

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Evidence

QUESTION

Dan was arrested and charged with possession of heroin with intent to sell. Dan allegedly sold a small bag of heroin to Peters, an undercover officer, at Guy's Bar and Grill. In his opening statement, Dan's lawyer said the evidence would show that Dan was entrapped. The following incidents occurred at trial:

1. The prosecutor called Wolf, a patron at Guy's, who testified over defense objections that Dan told him the night before the alleged sale that Dan intended to "sell some baggies" to Peters the next night.
2. The prosecutor called Peters, who testified that she was working as an undercover officer and received information that Dan was selling heroin at Guy's. She testified she went to Guy's two nights before the date of the arrest. Over defense objections, Peters testified she talked to Bob, another bar patron, who told her that he had bought marijuana from Dan at Guy's the night before.
3. Peters testified she found out that Dan used e-mail. Over defense objections, she testified that she had e-mailed Dan a message to meet her at Guy's with a small bag of heroin on the night in question. Peters preserved a paper copy of her e-mail message, which, over defense objections, was introduced into evidence.
4. The defense called Dan as a witness. Dan testified that Peters had begged and pleaded with him to get heroin for her because she was suffering from withdrawal and needed a fix. On cross-examination, the prosecutor asked Dan, over defense objections: "Isn't it true that you were arrested by the police for selling marijuana in 1994?" Dan answered: "Yes, but they didn't have any evidence to make the charge stick." The prosecutor moved to strike Dan's answer.
5. The defense called Cal, Dan's employer, as a character witness. The defense laid a foundation showing that Cal had known Dan for ten years. Over the prosecutor's objection, Dan's lawyer asked Cal if he had an opinion on Dan's good moral character. Cal answered: "Yes, I and everyone else who have known Dan for many years know that he always tells the truth." The prosecutor moved to strike Cal's answer.

Assume all appropriate objections were made. Was the objected-to evidence in items 1 through 4 properly admitted, and should the motion to strike in items 4 and 5 have been granted? Discuss.

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ANSWER A

Was the following evidence properly admitted:

- (1) Wolf's statement that Dan told him the night before the alleged sale that Dan intended to "sell some baggies" to Peters the next night.

Relevance

Logical - evidence is relevant if it tends to show that a material fact/element of crime is more or less likely. Here, Wolf's testimony regarding Dan's statement is relevant to show that Dan did indeed go to Guy's bar with the "intent to sell" heroin. It's also relevant to show that the baggies were of heroin.

Legal Relevance

Even if probative, evidence will be excluded if its probative value is substantially outweighed by prejudice. Here, there is nothing to indicate that this would be the case.

Presentation

Wolf is testifying as to something he has firsthand knowledge of so his qualification as a witness is okay. He personally had the conversation with Dan.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, Dan's alleged statement to Wolf was made the night before - hence, out-of-court.

Admission of Party

However, the prosecution will argue that Dan's statement is not covered under the hearsay rule because it is an Admission of a Party. Dan is the party who made the statement and it is being offered against him.

Present State of Mind -Exception to Hearsay Rule

Even if Dan's statement is considered hearsay, the prosecution will argue it falls under the hearsay exception of present state of mind. This is where the declarant's statement concerns something he is going to do right away. It then can be used to show that the declarant did what he said he intended to do. Here, Dan said he "intended to sell baggies" the next night. This might not fall within the exception because it's not about something he's immediately going to do. On the other hand, the next night might be close enough.

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Statement Against Interest

Since Dan is available to testify this exception won't apply.

Conclusion

Overall, the evidence was properly admitted as an Admission or alternatively, a statement concerning present state of mind.

- (2) Peter's testimony that Bob told her he had bought marijuana from Dan the night before at Guy's.

Relevance

If it is true that Bob bought marijuana from Dan the night before, this strongly contradicts Dan's entrapment defense. Thus, the evidence is relevant.

Character Evidence

Evidence will not be allowed if its sole purpose is to show that defendant acted in conformity with some prior bad act. Here, it would be improper to use the fact that Dan sold marijuana a couple of nights ago to infer that he was more prone to sell heroin a couple of nights later.

Specific bad acts for another purpose

If the prosecution can show that the evidence is being offered for some valid purpose (knowledge, intent, motive, etc.) then the evidence may come in.

Here, it might be offered to show that Dan intended to sell drugs and wasn't entrapped as he claims. Nonetheless, the jury could be inclined to find Dan guilty of heroin dealing just because he sold marijuana two nights ago. If this substantially outweighs probative value, it should be excluded.

Hearsay

Even if the court were to allow the statement as relevant it could still be excluded on hearsay grounds. Bob's statement to Peters was made out of court and it is being offered to show that Bob did buy drugs from Dan.

Statement Against Interest

If it can be shown that Bob is unavailable to testify, then his statement might be admitted as an exception to the hearsay rule.

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The statement that he purchased drugs was against Bob's penal interest. There could be a question as to whether Bob knew it was against his penal interest when he made it, since he may have not known he was talking to a cop. Peters was working undercover with Dan. She was probably undercover when talking to Bob too.

Conclusion

There are good grounds to exclude the evidence, either as character evidence, too prejudicial, or not falling within any hearsay exception.

I'd say they shouldn't have admitted it.

(3) Peter's statement regarding her e-mail to Dan

Relevance

This is relevant to show that Dan possessed the heroin with the intent to sell it. The e-mail asked Dan to meet Peters at the bar with the bag of heroin.

There doesn't seem to be any prejudice that substantially outweighs probative value.

Presentation - Best Evidence Rule

Here, Peters is testifying as to the contents of her e-mail. Thus, the e-mail itself, not Peters' testimony, is the best evidence of what it said.

Here, a paper copy of the e-mail is introduced. Under the circumstances a paper copy from the screen seems like the best you can do. It is a copy/duplicate unlikely to have any errors.

Authentication

The e-mail paper copy needs to be authenticated as the actual writing that came from Peters' computer. Since Peters authored the e-mail, she can probably authenticate it.

Hearsay

The e-mail is an out-of-court statement - it was prepared by Peters out-of-court on her computer.

Offered for Effect on Hearer - Not Hearsay

However, prosecution will argue that it is not being offered to prove truth of matter asserted. Rather, it is being offered to show the effect it had on Dan when he received it. The effect being that he went to the bar with the bag of heroin.

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Conclusion: The evidence, assuming authenticated, was properly admitted.

- (4) Prosecutor's question to Dan on cross-examination regarding prior arrest for selling marijuana.

Form: A leading question, but okay, because on cross-examination.

Relevance

If Dan was arrested for selling marijuana in the past, it might make it more likely that he had a propensity to sell heroin this time. Propensity defeats an entrapment defense.

Character Evidence

Again if this is being used to show that Dan has a propensity to sell drugs, then it is inadmissible.

It's tricky here, because propensity also goes to the issue of Dan's entrapment defense.

However, since this was a mere arrest, not a conviction, prejudice could substantially outweigh prejudicial value.

Impeachment

Since Dan is testifying, the inquiry on cross-examination regarding a prior specific bad act might be okay. However, the inquiry must be about a bad act that involves dishonesty or deceit. Here, the inquiry regarding a prior marijuana sale doesn't meet this requirement.

Had the 1994 incident resulted in a felony conviction, the judge would have discretion to let it in.

Conclusion

Here, the evidence - questions - should not have been allowed.

- (5) Dan's Employer's Testimony.

Relevance

To try to show that Dan as a "good moral person" would be less likely to sell heroin unless entrapped.

Character Evidence

Under the Mercy Rule, a criminal defendant can introduce evidence of his character with respect to the trait in question.

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The first question is whether “good moral character” is the trait in question for drug dealing. Arguably, it is.

The evidence can be in the form of the witness’ opinion or the witness can testify as to the defendant’s reputation in the community. Here, Dan was asked to give an opinion so the form was okay - even if his answer went too far.

Employer was qualified as a witness because he knew Dan for 10 years. Thus, he could render an opinion on this subject.

Impeachment

The question would not have been okay if offered to bolster Dan’s testimony as a witness. Because Dan’s credibility had not been questioned. Also, the question didn't go to truth/veracity for honesty.

Conclusion

The question was okay under the Mercy Rule for trait in question.

MOTIONS TO STRIKE

- Prosecution will argue that Dan’s answer was unresponsive. All they had asked him was whether he had been arrested. That only requires a “yes/no” reply. Dan went further. The portion beyond “yes” should be stricken.
- This reply, “yes and everyone else I know. . .” should be stricken as unresponsive. First, Cal was asked his opinion, not about Dan’s reputation. Second, Cal responds to a question regarding moral character with a reply about “truth and veracity.” This is not even an appropriate opinion evidence because Dan’s credibility has not been questioned. Motion to strike should be granted.

ANSWER B

The relevant issues in determining the admissibility of evidence in a criminal trial include logical relevance, discretionary or policy-based relevance and the competence of witnesses to testify. Certain of the objections were properly made and the trial judge erred in admitting certain evidence.

- (1) The issue is whether Wolf’s statement is properly admissible, as it contains an out-of-court statement of Dan that is being introduced for its truth.

Relevance

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First, we need to assess the logical relevance of this statement. Does the fact that Dan said that he intended to sell some baggies to Peters the next night have a tendency to make a material fact in the case more likely than not to be true? On these facts, as Dan is charged with intent to sell, Dan's statement has a tendency to prove intent. Thus, it is logically relevant.

Next, the issue is whether it should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. On these facts, as Dan is on trial for possession of heroin with intent to sell, this is not the case. The evidence is relevant.

Competence

In order for a witness to testify, she must be competent; specifically, she must have personal knowledge of the facts and take the oath. Here, assuming Wolf took the oath, Wolf has personal knowledge of what Dan said to him. Therefore, Wolf is competent.

Hearsay

Wolf is testifying as to what Dan allegedly said to him the night before the sale. The issue is, is Dan's statement an out-of-court statement that is being introduced for its truth? If so, it will be inadmissible hearsay unless it falls under an exclusion or an exception to the hearsay rule. Wolf is testifying that Dan said he intended to sell some baggies to Peters the next night in order to prove that very fact. Therefore, it is hearsay.

However, an admission of a party that is inconsistent with the party's position at trial is admissible as an exception to the hearsay rule. Here, as Dan is on trial for possession with intent to sell, the statement that he planned to sell heroin to Peters is obviously inconsistent with his defense. Therefore, the statement of Dan, as repeated in court by Wolf, is admissible as an admission of a party. Admissions of parties are admissible for their truth.

Alternatively, the prosecutor could counter defense counsel's hearsay objection with the argument that the statement was a statement of present intent to do something. A statement of present intent to commit an action is admissible to show that the person did, in fact, take that action. Here, the statement that Dan intended to sell heroin the next night could be construed as a statement of present intent and introduced to show that he did, in fact, sell heroin. However, the fact that he sold heroin is not in dispute (Dan is arguing entrapment). Therefore, this is not relevant.

Finally, the prosecutor could argue that this statement is not hearsay and that the purpose of this statement is to show the state of mind of Dan (i.e., the fact that Dan possessed the requisite intent for the crime charged of possession with intent to sell). This statement would be admissible on this ground as well, to show Dan's state of mind.

(2) Relevance

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The first question is whether this evidence is relevant. Is it relevant that Peters talked to Bob about purchasing marijuana from Dan? This is a heroin charge, not a marijuana charge. However the idea that Dan has sold drugs before is relevant to the current charge of selling heroin.

However, if the prejudicial value substantially outweighs the probative value of this evidence, it should be excluded. Here, as the evidence specifically relates to Dan selling drugs at Guy's, this is not the case.

Prior bad acts

Prior bad acts of the defendant may be introduced to show intent or a common plan or scheme. Introducing evidence about Dan selling drugs at Guy's before could show a common plan of drug dealing. However, one other incident of drug selling is insufficient to show this so this argument should be discarded.

Hearsay

If the prosecutor is trying to use this evidence to prove its truth, i.e., that Dan in fact sold marijuana to Bob, it must fall within a hearsay exception. Bob should come into court and testify about what happened himself. This is a statement against interest - it is not in Bob's penal interest to admit to purchasing pot. However, this requires that Bob be unavailable. As the prosecutor has not established Bob's unavailability, this evidence should be stricken.

- (3) The issue is whether or not Peters can testify about her e-mail message to Dan. She is trying to prove the contents of her e-mail message to Dan.

Prior consistent statement

This is a prior consistent statement of a witness, which is normally inadmissible. However, she is trying to show its effect on Dan, not the truth of the matter asserted. The contents of her statement to Dan are relevant as they tend to show the progression of facts leading up to the alleged crime. Peters has personal knowledge of these facts and is therefore competent to testify.

Not hearsay

The prosecutor will argue that the truth of the matter asserted was not proven, but that rather it was used to show its effect on Dan. Therefore, her statement about the e-mail should be admissible.

Authentication

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A writing must be properly authenticated. Assuming Peters testified that the e-mail was a correct copy of her e-mail, that would be sufficient.

Best Evidence Rule

A party seeking to prove the contents of a writing must produce the original or account for its absence. Here, Peters has knowledge of the e-mail independent of the e-mail as she wrote it herself. Therefore, the best evidence rule should not apply. If, however, the best evidence rule applies, a print out is probably an acceptable duplicate as there is no chance of casual error, and should be admissible. The alternative would be to produce the hard drive or disk in court, which seems unworkable.

The evidence was properly admitted as she was trying to show its effect on Dan.

(4) Prior Bad Acts

The issue is whether the prosecution may introduce evidence about prior arrest for marijuana sale. This has logical relevance, as it tends to prove his tendency to sell drugs, but it is very prejudicial. You can introduce evidence about a common plan or scheme, but as the arrest happened 6 years ago, it is far too remote.

Impeachment

The next issue is whether this evidence can be introduced to impeach Dan. Evidence of prior convictions including fraud or deceit may be introduced, or felonies involving more than one year. Here, this is just an arrest and these exclusions are inapplicable.

The prosecutor can ask about specific acts of deceit in good faith if she has a reasonable basis for belief, but selling marijuana is not an act of deceit.

The question should not have been admitted and Dan's answer should be stricken.

(5) Relevance

Is Cal's testimony as to Dan's truthfulness relevant? Yes, because Dan took the stand. However, this testimony is inadmissible for many reasons.

Habit

The defense will argue that the fact that Dan always tells the truth is habit evidence. However, this is far too general. Habit evidence requires specificity.

Bolstering one's own witness

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A defendant can introduce good testimony about the trait in question, but truthfulness is not the trait in question. Defense counsel cannot bolster the testimony of Dan until he has been impeached.

The attempted introduced evidence about Dan's prior arrest will not count as an attempt to impeach, as it did not attack Dan's character.

Competence

Even if Cal was allowed to testify as to his opinion of Dan's truthfulness, he is not competent to testify about other people's opinion. This portion of the testimony should be stricken.

The question, and the answer, should be stricken as the defendant had not yet been impeached.