you have been lying all along" from "you are lying because the prosecutor influenced you":

> The defendant claims he does not assert a subsequent fabrication on the part of the victim, but that she was fabricating or lying all along. Generally speaking, if this were true, prior consistent statements would not be admitted. However, given the fact that the defense implied improper influence on the part of the prosecuting attorney in cross examining the victim, we hold that her prior consistent statements in this case were properly admitted.
>
> State v. Scheffelman, 250 Mont. 334, 339, 820 P.2d 1293, 1296 (1991).

Acknowledging that some jurisdictions (notably Colorado and New Mexico) have given up the chronological requirement, and allow all prior statements in, without regard to their timing relative to the alleged motive or influence to fabricate, the Montana Supreme Court decided to join the majority of jurisdictions which retained the common law approach:

Most jurisdictions still look to the time that the statement was made in order to address concerns of relevancy, however. These jurisdictions hold that in order to be relevant, a prior consistent statement must be made before the declarant has a motive to fabricate. If a declarant makes consistent statements after the motive to fabricate arises, the relevancy of those statements under Rules 402 and 403, M.R.Evid, is lost because they have no bearing upon truthfulness or veracity. See e.g. United States v. Miller, (9th Cir.1989), 874 F.2d 1255, 1272...

We believe that the most logical view is that held by the Ninth Circuit. As described above, this view requires the prior consistent statement to be made before any motive to fabricate has arisen. This view is most in line with the traditional common law and with common sense notions of relevancy. (Emphasis added).

250 Mont. at 340-314, 820 P.2d at 1297.

The problem with Sheffelman lies in its application of this theory to its facts. The Court affirmed admission of the consistent statements under Rule 801(d)(1)(B), holding that:

According to Scheffelman, the victim's prior statements should not have been admitted because she had a motive to fabricate when they were made. However, according to the testimony, the victim's motive for fabrication was that she did not want Scheffelman to return to the family household and continue his pattern of abuse. This reason cannot be considered a motive to fabricate. Rather, it is inherently intertwined with the truth or falsity of the charge of the crime itself. It may provide the impetus to report the defendant's abuse, but it does not evidence any motive to lie or fabricate. Therefore, we hold no error was committed in allowing the prior consistent statements into evidence.

250 Mont. at 341, 820 P.2d at 1297.

Justice Trieweiler filed a separate opinion in which he concurred with the holding admitting the prior consistent statements, but simply said "I do not agree with all that is said in the majority's discussion of prior consistent statements." (The bulk of his opinion dissented about an issue of expert witness qualifications).

If the girl's motive was to prevent her stepfather's return, that motive existed at the first time she spoke about the abuse, and so the consistent statements are all subsequent, not prior to, the existence of her alleged motive. The only logical way to read Sheffelman, although the Court did not articulate this specifically, is to parse the language of the rule ("offered to rebut an express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…**") so that the word "subsequent" modifies only "fabrication," and thus there is no temporal requirement for that prior consistent statements offered to rebut any implication of improper influence or motive. Although this interpretation is grammatically possible, it does not comport either with the common law or the Tome approach. In Lunstad, the Court discussed but distinguished Sheffelman; its description of Sheffelman is somewhat clearer than the original case itself:

> [In Sheffelman] Court held that a prior consistent statement was allowable if it was made before any motive to fabricate had arisen. However, if a defendant does not assert that the victim is subsequently fabricating her story, but claims, as in this case, she was lying all along, prior consistent statements are not admissible. Scheffelman, 820 P.2d at 1296. In Scheffelman, the Court held that, because the defendant alleged the victim was improperly influenced, no error was committed in allowing the prior consistent statements into evidence under Rule 801. Scheffelman, 820 P.2d at 1296 .
>
> State v. Lunstad, 259 Mont. 512, 517, 857 P.2d 723, 726 (1993).

Two years later, the Court acknowledged its improvement of Scheffelman, and reaffirmed its commitment to the chronologic requirement:

> We interpreted Rule 801(d)(1)(B), M.R.Evid., in Scheffelman and refined that interpretation in State

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> v. Lunstad (1993)... . We emphasized in Lunstad that prior consistent statements are admissible only when a specific motive to fabricate is alleged and the prior consistent statements were made before the time the alleged motive to fabricate arose. Lunstad, 857 P.2d at 726.
>
> State v. Fina, 273 Mont. 171, 182, 902 P.2d 30, 37 (1995).

The Court observed that, although the defendant wanted to admit the consistent out-of-court statements of the defense witnesses:

Fina does not establish that any specific motive to fabricate was raised at trial regarding any of the witnesses whose statements are at issue here. He also does not establish that any express or implied charge was raised that any or all of the witnesses were improperly influenced or had improper motives.

273 Mont. at182, 902 P.2d at 37.

Fina did not identify on appeal any impeachment by the prosecution which would trigger 801(d)(1)(B); indeed, he did not identify any particular witness or any particular out of court statement which would qualify for non-hearsay treatment. Therefore, 801(d)(1)(B) did not apply, and the consistent statements remained inadmissible hearsay.

The Lunstad/Fina gloss on Sheffelman helps, but not enough. The Montana Supreme Court cited Lunstad in a 1998 case which confuses the issue even more. State v. Johnson is another sexual assault case. This time the defendant was not a family member, and the victim was an adult. She claimed that, instead of giving her the promised ride home, Johnson drove her to an isolated trail outside Hamilton and raped her. The defense theory was that the intercourse was consensual, and that the victim concocted the rape story afterwards to maintain her relationship with her boyfriend and another man (the Supreme Court described this as "hiding her promiscuity from others").

The victim gave a lengthy interview to the police after she was rescued by passers-by. There were two versions of the typed transcript, which led to confusion at trial because the defendant had a version which the victim had annotated in handwriting, which somehow the prosecution did not have. Johnson's lawyer used the annotated version to impeach the victim during her cross-examination, and may have adduced some of the same statements during the detective's cross-examination as well (the case is not clear on this point). The State then offered the whole transcript into evidence "under Rule 801(d)(1), M.R.Evid., as either a prior consistent or prior inconsistent statement."

State v. Johnson, 288 Mont. 513, 522, 958 P.2d 1182, 1188 (1998). The confusion lay in exact words the victim handwrote in the transcript: "I kept going back and forth." The defense claimed this meant that she was physically going back and forth, voluntarily participating in the encounter with pleasure; the victim explained that this phrase described her mental state, alternating between scared and furious, which would be consistent with her testimony.

The trial judge chose the consistent statement approach, and admitted the transcript under 801(d)(1)(B). Both sides discussed the prior statement in their closings: the prosecutor argued that it was "not that inconsistent" with her testimony, while the defense argued that it was very different from what she said on the stand and supported the defense theory that she had fabricated the story all along. On appeal, the defendant cited both Tome and Lundstad. The Court dismissed Tome in a single observation that the federal version was different from M.R.E. 801(d)(1)(B) (which did not refer at all to the Commission's express desire to emulate and clarify the federal rule); see above. The Court then went on to cite with approval the Lunstad principle that if the defendant alleges the victim has been lying from the start, there is no "subsequent" fabrication, so consistent out of court statements are not admissible. The Court's next two paragraphs are both confused and confusing:

> ¶ 45 In this case, the prior statement in the annotated transcription may have had general impeachment value to the defense, but ... nothing in it supported Johnson's theory that the victim was concocting the rape to hide her promiscuity from others. The prior statement thus provided no independent basis for defense counsel to question the victim about a "motive to lie all along," but was relevant only to suggest that the victim's overall credibility was suspect because of her various statements concerning the rape.
>
> ¶ 46 The annotated statement was initially brought before the jury by the defense, for purposes of impeachment. The defense attempted to use the annotated transcription as *a prior inconsistent statement by the victim. Under that argument, the annotated transcription would have had to predate the motive to lie.* But, as the District Court noted, the victim's statements in the annotated transcription proved to be fairly consistent with her trial testimony. *A prior consistent statement which predates the motive to lie is admissible into evidence*. Therefore, we conclude that the State was thereafter entitled to utilize the statement as a prior consistent statement to rehabilitate the witness, and the annotated transcription was admissible under Rule 801(d)(1)(B), M.R.Evid.
>
> State v. Johnson, 288 Mont. 513, 524, 958 P.2d 1182, 1189 (1998).

Obviously, the Court made perhaps a typographical error, but its confusion between the requirements for prior consistent v. prior inconsistent statements deepens the murk.

In State v. Hibbs (1989), four young girls accused their 58 year old neighbor of forcing them to perform sexual acts on him. All four of them testified at trial. After they had testified, the prosecutor was allowed to call two of their mothers and a social worker, who testified about prior consistent statements made by the girls. The defendant objected to all the consistent statements as hearsay, but was overruled. The Supreme Court affirmed their admission under Rule 801(d)(1)(B), citing the defense attack on the credibility of the girls, but acknowledging that

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it was a general attack that they did not know the difference between fantasy and truth. In opening, defense counsel warned the jury: "Be sure...the children...know the difference between truth and fantasy, between the truth and a lie." In his cross-examinations of them, he continued with this theme: "he questioned the children *repeatedly* (original emphasis) over whether they knew what a lie was and whether they had ever lied." The Court held: "In asking such questions, defense counsel placed the credibility of the child witnesses in issue," State v. Hibbs, 239 Mont. 308, 313, 780 P.2d 182, 185 (1989), and therefore their prior consistent statements were admissible to rebut the attack on the witnesses' credibility. There was no analysis at all about the chronological relationship between the alleged fabrication and the out of court statements, nor any identification of any improper motive or influence, both of which appear to be necessary under the plain language of the rule. The lesson from Hibbs seems to be that if the opponent attacks the credibility of any witness in any way, all prior consistent statements of that witness made out of court are admissible. This simply does not comport with either the plain language of Rule 801(d)(1)(B) or the Comments of the Montana Evidence Commission to that rule.

Cases where the prior statement was inadmissible hearsay because it did not predate the alleged reason to lie

In State v. McOmber, 340 Mont. 262, 173 P. 3d 690 (2007), discussed earlier, the defense clearly triggered 801(d)(1)(B) when it cross-examined witness Bill Peltier about the plea bargain he received for a related charge, implying he shaded his testimony against McOmber in return, an "improper motive" or "improper influence." After Peltier testified against McOmber, the prosecution offered as exhibits both Peltier's written statement and the transcript of his interview, both made while he was in jail. The defense counsel used the old "gilding the lily" objection, which actually gets to the common law rule that generally prior consistent statements are not admissible (which would be a better phrase for your objection). The trial judge overruled the objection, citing M.R.E. 801(d)(1)(A), and admitted both statements. The Supreme Court found this was error, on a chronological ground:

> ¶ 15 We have previously held that the prior consistent statement rule "only applies when the declarant's in-court testimony has been impeached by another party's allegations of subsequent fabrication, improper influence, or motive." *State v. Lunstad,* 259 Mont. 512, 515, 857 P.2d 723, 725 (1993). **In addition, to qualify as a prior consistent statement under M.R. Evid. 801(d)(1)(B), the statement must have been made *before* the alleged motive to fabricate arose.** *Teters,* ¶ 27; *State v. Veis,* 1998 MT 162, ¶ 24, 289 Mont. 450, ¶ 24, 962 P.2d 1153, ¶ 24 (citing *Tome v. U.S.,* 513 U.S. 150, 167, 115 S.Ct. 696, 705, 130 L.Ed.2d 574 (1995)). (Emphasis added).

State v. McOmber, 2007 MT 340, 340 Mont. 262, 267, 173 P.3d 690, 695. The timing of the prior statements and the motive to lie was critical:

> Crucially, as to the requirement that the statements were made prior to the time the alleged motive to fabricate arose, McOmber claims this requirement was not met and, therefore, the exhibits' admission was in error. The State charged Peltier with the felony count of issuing a bad check on December 2, 2003, and he was arrested in February 2004 on that charge. While incarcerated in the Powell County jail, Peltier made his written statement on February 18, 2004, and the interview with Captain George took place the following day. McOmber maintains that Peltier's motive to fabricate existed prior to the time he made his statements to Captain George—i.e., the motive arose when Peltier was arrested. We agree with McOmber's assertion. Given that Peltier's prior consistent statements were made after he had been charged and jailed on the felony charge, it is clear that the alleged motive to fabricate arose *before* he made those statements.
>
> State v. McOmber, 2007 MT 340, 340 Mont. 262, 267-68, 173 P.3d 690, 695. The admission of the prior statements was error.[1]

State v. Maier was a1999 case, involving attempted homicide. One of the shooting victims was Robert Bradford. He testified at trial, identifying Maier as the shooter. The defense cross-examined to the effect that Bradford first found out "around town" who had been arrested for the shooting, and then went to the police and told them it was Maier. The prosecutor was allowed to call the detective who recounted Bradford's out-of-court statement that Maier was the shooter. The Supreme Court concluded that this was an inappropriate use of 801(d)(1)(B) because of the timing of the alleged motive to fabricate and the out of court statement:

> ¶ 38 We conclude that Detective Hollis' testimony concerning what Bradford told him about the identity of the shooter was not a prior consistent statement. In *State v. Lunstad* (1993), 259 Mont. 512, 857 P.2d 723, this Court held that Rule 801(d)(1)(B) "only applies when the declarant's in-court testimony has been impeached by another party's allegations of subsequent fabrication, improper influence, or motive." *Lunstad,* 259 Mont. at 515, 857 P.2d at 725. The *Lunstad* Court further held that prior consistent statements must be made before a declarant's alleged motive to fabricate arose. *Lunstad,* 259 Mont. at 516, 857 P.2d at 726.
>
> ¶ 39 In the present case, Maier's cross-examination of Bradford clearly suggested that Bradford's motive to fabricate arose as soon as he learned of Maier's arrest:
>
> Q. So isn't it true that you didn't see who was

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1 The Court held, however, that this trial error was harmless, and the conviction stood.

> sitting in there shooting at you-
>
> ...
>
> Q. That you ran around town trying to get the name of who was sitting in that seat shooting at you. And once you got the name, because Mr. Maier had been arrested, you went in to the police and you told them, Mr. Maier is the one that was shooting at me? Isn't that true?
>
> A. No. I seen who it was. I just went around and tried to find out to verify my mind before I start accusing someone.
>
> Bradford testified that he thought he had talked to police about Maier several days after Maier was arrested. We conclude that Bradford's statement was not a prior consistent statement under Rule 801(d)(1)(B), M.R.Evid., because he made it after his alleged motive to fabricate arose.
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> State v. Maier, 1999 MT 51, 293 Mont. 403, 412, 977 P.2d 298, 305. Once again, though, the Court held that this error was harmless.

Similarly, in State v.Veis, 289 Mont. 450, 962 P.2d 1153 (1998), the defense theory was that the young victims had been sexually abused but by someone other than Veis. In support of that theory, the defense introduced a note which one of the boys had written, indicating that he had been raped by his father (who was not Veis). The boy's explanation was that the note was false, but he had written it to work up his courage to report Veis' abuse. The prosecutor then called the boys' therapist, who recounted what the boys had said about their abuser during therapy sessions. The Supreme Court held this evidence to be hearsay, outside the non-hearsay definition of 801(b)(1)(B):

> in order for a statement to be admissible as a prior consistent statement pursuant to Rule 801(d)(1)(B), M.R.Evid., it must, among other things, have been made before the declarant had a motive to fabricate. *See Tome v. United States* (1995), 513 U.S. 150, 167, 115 S.Ct. 696, 705, 130 L.Ed.2d 574, 588; *State v. Lunstad* (1993), 259 Mont. 512, 517, 857 P.2d 723, 726. Here, based on Veis's theory of defense, S.J.'s motive to fabricate his accusations about Veis existed prior to the time that he revealed during therapy to Dugan-Laemmle that Veis was his abuser. Accordingly, testimony from Dugan-Laemmle regarding who S.J. identified during the exercises constitutes hearsay that is not admissible as a prior consistent statement.
>
> State v. Veis, 1998 MT 162, 289 Mont. 450, 962 P.2d 1153, 1156-57. (However, here again the Court went on to hold that the error in admitting the hearsay testimony was harmless; see above).

State v. Lunstad was actually decided on "trigger" grounds, the Supreme Court holding that the prosecutor can't create the impeachment of its own witness on cross-examination of the defense witnesses, as a pretext to admit prior consistent statements. (See above). However, the Court went on to discuss the chronology requirements, and held that the statement did not qualify for admission under 801(d)(1)(B) anyway:

> [W]e also hold that the statements of C.H. were not admissible under Rule 801(d)(1)(B), M.R.Evid., because such statements were not made prior to the time C.H.'s alleged motive to fabricate arose. In this case, Mr. Lunstad claimed that C.H. threatened to tell her father about the touch if Mr. Lunstad would not give her a piggy back ride. The only possible motive to fabricate suggested by Mr. Lunstad was the fact that C.H. was angered at him for refusing her the piggy back ride. Therefore, any "motive" arose on November 4, 1991, the day C.H. allegedly made that statement to Mr. Lunstad. Any statements C.H. made after that date, including statements to her father (November 4, 1991), the police officer (November 5 and 6, 1991), and her counselor (January, 1992), could not be prior consistent statements, because they were made subsequent to the time C.H.'s alleged motive to fabricate arose. Therefore, C.H.'s statements were not admissible as prior consistent statements as contemplated by Rule 801(d)(1)(B)...
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> 259 Mont. 512, 516-17, 857 P.2d 723, 726 (1993).

Conclusion

It is time to clean up this troublesome area of Montana evidence law. The easiest way to do that is to change the language of the rule itself so that it conforms exactly with the current version of F.R.E. 801(d)(1)(B). The recent stylistic amendments to the F.R.E. substantially improved 801(d)(1)(B) by repeating the temporal requirement for both types of impeachment: "offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying."** This is the best way to accomplish the original intent of the Montana Commission to retain the common law disfavor of out-of-court consistent statements, while allowing those few which actually counter specific accusations of improper influence on a witness' testimony.

When the change is made, the Montana Commission Comment to the new version of the rule can reiterate the general rule (that prior consistent statements are inadmissible hearsay) and clarify the specific requirements for the few exceptions to that rule. At the same time, the Montana Supreme Court should acknowledge and resolve its prior inconsistent applications of M.R.E. 801(d)(1)(B), so that both trial judges and trial lawyers clearly understand when a statement qualifies for admission under the rule. The Court should also clarify the divergence in its opinions, some of which seem to state categorically that error in admitting prior consistent statements which do not qualify for the non-hearsay definition is always harmless and not a ground for reversal. (On the other hand, the Court could choose to affirm its occasional statement that all prior consistent statements are admissible, as a few other states have done, which would be another way to solve the problem. If the Court chooses this approach, the M.R.E. should be amended accordingly, so that the rule and the case law are consistent).

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