

Question 6

Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. After being given and waiving his Miranda rights, Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.

Donna's trial began while Calvin's case was still pending.

At Donna's trial, the following occurred:

- (1) The prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction.
- (2) The prosecutor then called Ned, an experienced detective assigned to the Narcotics Bureau, who testified that high level drug dealers customarily use others to transport their drugs for them.

In the defense case, Donna testified that she was not a drug dealer and that she knew nothing about the cocaine. She stated that she was merely meeting Calvin because he was an old friend who had called to say he was coming to town and would like to see her.

- (3) Donna further testified that when she was in the car with Calvin, she found a receipt for the rental car, which showed that Calvin had rented it six months prior to his arrest. She offered a copy of the receipt into evidence. The court admitted the document in evidence.
- (4) On cross-examination, the prosecutor asked Donna whether she had lied on her income tax returns.

The prosecutor had no evidence that Donna had lied on her income tax returns, but believed that it was likely on the basis that drug dealers do not generally report their income. Donna denied lying on her income tax returns.

Assuming that, in each instance, all the appropriate objections were made, should the evidence in numbers 1, 2, and 3 have been admitted, and should the cross-examination in 4 have been allowed? Discuss.

Answer A to Question 6

6)

QUESTION 6

(1) Should Officer Will's Testimony Have Been Admitted?

Relevance

In order for Officer Will's testimony to be permitted it must be relevant. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Officer Will's testimony was relevant because Calvin's statements, that he was driving the car for his friend Donna and that she was going to meet him at a particular destination to collect her cocaine, had a tendency to make the fact of consequence that he was a coconspirator with Donna for distribution of cocaine more likely. Therefore, the evidence was relevant.

FRE 403

Although relevant, Donna may argue that it should have been excluded on FRE 403 grounds. FRE 403 provides that relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, confusing/misleading the jury, or cumulative evidence. Donna will argue that there are no reliable ways of showing that this statement was true and therefore the probative value of the evidence is substantially outweighed by risk of unfair prejudice because a jury will hear the statement and automatically want to convict her. However, witnesses or convicts are often allowed to testify and any evidence against the truthfulness of the statement would be go to [sic] weight of Officer's testimony.

Hearsay

Donna will argue that the testimony was impermissible hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Officer Will is testifying about Calvin's comments to him when he was arrested. The statements that he was driving the car for his friend Donna and that he was going to meet her at a particular destination to collect her cocaine are all offered to prove that indeed the car was being driven for Donna and he was meeting her because it was her cocaine. So it is an out-of-court statement offered for the truth of the matter asserted because it is an oral assertion by Calvin out of court. Therefore, it is hearsay and is not admissible unless it comes in under an exception.

Coconspirator Admission

Prosecutor would argue that the statement was a valid party-opponent admission. Party-

opponent admissions are categorically non-hearsay and are exempted from the hearsay rule's exclusionary effect. A party-opponent admission can be done by a statement by a coconspirator during the course of the conspiracy and in furtherance of the conspiracy. Donna would argue that Calvin had already been arrested and therefore this was not made in furtherance of the conspiracy. Therefore, Calvin's statements could not come in under this exemption, 801(d)(2).

Statement Against Interest

The prosecutor could also have argued that this was a statement against interest and hence is an exception to the hearsay rule. Statement against interest comes in under FRE 804, which requires unavailability of the witness, which can include witnesses not testifying because of self-incrimination. Here Calvin would not be testifying because of such self-incrimination and he is not present at the trial, so therefore he is considered unavailable. Statement against interest excepts statements from the hearsay rule that are so contrary to declarant's criminal liability that a reasonable person would not have made such a statement unless it were true. The prosecutor would argue that a reasonable person would not admit his involvement in the transportation of cocaine unless it were true and therefore this falls within the exception since Calvin would be subject to criminal liability. Therefore, the evidence could potentially be admitted under this exception.

Confrontation Clause

Donna would argue that regardless the statement should not be introduced because it violates the confrontation clause. The 6th Amendment Confrontation Clause provides that an accused has the right to confront his accusers. For this reason, hearsay testimony used against an accused is often not permitted. The Supreme Court has determined that testimonial evidence can in no circumstance be used against an accused without the right to cross-examination at trial or a prior proceeding with the same motive to develop such testimony. Testimonial evidence are all [sic] statements made that a reasonable person would believe would be used by the prosecution against another at trial. Usually there requires at least statements to the police. So when Calvin spoke to the police officer and made statements about the culpability of Donna, he was giving testimonial evidence since it could have been foreseen by telling the police it could be used against her. Furthermore, he did so in hoping to get a plea bargain and hence it shows that it was testimonial. Therefore, since he cannot testify because of self-incrimination/presence in court and Donna had no opportunity at any time to cross-examine him, the police officer's statement regarding Calvin's statements should be excluded.

(2) Should Ned's Testimony Have Been Admitted?

Relevance

It must be determined whether Ned's testimony was relevant to the case. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Ned's testimony was relevant because it had a tendency to show that Donna was

potentially a high level drug dealer because she had someone else transport the cocaine and hence it is more likely that she should be convicted of distributing cocaine. Therefore, it should be allowed in as relevant.

Expert Testimony

Although relevant, the testimony must be valid expert testimony in order to be allowed in. Pursuant to FRE 104, a court must make the preliminary fact determination of whether an expert is qualified to give expert testimony. Under 104, evidence is not relevant if dependent on a conditional fact unless that condition is found to exist. A judge need only find sufficient evidence to show existence of the condition to allow the question to go to the jury for credibility and weight. Here the judge would consider the Daubert factors that were incorporated into the FRE on expert testimony in order to determine whether it should be allowed in.

The factors require that the expert testimony be based on the knowledge, experience, and training of the expert, be beyond the normal experience of an average lay juror, be helpful to the determination of the action, and based on proven and reliable data and methods, and be an application of such methods and data to the underlying facts of the case. Here Ned was an experienced detective in the Narcotics Bureau and hence had the knowledge, experience and training. His testimony was beyond the normal lay juror because it involved high level drug dealers' actions. Furthermore, it was relevant and helped to determine what Donna was guilty of. Finally, it was based on reliable data of customary experience in the field that high level drug dealers customarily use others to distribute the drugs. Therefore, the testimony should be allowed in.

(3) Should Donna's Testimony and Receipt Be Admitted?

Relevance

Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Donna will argue that the evidence is relevant because it makes the existence of the fact that Calvin had control over the cocaine more likely here and hence she was not involved. Therefore, it will be allowed in as relevant, unless there are other problems.

Best Evidence

Prosecutor will argue that this is not the best evidence. The Best Evidence Rule requires that one cannot testify to the contents of a writing unless the writing is presented. However, a copy is permissible. Therefore, since Donna brought a copy of the receipt that she found in the car, it should be allowed in.

Hearsay

Prosecutor will object on grounds of hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Therefore since the document asserts that Calvin rented the car, it is offered for the truth of the matter and must come

in under an exception.

Business Records

Donna will argue this is a business record and should be admitted. Business records are records or documents made during the normal course of business with guarantees of trustworthiness. There needs to be some type of testimony demonstrating that this was in the normal course of business, and hence Donna would have needed some type of custodian or the person who entered the information testify to those facts. Therefore, the evidence will be excluded.

(4) Should the Cross-Examination Have Been Allowed?

Relevance

Prosecutor would argue that the question was relevant as to whether Donna was telling the truth. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. If Donna had lied in the past on her income tax then it would be more likely that she would lie at trial because she is dishonest. Therefore, it is relevant to the case.

Character Evidence of a Witness

Donna would initially argue that this is improper character evidence. Character evidence is evidence of a trait or character offered to prove action in conformity therewith. Character evidence is not allowed unless it falls under one of the exceptions to character evidence. Here this falls under the exception to character of a witness. Therefore, it is governed by 607 and 608 of the FRE.

FRE 607 allows an opposing party to generally impeach to show bias or lack of credibility of a witness. FRE 608 allows a party to use character evidence for the purpose of impeachment. However, if one wants to impeach by specific instances of conduct one can only do so by inquiring on cross-examination and not through extrinsic evidence.

Furthermore, it must bear on the truthfulness of the witness. The prosecutor's question about whether Donna lied on her tax return was valid because it was merely a question, and no extrinsic evidence was offered. It beared [sic] on whether she was telling the truth at trial after saying she knew nothing about cocaine and only met Calvin in order to see an old friend. Therefore, it was proper use of specific instances of conduct through cross-examination of a witness.

Answer B to Question 6

6)

1. Will's testimony of Calvin's statements were NOT properly admitted.

(a) Relevance

Evidence is generally admissible if it is relevant, meaning that it tends to make a material fact more or less likely to be true. Here, Will's testimony of Calvin's statements would make Donna's alleged involvement more likely to be true, and thus is logically relevant. However, evidence should not be admitted under Federal Rules of Evidence (FRE) 403 if its prejudicial effect substantially outweighs its probative value. Setting aside the Confrontation Clause question (discussed below), this evidence is prejudicial against Donna but is also very probative as to the central issue of the trial – whether Donna is guilty of distribution of cocaine and conspiracy to distribute. As such, the prejudicial effect does not substantially outweigh the probative effect, and testimony should be admitted absent other reasons for preclusion.

(b) Competence

A witness's testimony is admissible if he is competent to testify. A witness is competent if (1) he had personal knowledge of the fact he is testifying to, and (2) he takes an oath or affirmation to tell the truth.

Here, Will was present when Calvin made the statement about Donna's role in the transaction, and thus has the required personal knowledge. Assuming he took the proper oath at trial, Will is competent to testify as to what Calvin had said.

(c) Hearsay

Hearsay is not admissible unless an exemption or exception applies. Hearsay is an out-of-court statement offered for its truth. Here, Calvin's statement about Donna was made outside the court proceedings and was offered by the prosecution to prove that Donna indeed was involved in the cocaine transaction. Thus, it is hearsay. This issue here is whether a proper exemption or exception applies.

The prosecution will argue that this declaration is (1) a coconspirator admission and (2) a statement against interest. Coconspirator statements are exempted from the hearsay rule under FRE 801(d), and can be admitted as substantive evidence. Here, Calvin was allegedly a coconspirator with Donna. If the judge finds by a preponderance that the two were indeed coconspirators, Calvin's statement against Donna can be admitted, subject to the Confrontation Clause limitations, discussed below.

On the other hand, a statement against interest is a hearsay exception, allowing admission for a statement made by an unavailable declarant which was against the declarant's own penal, proprietary, or other interest. To apply, the declarant must be unavailable by reason of privilege, absence [sic] from the jurisdiction, illness, death, or stubborn refusal to testify. However, if the declarant's "unavailability" is procured by the party seeking to offer his statement, or if the party acquiesced in a plan to make the declarant unavailable, with the result that he is in fact made unavailable, the right to use such declarations is forfeited. Here, Calvin has the Fifth Amendment privilege against self-incrimination to refuse to testify in Donna's trial, and, assuming he exercised that privilege, and that his absence from Donna's trial is not encouraged or induced by the prosecution,

Calvin is properly deemed unavailable. Nevertheless, Calvin's statement identifying Donna's role in the transaction was made with the intent to push responsibility onto Donna, in an attempt to either secure a favorable plea bargain with the prosecution, or convince the arresting officer that Calvin was not in fact involved in the transaction at all. Statements like these which are made for the purpose of currying favor with the prosecution are not against the declarant's penal interest and cannot properly be admitted under the "statement against interest" exception.

(d) Confrontation Clause

Even though Calvin's statement is exempted from the hearsay rule as a coconspirator admission, it may not be admitted against Donna in her trial without Calvin actually testifying. Under the Sixth Amendment, the [sic] criminal defendant has a constitutional right to confront witnesses against him. In a recent Supreme Court case, Crawford v. Washington, the court held that hearsay statements that are testimonial in nature cannot be admitted against a criminal defendant unless the defendant had either (1) a prior opportunity to cross-examine the declarant, or (2) a present opportunity to cross-examine the declarant at trial as a witness. A statement is "testimonial" if the declarant reasonably could foresee that it would be used against the criminal defendant in her prosecution. Here, Calvin told a police officer that Donna was the person who owned the cocaine, and thus could reasonably foresee his statement would be used to prosecute Donna, making it testimonial. If Calvin is not now produced as a witness at Donna's trial, and subjected to Donna's cross-examination, his out-of-court statement could not be constitutionally admitted against Donna.

2. Ned's expert testimony WAS properly admitted.

As per the discussion on relevance, Ned's testimony is generally admissible because (1) it would make the prosecution's theory that Donna used Calvin to transport her cocaine more probable, and (2) its probative value is great, and not substantially outweighed by the risk of prejudice to Donna.

In addition to taking a valid oath, an expert witness is permitted to give expert testimony where (1) the subject matter is one where expert opinion would be useful to the fact finder, (2) the witness is properly qualified as a witness, (3) the judge finds that the expert opinion is reliable, and (4) the expert opinion has proper bases.

Here, whether or not drug dealers usually use others to transport drugs for them is a matter outside most average people's ken, and thus is a subject matter where expert opinion would be useful. As an "experienced detective assigned to the Narcotics Bureau," Ned has specialized knowledge and experience in the matter of drug dealers' behavior patterns, and would probably qualify as an expert.

The judge must also find, by a preponderance, that the expert opinion is reliable – that is, that the methodology the expert used to reach his conclusions were reliable, and that the methodology "fits" the facts in the case. Under the Daubert case, the judge can consider these following factors in considering reliability of an expert's methodology: (1) Existence of peer review, (2) the error rate of the expert's methodology, (3) the testability of the methodology, and (4) whether the methodology were [sic] generally accepted by experts in the field. Here, Ned's methodology in reaching the conclusion that drug dealers

customarily use others to transport drugs was probably his experience in dealing with narcotics cases, and perhaps an analysis of the rate of “using others” narcotics cases to other narcotics cases. The methodology should be explained to the court, and if the judge finds it to be reliable, and that it properly “fits” with the facts of this case (alleged use of others to transport drugs for the dealer), the court will find the expert opinion reliable.

Finally, expert opinion must have a proper basis – it must be based on either facts already in evidence, or facts not in evidence that are generally relied upon by experts in the field. Assuming that the data set [sic] from which Ned drew his conclusion was not admitted into evidence, it must be shown to be data relied upon by other drug dealer behavior experts in the field.

3. The copy of Calvin’s rental car receipt was NOT properly admitted.

Because the evidence sought to be admitted here is a piece of writing (receipt), it must not only be relevant, but also be authenticated as the thing it is purported to be, satisfy the Best Evidence Rule, if applicable, and shown not to be barred by the hearsay rule.

Here, if the receipt was believed, it would tend to make the prosecution’s theory that Donna rented the car and had Calvin drive it to distribute drugs less likely. Thus, it is relevant. Moreover, the prejudicial effect to the prosecution is not substantially outweighed by the probative value of the receipt as to who in fact rented the car.

Because the receipt’s relevance is dependent upon it being the receipt recovered from Calvin’s car, it must be authenticated as such, meaning that defense must present sufficient evidence for a reasonable jury to decide that the receipt in court was the one recovered from the car. Donna can do this by establishing a substantially unbroken chain of custody, testifying that she had kept the receipt in a safe place since she personally retrieved it from Calvin’s car, that no one had the opportunity to access and materially alter it, and that the contents of the receipt were in fact substantially unaltered from when she retrieved it from the car.

The best evidence rule also applies here because defense is offering the receipt for its contents. Under the rule, an original or mechanically made duplicated [sic] must be presented into evidence. Here, if Donna can show that the copy presented was mechanically made from the original receipt, the rule is satisfied.

Finally, because the receipt is an out-of-court statement offered for its truth (that Calvin rented the car six months before his arrest), it is hearsay and inadmissible unless an exemption or exception applies. Here, the receipt might be admitted under the “business record” exception; if Donna could show that the receipt was made in the regular course of the car renter’s business, made in the manner such records are usually kept and at or around the time the car was rented, then the exception applies. However, this requires that a record custodian from the car rental company testify at trial as to these elements. Assuming that the defense did not present a custodian from the car rental company, the receipt cannot be deemed a business record, and cannot be properly admitted.

4. The cross-examination question to Donna probably should NOT be allowed.

As discussed above, a piece of fact or, in this case, a question, that tends to make a material fact in case more or less likely to be true is relevant and generally admissible. Here, if Donna lied in [sic] her income tax return, it would make her a less credible witness, and more likely a drug dealer. Thus, the question is generally allowable as relevant.

Character evidence is generally inadmissible for the purpose of showing that a

person acted on the particular occasion according to her propensity to act a certain way. However, character evidence on [sic] a witness's veracity, including specific prior bad acts committed by the witness, may be used to impeach her credibility, provided that the cross-examining party has a good faith basis to believe that such prior bad acts in fact took place.

Here, whether Donna lied on her tax return goes to her veracity, and thus is character evidence. The cross-examination question was presented for the purpose of impeaching Donna's credibility, but the prosecution did not have actual evidence to believe that Donna had lied on her income tax returns. Instead, the basis for this question was a general impression that drug dealers usually do not report their income. While this impression was honestly held by the prosecution, its basis is weak as it relates to Donna, who has not even been proven to be a drug dealer. Moreover, the question creates a prejudicial effect on the jury's mind, making them doubt the veracity of the defendant herself. As such, the prejudicial effect of this question substantially outweighs its weak probative value, and should therefore not be allowed.