

Question # 4

Alan, age 18, decided that as a graduation prank he would set fire to the athletics equipment shed at the high school. Late on a Saturday night, Alan, who had consumed a few beers, told his friend, Brian, about his plan and asked Brian to drive him to the school. "That's an idiotic idea," Brian told Alan. "What if somebody's in there? Somebody might get hurt." Alan replied that he didn't think it was likely anyone would be there late at night. Brian said, "It's not my business why you want a ride. I'll give you a lift, and what you do while you're there is your problem." Brian drove Alan to the school and parked a hundred feet from the athletics shed. The shed was made of wood. Alan had brought a single pack of paper matches, but was unable to set the shed aflame. Brian, watching from a distance, beckoned to Alan and offered him his cigarette lighter, saying, "Get this over with so we can get out of here." Alan returned to the shed with the lighter and was able to get the shed to smolder, but not catch fire. After several tries, he gave up. Alan and Brian left the school. Because of his intoxication, Alan did not hear Carl, a local homeless man, snoring inside the shed. Unbeknownst to Alan or Brian, the shed was still smoldering. Two hours later, high winds caused the remaining sparks to burst into flame; the resulting fire destroyed the athletics shed. Carl was still asleep in the shed and was killed by the fire.

What crimes, if any, have Alan and Brian committed? What defenses can each assert, and will they be successful? Discuss.

Model Answer Criminal Law
Question # 4

1. What crimes, if any, have Alan and Brian committed? What defenses can each assert, and will they be successful? Discuss.

State vs. Alan

Solicitation

Solicitation is the, inciting, or inducing of another to commit or to join in the commission of an unlawful act.

Alan, age 18, decided as a graduation prank he would set fire to the athletics equipment shed at the high school. Alan told his friend Brian about his plan and asked Brian to drive him to the school. Thus, the prosecution will argue Alan's act of asking Brian for a ride in order to help in his plan to burn the equipment shed shows his intent to entice and encourage Brian to participate in an unlawful act.

Alan will counter that he was merely asking for a ride to the school and that he did not ask Brian to participate in setting fire to the equipment shed. The fact that he did not ask Brian to participate shows he had no intent to entice or encourage Brian to commit the unlawful act of arson, despite asking for a ride to the school.

Therefore, Alan cannot be charged with solicitation.

Conspiracy

Conspiracy is an agreement between two or more persons with the specific intent to commit an unlawful act. At modern law you need an overt act.

Alan decided that for a graduation prank he would set fire to the athletics equipment shed at the high school. Alan told his friend Brian about his plan and Brian stated "That's an idiotic idea, What if somebody's in there? Somebody may get hurt." Although Alan replied that he did not think anyone would get hurt, Brian said "It's not my business why you want a ride." Further, Brian never agreed with Alan to set fire to the athletics equipment shed. Brian will further argue that he only agreed to the limited role of providing Alan with a ride to the high school. Thus, an agreement was formed, but only for a ride to the high school.

The agreement was between Alan and Brian. Thus, it involved two persons.

By limiting his agreement with Alan to only provide him with a ride to the high school, there was no specific intent to commit an unlawful act.

Therefore, Alan and Brian are not guilty of conspiracy.

Attempted Arson

An attempted crime is the specific intent to commit a crime with the taking of a substantial step towards completion of the crime by one who has the apparent ability to commit the crime. A substantial step is more than mere preparation, but less than perpetration of the crime.

Alan decided that as a graduation prank he would set fire to the athletic equipment shed at the high school. Thus, Alan had the specific intent to commit arson.

Late on Saturday night, Alan told his friend of his plan and asked for a ride to the high school. Alan's friend Brian drove Alan to the high school. Alan had brought a single pack of paper matches and tries to set the shed on fire. These acts show Alan performed a substantial step towards completion of the intended arson.

The fact that Alan had a friend drove him to the high school and he took a pack of matches with him shows Alan had the apparent ability to commit the arson.

Once at the high school, Alan tried to set the shed on fire, but was only able to get it to smolder. These acts by Alan go beyond mere preparation, but are less than perpetration of the crime of arson since the shed would not ignite and he gave up.

Thus, Alan can be charged with an attempted arson.

Factual Impossibility

Factual impossibility is where the defendant intends to violate the law, but because of factors of which he is unaware, there is no chance he will succeed in doing these things or causing the intended result. Factual impossibility is universally rejected as a defense to a charge of attempt.

Alan arrived at the high school to carry out his plan to burn the high school athletics equipment shed. However, Alan was unable to set the shed on fire. He brought a single book of matches and was unable to ignite the shed. Further, when he used Alan will argue since he could not ignite the shed, this makes it impossible for him to commit the arson. Thus, it was factually impossible for Alan to commit the arson.

However, since factual impossibility is universally rejected as a defense, his inability to ignite the shed in order to commit the attempted crime of arson is no defense.

Arson

Arson is the malicious burning of the dwelling house of another.

Alan decided to play a prank on the high school and burn the athletic equipment shed. Further, he found a friend to give him a ride and brought matches with him. When the shed would not

ignite he gave up, but his friend offered him his cigarette lighter and stated Get this over with so we can get out of here. With the lighter he returned to the shed and was able to get the shed to smolder, but no catch fire. However, two hours later high winds caused the remaining sparks to burst into flames. Thus, Alan's conduct in starting the smolder which resulted in a fire causing the shed to burn was malicious.

The subsequent fire resulted in the shed bursting into flames and burning down. However, this is a shed and not a dwelling house of another. Thus, no dwelling house of another.

Alan will not be charged with arson.

Modern Law Arson

Arson is the malicious burning of a structure.

As discussed under common law arson supra Alan decided to play a prank on the high school and burn the athletic equipment shed and tried to ignite the shed.

After Alan's attempt to burn down the shed failed, and then he tried with his friend's lighter causing a smolder and after a few hours resulted in a fire burning down the shed shows a malicious burning of a structure.

Therefore, Alan will be charged with modern law arson.

Murder

Murder is an unlawful killing committed with malice aforethought. Malice aforethought can be evidenced through willful and wanton conduct.

Alan did take a cigarette lighter and tried to set the equipment shed on fire. His conduct did result in a fire and burned the shed down killing Carl who was a sleep in the shed. Thus, an unlawful killing occurred. Alan was trying to play a practical joke by burning down the equipment shed at the high school. Based on his conduct and the facts that he did not know anyone was in the shed shows he had no intent to kill, or intent to cause great bodily harm.

However, Alan did take a cigarette lighter and tried to set the equipment shed on fire. Although the shed never ignited while Alan was present, the shed started to smolder which when high winds came caused the remaining sparks to burst into flames resulting in the athletics equipment shed to burn killing Carl. Alan's act of igniting the shed believing no one was in the shed or around on the school grounds shows a reckless disregard for human life. Therefore, Alan's conduct was willful and wanton.

Alan will argue that he was merely playing a prank and had no knowledge that a homeless man was sleeping in the shed. The high winds caused the shed to burst into flames causing the death

of Carl, which was a mere accident.

However, the prosecution will rebut by stating Alan's act of lighting the shed with a lighter causing it to smolder and then leave the school without making sure there were no hot ashes, such conduct equates to a reckless disregard for human life. Thus, malice is established.

Alan will be convicted of murder.

Actual Causation

"But for" Alan igniting the shed with a smolder and leaving without making sure that it was out the shed would not have caught fire and killed Carl.

Therefore, Alan is the actual cause of Carl's death.

Proximate Causation

Alan will argue that a high wind caused the remaining sparks to burst into flames resulting in the shed burning down and this was an intervening act.

However, Alan did take a cigarette lighter to the shed and tried several times to ignite the shed. He left with the shed smoldering. Thus, the act of leaving the equipment shed smoldering which eventually turned into a fire because of a high wind was the consequences of Alan's act of trying to set fire to the shed. Thus, Carl's death is a foreseeable result of Alan's conduct.

Therefore, Alan is the proximate cause of Carl's death.

First Degree Murder

First degree murder is shown by specific intent to kill, plus premeditation and deliberation. Alan's act of trying to set fire to the equipment shed with the belief that no one was at the school late at night show he did not have premeditation to kill. Thus, Alan did not have the requisite specific intent to kill Carl.

However, the prosecution will argue the felony murder rule.

Felony Murder Rule

Any death caused in the commission of, or in an attempt to commit, a dangerous felony is murder. Malice is implied from the intent to commit the underlying felony. However, the felony must be distinct from the killing itself.

Alan just left the school after trying to set fire to the equipment shed. His conduct resulted in burning down the equipment shed i.e. arson discussed supra. The fact that Alan was not successful in burning down the shed until later will not negate the felony murder rule. When

Carl died in the fire this was the result of Alan's act. Even if the court does not find arson on behalf of Alan, an attempted crime of arson will still show liability under the felony murder rule.

Therefore, Alan would be guilty of felony murder for the death of Carl.

Therefore, Alan may be convicted of first degree murder.

Second Degree Murder

Second degree murder is all murder that is not first degree murder.

If Alan's conduct is found to be wanton and reckless, he will be found guilty of second degree murder.

Involuntary Manslaughter

Involuntary manslaughter is the unintentional killing of a human being without malice.

As stated above, Alan's act of trying to set fire to the schools athletic equipment shed which resulted in the shed catching fire and burning killing Carl; who was asleep in the shed shows Alan acted in a criminally negligent manner.

Alan will be guilty of involuntary manslaughter.

Justification -- Infancy

A child between the age of seven and fourteen years of age is presumed incapable of forming criminal intent. However, the presumption is rebuttable and the prosecution can introduce evidence sufficient enough to establish that the defendant knew what he was doing was wrong.

Based on the facts Alan is eighteen and will not be presumed incapable of forming criminal intent.

Therefore, it appears that Alan does not have a valid infancy defense and will be found guilty of conspiracy, arson, and murder.

Intoxication

Intoxication is a complete defense to a specific intent crime. The defendant must prove a lack of mens rea to negate the specific intent.

Based on the facts, Alan has just consumed a few beers. However, he decided to set fire to the school's athletic equipment shed as a prank. Since he was aware of what he was doing based on

explaining his plans to his friend Brian as well as going to the school and trying to ignite the shed shows that he was fully aware of his actions. Thus, he had the specific intent to burn down the shed.

Hence, intoxication is no defense.

State v Brian

Conspiracy:

Defined supra.

As discussed Alan decided for a graduation prank he would set fire to the athletics equipment shed and asked Brian for a ride to the school. Brian stated “That’s an idiotic idea, “What if somebody’s in there? Somebody may get hurt.” Although Alan replied that he did not think anyone would get hurt, Brian said” It’s not my business why you want a ride.” Brian never agreed with Alan to set fire to the athletics equipment shed.

The agreement was for a ride to the high school. Thus, an agreement was formed, but only for a ride to the high school. The agreement was between Alan and Brian. Thus, it involved two persons.

Brian told Alan that the proposed prank was an idiotic idea and only agreed to give him a ride to the high school. Therefore, there was no specific intent to commit an unlawful act.

Therefore, Brian is not guilty of conspiracy.

Accomplice Liability

Any person who aids, abets, or assists a principal in committing a crime with the specific intent that the crime be carried out will be held liable for accomplice liability.

Alan decided to play a prank on the high school and burn down the athletic equipment shed. Brian gave him a ride to the school in order for him to carry out his prank. When the shed would not ignite with the matches Alan brought he gave up on his attempt to burn the shed. However, Brian offered him his cigarette lighter, and stated “Get this over with so we can get out of here.” Only then did Alan return to the shed in order to ignite the shed. Alan was able to get the shed to smolder, but it did not catch fire. However, two hours later high winds caused the remaining sparks to burst into flames. Thus, Brian’s conduct of providing the lighter to Alan aided Alan in committing the crime of arson. Further, Brian’s statement “Get this over with so

we can get out of here” when he turned the lighter over to Alan, shows Brian’s intent to assist Alan with his “prank” even though Brian did not participate in setting the fire himself.

Therefore, Alan will be held liable as an accomplice.

Scope of Accomplice Liability

An accomplice is liable for any of the crimes that he aided, abetted, or assisted with.

Brian will be held liable for all the crimes that occurred in furtherance of Alan’s actions of burning down the shed. Thus, Brian will be guilty for modern law arson and the murder of Carl as a Principal in the Second Degree since he did not participate in setting the fire.

Question # 5

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at \$10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

Constitutional Law Model Answer Question # 5

1st Amendment – Freedom of Speech

First Amendment freedom of speech is a preferred right under the United States Constitution, applicable to the states through the 14th Amendment. It is not an absolute right and can be restricted by the government under certain situations.

Commercial Speech

Commercial speech is protected as long as it is not false or misleading. The City can regulate if there is a substantial governmental interest, that the regulation advances the governmental interest, and the regulation is not more extensive than necessary to serve that interest.

City will argue that any postings on the central bus station's bulletin board are commercial speech and that they can regulate it.

The rationale behind any posting on the bulletin board to be in both English and Spanish is because half of the population in that area is Spanish. Since the Spanish population would be using the bus station, they should be able to read whatever is posted. Hence, there is a substantial governmental interest.

Further, since the population is half Spanish, the government has an interest to keep all of their citizens informed. In order to make sure everyone is informed, a communication must be in both languages. In order to reasonably make sure that everyone is informed is to require anything posted on the central bus station's bulletin board to be in both English and Spanish. Therefore, the requirement does advance a governmental interest.

Lastly, the regulation in only requiring any postings on the central bus station's bulletin board is not more extensive than necessary to serve the City's interest.

Therefore, the speech can be regulated.

Content Based Regulation

Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential 1st Amendment right. Such speech is presumptively invalid and subject to strict scrutiny. Further, if the law restricts speech based on its content, whereby it is based on the subject matter or viewpoint of the speech, strict scrutiny review applies.

The AAO will contend that the City's requirement that all posted bulletins placed on the central bus station's bulletin board must be in both English and Spanish is a regulation based on the content of the speech. Further, because it is only allowing flyers that are posted in Spanish and English, the regulation is restricting AAO's message against immigration which would require only posting flyers in English, as posting flyers in Spanish would communicate to the Hispanic community, which is an immigrant population. Therefore, the City's regulation is content based and must face strict scrutiny in order to be upheld.

Strict Scrutiny

In order to meet strict scrutiny, the government must show a compelling state interest and must be narrowly tailored to meet that interest.

City will contend that the regulation is not aimed at the content of what is being communicated to the public. Therefore, City will contend that it does not need to meet the strict scrutiny test. AAO will claim that the requirement that all posted documents to be in both English and Spanish is a regulation based on the content of the speech.

AAO will contend that the regulation requiring any posting placed on the central bus station's bulletin board to be in both English and Spanish. AAO's primary goal is the restriction of immigration. What good would it do to place the flyer in Spanish since the primary purpose of the flyer is to restrict immigration? The City regulation is aimed at preventing AAO from communicating their message, and the regulation is aimed at the content. In addition, AAO will likely argue that since its primary goal is restricting immigration, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak and read English. Thus, this is a further basis for showing the regulation is based on the content of the speech.

City will claim that the regulation is content neutral because it doesn't matter exactly what you say for the regulation to apply. In turn, you must post any flyer in both English and Spanish. City will claim this regulates the manner of the speech and not the content.

City's population is equally divided between English and Spanish-speaking people. The City has a compelling interest to require that all bulletins placed on the City's bulletin board to be in both English and Spanish because City's population is about equally divided.

Furthermore, the regulation requires all "free-posted" bulletins be in both English and Spanish. Therefore, the regulation is narrowly tailored. However, AAO will argue that the regulation only applies to free postings. Since any "paid" for bulletins placed on the City's bus station's bulletin board does not need to be in both Spanish and English, the regulation is not narrowly tailored.

It does not appear that the restriction is based on the subject matter or viewpoint of AAO's speech. AAO could post the same flyer in Spanish stating that its primary purpose is to promote immigration. The court will agree that the regulation is not aimed at the content of the speech, and that the regulation is content neutral. Therefore, strict scrutiny does not apply.

First Amendment Speech – Content Neutral

Content neutral is a regulation not aimed at the content of the message.

City will argue that the regulation requiring any posting to be in English and Spanish in City's central bus station is not aimed at the suppression of the message. Thus, the regulation is content neutral.

AAO will claim that the requirement that "all" free-posted documents to be in both English and Spanish is a regulation based on the content of the speech. Since the AAO organization's primary goal is restricting immigration, which is known by City, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak and read English. Moreover, the content of AAO's posted documents will be effectively communicated to Spanish-speaking residents, hence the regulation does affect content by requiring the content to be in specific languages.

The City will claim it is content neutral because it doesn't matter exactly what you say, just how you say it. City will claim the regulating of the manner of the speech. Since the regulation is regulating conduct by banning all free postings from City's central bus station that does not have both English and Spanish, it is not aimed at the suppression of the message. Thus, the regulation is content neutral.

Therefore, the regulation is content neutral.

Public Forum

Public forums are areas which the constitution requires that the government allow open to speech. These areas include parks and sidewalks.

The restriction is taking place within the central bus station, wherein the city has provided a large bulletin board that is available for free posting of documents. The central bus station will not be deemed a public forum, as it is not a constitutionally required forum for the government to open up to speech. People using the central bus station need to get to and from their destination. To have people gather there in order to speak would interfere with the bus transportation, since there would be people who are crowding around to hear the speaker, and others who are not even taking the bus, but causing congestion.

Nevertheless, if it were to be considered a public forum and the regulation affects a person's right to use a public forum for speech, the City will have to meet the burden of strict scrutiny in order to have the regulation upheld. In order to meet strict scrutiny, the City must have a

compelling interest and the regulation affecting speech must be narrowly tailored to meet the compelling interest.

The City will argue the purpose behind the ordinance is due to City's population that is equally divided between English and Spanish-speaking people. Since both English and Spanish-speaking people use the central bus station, they should be able to read whatever is posted on the bulletin board. The purpose is to allow "all" who use the central bus station the right to read any flyer posted on the bulletin board. Thus, there is a compelling interest in allowing all persons who use the bus station to read any posting posted within the central bus station.

Furthermore, the ordinance requires all free-posted documents to be in both English and Spanish. The restriction is substantially related to the purpose of communicating to all individuals in its population. The City's population is about equally divided between English and Spanish-speaking people, and therefore it has an important purpose of making sure that messages posted on the board for free will be communicated to all its population. Hence, the ordinance is narrowly tailored.

AAO will contend the ordinance only applies to all free-posted documents, and not paid posted documents. In other words, the ordinance is not narrowly tailored since paid postings would not have to comply. Further, the AAO flyer is in English because the flyer is stating their goal is the restriction of immigration. What good would it do to place the flyer in Spanish since the primary purpose of the flyer is to restrict immigration? What about those persons who do not read English or Spanish. What about other people who only speak and read French? How would they be able to read the flyer? Where would you draw the line?

However, assumedly the central bus station only allows free postings on the bulletin board; and the general population is half Spanish. The court would find that the ordinance is narrowly tailored. Therefore, since it applies to any free postings the ordinance is narrowly tailored.

Therefore, the ordinance does not violate AAO's First Amendments rights to speak in a public forum.

Non-Public Forum

A non-public forum is a forum wherein the government may constitutionally restrict speech. These include military bases, sidewalks next to a post office, ad space on buses, and solicitation for money in airports. The restriction, however, must be viewpoint neutral and must pass the rational basis test. Here, AAO would have to argue that the restriction is not rationally related to a legitimate government interest.

The City will argue that the central bus station is a non-public forum and that the government must not open it to speech. Although the central bus station is likely to be deemed a non-public forum, AAO will argue that the City has changed the status of the forum by providing a large

bulletin board and making it available for people to post their flyers and messages. By doing so the City transformed a non-public forum to a public forum. City will argue because AAO is soliciting money for membership that they can restrict speech for solicitation of money in bus stations as it can in airports. However, this argument is unlikely to apply since AAO is not directly soliciting money but rather, only to those individuals who show up at the meeting and would like to become members by paying a membership fees.

Thus the bus station is not a non-public forum.

Time/Place/Manner

The government can regulate conduct in public forums where expression is allowed under time, place and manner restrictions. The City council will have to show that the ordinance is for an important governmental interest, narrowly tailored to serve that interest, and leaves alternative channels of communication.

As discussed above, the ordinance is content neutral. The City has this regulation in order to allow all persons who are using the central bus station the equal right to read whatever is posted on the bulletin board. However, they are only preventing free-posting versus paid postings. There is no nexus between free postings and paid postings. Although there are alternative channels that the Spanish-speaking people can get the information that is on the bulletin board by having the document interpreted, or the bus station have the flyer placed in Spanish, if one is interested to read the flyer thus, the ordinance is not narrowly tailored.

However, it would create an undue burden on the central bus station to have every flyer posted on the bulletin board translated into Spanish. The City will contend that there is a significant interest in communicating with and including the Spanish-speaking population, which make up about ½ of the people.

Thus, the regulation does not violate AAO's rights guaranteed under the First Amendment. Because it is necessary to communicate with your residents, the City has a significant interest. AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. The City can require English/Spanish communications around heavily populated Spanish-speaking areas. However, since the population is half Spanish that would include the bus station as a highly populated class requiring English/Spanish in the posted bulletins at the bus station.

Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in another manner. To be narrowly tailored there needs to be a tight fit. However, because this is a central bus station, it is likely that many Spanish-speaking people use it and therefore need the translation

AAO or others who want to disseminate their information can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board, thus leaving alternative channels of communication.

Thus, the City can regulate under time, place and manner against what is posted on the City's bus station bulletin board.

Freedom of Association:

The government may not punish individuals for joining any association unless the individuals know of the unlawful purpose of the association, the individual actively participates, and the individual intends to advance the illegal purpose.

AAO's primary goal is the restriction of immigration. This is not an unlawful purpose. Therefore, the government may not punish anyone for their freedom to associate with the AAO. AAO will argue that it is violating its freedom of association by restricting its message. It will argue that the requirement is unconstitutional because the AAO is an intimate association and it would chill its expressive activities. However, this argument is unlikely to prevail as argued above, because AAO's message of anti-immigration can be communicated in multiple languages and would not violate its freedom of association rights.

Question # 6

A car driven by Dunn collided with Empire Trucking Co.'s truck driven by Kemper. Kemper died at the scene. Dunn and Dunn's passenger, Paul, were seriously injured. Paul sued Empire for personal injuries. Paul attempted to serve Sigel, an Empire mechanic who was on duty the day of the collision with a subpoena to appear at the trial, but the process server could not locate Sigel. The following occurred at the jury trial.

1. Paul called the investigating police officer, Oliver, who testified that he talked to Wit at the scene a half hour after the collision. Oliver wrote down Wit's statement and attached it to his report. Oliver testified that Wit told him that he ran over to the scene from the curb and spoke to the driver of the car, Dunn, who told Wit: "I'm not going to make it and I want you to know the truth—the truck ran a red light."
2. Paul called a court reporter who properly authenticated the trial transcript of Sigel's testimony in *People v. Dunn*, a reckless homicide case relating to the same accident, in which Sigel testified that on the morning of the incident he warned Kemper that the brakes on the truck were defective, but Kemper drove the truck anyway. The transcript was admitted into evidence.
3. Paul called Dunn who testified that she had a green light and was driving below the speed limit when the defendant's truck struck her car.
4. Empire offered into evidence a properly authenticated copy of the conviction of Dunn for reckless homicide based on this incident. Paul's objections to this offer were sustained.
5. Empire asked Dunn on cross examination: "Q. Isn't it true your insurance carrier reached a settlement with Paul and as part of that written agreement, you agreed to testify on Paul's behalf today?" Paul's objection to this question was sustained.

Assume that all appropriate objections were made. Was the evidence in items (1), (2), and (3), properly admitted, and were the objections in (4) and (5) properly sustained? Discuss.

Evidence Model Answer Question # 6

1. Testimony of Oliver

Logical Relevance

Logical relevancy is any evidence having a tendency in reason to prove or disprove a material fact that is of consequence to the determination of the action.

Oliver's, who was the investigating officer, testimony that he talked to Wit, a witness at the scene of the accident which has a tendency in reason to prove that Kemper ran a red light and caused the accident, a disputed fact of consequences to the determination of liability for the cause of the car accident.

Therefore, the evidence is logically relevant.

Authentication

When contents of writing are being testified to a foundation must be laid in order to show that the writing is genuine by proof that the writing is what it purports to be.

Officer Oliver is testifying to the contents of the police report he created. Thus, he must lay a proper foundation as to the genuineness of the report in order to testify to its contents.

Best Evidence

When the contents of writing are being testified to, the original must be introduced.

Oliver is testifying that he talked to Wit at the scene of the accident a half hour after the collision. Oliver wrote Wit's statement and attached it to his report. The statement he is testifying to is that Wit told him that he ran over from the curb to the scene when Dunn told him that she was not going to make it, and I want you to know the truth - the truck ran the red light. Oliver is testifying to the contents of Wit's statement that is attached to the police report which is in writing.

Thus, the original, i.e. the statement, must be produced.

Multiple Hearsay

An out-of-court statement that incorporates other hearsay is admissible only if each part of the statement falls within an exception to the rule. Hearsay is an out of court statement offered to prove the truth of the matter asserted.

The police report contained several out-of-court statements. The first statement was from Dunn to Wit, then from Wit to Officer Oliver, and then from the officer to his report.

The statements were made while at the scene of the accident, thus, an out of court statement. Dunn's statement to Wit explains who caused the accident, the truth of the matter asserted. Further, Wit's statement to Oliver that Dunn told him I'm not going to make it and I want you to know the truth-the truck ran a red light, is being offered to show that Kemper caused the accident, the truth of the matter asserted. Further, the report with Wit's statement to Oliver, that he ran over to the scene from the curb and spoke to Dunn, who stated the truck ran a red light, an out of court statement offer to prove fault, the truth of the matter asserted.

The testimony is inadmissible hearsay.

In general, hearsay is inadmissible absent an exception. In a situation where a statement contains multiple levels of hearsay, such as here, all levels of hearsay must fall within an exception in order to be admissible.

Hearsay – Dunn

Defined Supra.

Dunn made his statement at the scene of the accident and thus it was made out of court. Furthermore, it is being offered to prove that Kemper ran the red light. Therefore, the statement is offered for the truth of the matter asserted and is hearsay and must fall within an exception to be admitted into evidence.

Present Sense Impression

A statement may come in as a present sense impression if the following elements are met. (i) Statements made contemporaneously with the event or condition; (ii) Statement is uttered upon perception or immediately thereafter; (iii) Statement relates to the event; (iv) Personal knowledge.

The statement was made contemporaneous to the accident since it happened shortly thereafter. Thus, the statement was made contemporaneously with the event, i.e. car accident. Further, the statement was made after the accident when Wit ran over to the scene when Dunn made his statement; hence the statement was uttered immediately after her perception of the accident. The

accident relates to the accident since it implicates Kemper, the truck driver. Furthermore, Dunn had personal knowledge since she was a party to the accident.

Therefore, the statement would qualify as a present sense impression statement, and would be admissible as an exception to the hearsay rule.

Excited Utterance

A statement may come in as an excited utterance if the following is established that there was.

(i) A startling event; (ii) Statement was made while declarant was under the stress of startling event; (iii) Statement relates to startling event; (iv) Personal knowledge.

The statement was made after a car accident, a startling event. The statement was made under the stress of the accident since it was made immediately after the accident. Additionally, the statement relates to the accident in that it implicates Kemper, the truck driver, as the cause of the accident. Furthermore, Dunn would have personal knowledge since she was a participant of the accident.

Therefore, the statement would qualify as an excited utterance statement, and would be admissible as an exception to the hearsay rule.

Dying Declaration

A statement may come in as a dying declaration if: (i) The declarant is unavailable;

(ii) Declarant believes death is imminent; (iii) The statement relates to the cause of death; (iv) Personal knowledge.

The facts indicate that Paul called Dunn to testify, thus she is available. Dunn was under the belief that death was imminent since she told Witt that she was not going to make it. The statement relates to the cause of death since it implicates Kemper, the truck driver, as the cause of the accident. Furthermore, Dunn would have personal knowledge since she was a victim of the accident. However, since Dunn is alive, and present at trial, the dying declaration exception will not work.

Therefore, the statement would not qualify as a dying declaration statement, and would not be admissible as an exception to the hearsay rule.

Hearsay – Wit

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.

Witt made the statement to Oliver a half hour after the collision and thus it was made out of court. Furthermore, it is offered to prove that the truck ran a red light. Therefore, the statement is hearsay and must fall within an exception to be admitted into evidence.

Present Sense Impression

Define Supra.

The statement was made 30 minutes after the collision and thus was not made contemporaneously with the collision. The statement was not uttered immediately upon perception of the accident since it occurred 30 minutes after the accident. The statement relates to the accident since it implicates Kemper, the truck driver, as the party at fault, and Witt has personal knowledge since he was present at the scene. However, due to the time lapse this exception will not apply.

Excited Utterance

Define Supra.

The startling event is the car collision. However, the statement was made 30 minutes after the collision and thus, Witt was most likely no longer under the stress of observing the accident. The statement related to the accident in that it states it was Kemper's fault since he ran the red light. Additionally, Witt would have personal knowledge of the accident since he was present at the scene. Therefore, since the statement was not made under the stress of the event, excited utterance exception will fail.

However, if the court does determine that Witt was still under the stress of the accident, the statement will fall under this exception and be admissible as an exception to the hearsay rule.

Hearsay- Police report

Official record

A document prepared by a public official who has a duty to record the document within the scope of their official duties is an exception to the hearsay rule.

The report is in the form of a written document and has Wit's statement attached. As a public official, Officer Oliver is under a duty to investigate scenes where collisions occur. Thus, Oliver was under a duty to report his findings. However, he does not have personal knowledge of how the accident occurred. Thus, he does not have personal knowledge of Wit's statement. Further, Wit is not under a duty to report. Therefore, the official record exception does not apply.

Since the statement is barred by hearsay, none of the statements are admissible.

2. Testimony of Court Reporter

Logical Relevance

Defined Supra.

The transcript tends to prove that Kemper had knowledge of the defective breaks of the truck before he drove off. Therefore, the transcript has a tendency in reason to prove that Kemper caused the accident, a disputed fact of consequences to the determination of liability for the car accident.

Thus, the transcript is logically relevant.

Multiple Hearsay

An out-of-court statement that incorporates other hearsay is admissible only if each part of the statement falls within an exception to the rule.

Hearsay – Transcript

Defined Supra.

The transcription was made during another hearing and thus made out-of-court. Furthermore, it is offered to prove that Kemper had knowledge of the defective breaks and thus it is offered for the truth of the matter asserted and is hearsay.

Prior Testimony

A statement made while under oath and subject to cross-examination at a prior proceeding with identical parties and issues and the Declarant is unavailable is admissible as an exception to the hearsay rule.

The testimony was given in homicide case relating to the same accident, thus the statement was made while under oath since Sigel testified at trial. Further, since he was a witness and took the stand he was subject to cross examination. However, Empire did not have the opportunity to cross examine Sigel since Empire was not involved in Dunn's criminal trial. In addition, Sigel was not a party nor in privity with the People v Dunn lawsuit. Thus, not an identical party. Although, the former action involved the same accident, the issues are not identical as to liability. Although Paul may try to argue he is a predecessor in interest, Sigel, the witness who gave the testimony is unavailable since the process server could not locate him.

Therefore, the prior testimony exception will not apply.

Hearsay – Sigel

Defined Supra.

Sigel made the statement out of court. However, the statement is not offered for the truth, that the brakes were defective, but for another purpose.

Effect on the hearer or reader

Testimony offered to show words spoken to another party in order to show how they reacted.

The statement is offered to show the effect it had on Kemper to establish that he had notice of the defect in the truck's brakes. Therefore, the statement is not offered for the truth but for the purpose to show Kemper had notice of the defective brakes and drove the truck anyway.

Therefore the statement falls within an exclusion to the hearsay rule.

However, since Sigel's testimony does not fall within an exception to the hearsay rule, the transcript is not admissible. Thus, the court admitted the transcript improperly.

3. Dunn's testimony in Court

Logical Relevance

Defined Supra

Dunn's testimony tends to prove that she had a green light and was driving below the speed limit when the defendant's car struck her car. Therefore, the evidence is relevant.

Hearsay

Defined Supra.

The speed limit sign was made out of court. However, it is not offered for the truth of the matter asserted. See discussion below.

Independent Significance

A statement is not hearsay if it has independent significance.

The speed limit has independent legal significance. Therefore, it is not hearsay. Thus, Dunn's testimony will be admitted.

4. Dunn's conviction admitted into evidence at trial

Logical Relevance

Defined Supra..

The reckless homicide conviction Dunn received for this incident has a tendency to prove that she was the negligent party. Therefore, the evidence is logically relevant.

Impeachment – Past crime

Any felony conviction dealing with dishonesty and false statements are admissible to impeach or any felony where its probative value is substantially outweighed by its prejudicial effect.

The reckless homicide conviction does not involve dishonesty; therefore, the judge has the discretion to exclude it if he believes its probative value is substantially outweighed by its prejudicial effect. It most likely is too prejudicial since it will influence the jury that Dunn was the negligent party. Therefore, it most likely is an improper mode of impeachment.

Legal Relevance

Even if the evidence is relevant, it is to be excluded if its probative value is substantially outweighed by considerations of prejudice, waste of time, or confusion.

Dunn will most likely argue that the probative value of the conviction is substantially outweighed by the prejudice it would create in the jurors. Therefore, the judge must weigh its probative value and its prejudicial effect to determine its admissibility. On balance, the judge would likely find it substantially more prejudicial than probative.

5. Cross-examination of Dunn at trial

Logical Relevance

Defined Supra.

The settlement agreement tends to prove that Dunn is biased towards Paul. Therefore, the evidence is logically relevant.

Bias

Evidence that a witness is biased tends to show that the witness has a motive to lie.

The settlement agreement will be admitted for the purpose of showing that Dunn is biased since the agreement requires her to testify in favor of Paul.

Settlement Offer

Evidence of compromises or offers to compromise is not admissible to prove liability for, or invalidity of, a claim that is disputed as to validity or amount. Not even direct admissions of liability during compromise negotiations are admissible. However, for the rule to apply there must be some indication that a party is going to make a claim. Furthermore, the claim must be in dispute as to liability or amount.

There is a pending claim against Empire since the trial has begun. Furthermore, Dunn's insurance company reached a settlement. Therefore, the compromise may not be offered to prove liability. Thus, the agreement is inadmissible as substantial evidence. However, it will be admissible to establish bias.