

## Question 4

Dan was charged with arson. The prosecution attempted to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At a jury trial, the following occurred:

The prosecution called Neighbor, who testified that fifteen minutes after the fire broke out, he saw a blue Corvette speed from the scene.

The prosecution next called Detective Pry. Pry testified that he checked Motor Vehicle Department records and found that a blue Corvette was registered to Dan. Pry also testified that he observed a blue Corvette in the driveway of Dan's house.

The prosecution then called Scribe, the bookkeeper for Dan's business. Scribe testified that, two months before the fire, Dan told Scribe to record some phony accounts receivable to increase his chances of obtaining a loan from Bank. Scribe then testified that she created and recorded an account receivable from a fictitious entity in the amount of \$250,000, but that Bank denied the loan anyway. Scribe further testified that, two days after the fire, Dan again told her to create some phony accounts receivable, but that she refused to do so.

The prosecution called Jan, the night janitor at Dan's business, to testify that the evening before the fire, as Jan was walking past Dan's office, Jan heard a male voice say, "Gasoline is the best fire starter." Jan knew Dan's voice, but because the office door was closed and the voice muffled, Jan could not testify that the voice was Dan's.

Assume that, in each instance, all appropriate objections were made.

Should the court have admitted:

1. Detective Pry's testimony? Discuss.
2. Scribe's testimony? Discuss.
3. Jan's testimony? Discuss.

## Answer A to Question 4

4)

### State v. Dan

#### **Admissibility of Detective Pry's Testimony**

##### Logical Relevance

To be admissible, evidence must first be relevant. A piece of evidence is logically relevant if it has any tendency to make a fact of consequence in the case more or less likely to be true than it would be without the evidence.

Detective's Pry's testimony regarding what he learned from checking the DMV records is admissible because it tends to make it more likely that Dan was the one who committed the arson. Neighbor has already testified that he saw a blue [C]orvette speeding away from the scene of the arson. It is likely that the [C]orvette was driven by the one who had committed the crime. Therefore, if Dan also drove a blue [C]orvette, it would tend to make it more likely that Dan is guilty of the crime.

Detective Pry's testimony regarding the blue [C]orvette that he observed on Dan's driveway is also admissible. Since a witness saw a blue [C]orvette speeding away from the scene, the fact that Dan owns and possesses a blue [C]orvette makes it more likely that he committed the crime. The officer's testimony regarding seeing the car in Dan's driveway is also relevant because it tends to support the theory that Dan still possessed the car and had not sold it to someone else before the crime was committed.

Therefore, Detective Fry's testimony is logically relevant.

##### Legal Relevance

To be admissible, evidence must also be legally relevant. Evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice to the jury.

Here, the evidence is legally relevant. The evidence has some probative value in making it more likely that Dan was the one who committed the arson, and there is little risk of undue prejudice. Evidence is only prejudicial if it is likely to lead the jury to draw improper conclusions about the defendant's guilt or innocence. The fact that Dan possessed a blue [C]orvette like that driven from the crime scene may hurt Dan's case, but it will be because the jury drew the reasonable conclusion that Dan may have been driving the car scene [sic] by neighbor, not because of any prejudicial effect.

Thus, the evidence is legally relevant.

### Personal Knowledge

For the evidence to be admissible, Detective Pry must be competent to testify regarding it. A witness is competent if he has personal knowledge about the facts that he is testifying to.

In this case, [P]ry is competent to testify to the fact that he saw a blue [C]orvette in Dan's driveway, because he observed that himself and had personal knowledge of it. However, Pry's testimony regarding the DMV records will be inadmissible because Pry's only knowledge that the [C]orvette was registered to Dan came from the DMV records, and the DMV records have not been produced at trial, under the best evidence rule described below.

### Best Evidence Rule

Under the best evidence rule, if a witness's sole knowledge of facts comes from a written document, then the fact must be proved from the written document unless the absence of the document is explained and excused.

On these facts, Pry's only knowledge of the fact that a blue [C]orvette was registered to Dan came from reading the DMV records. Therefore, the best evidence rule applies and Dan's ownership of the car must be proved with the DMV records themselves, rather than by Detective Pry's testimony regarding the contents of the records.

For this reason, Detective Pry's testimony regarding the contents of the DMV records should not have been admitted into evidence. Instead, the prosecution should have proved Dan's ownership of the car by introducing the DMV records themselves into evidence.

### Hearsay

Another objection that Dan could make to the admission of the evidence is hearsay. Hearsay is an out[-]of[-]court statement offered into evidence to prove the truth of the matter asserted. The DMV records are hearsay because they are the out[-]of[-]court statements of DMV employees who prepared the report and it is being offered to prove the truth of the matter asserted – namely, that Dan was the registered owner of a blue [C]orvette.

Therefore, the evidence will be inadmissible unless a hearsay exception or exemption applies.

### Business Records Hearsay Exception

Under the business records hearsay exception, the records of a business may be admitted into evidence if they were regularly prepared in the ordinary course of business by business employees with a duty to the business to maintain accurate records. Business is defined

to not only include for-profit businesses but also nonprofits and government agencies.

The DMV records could be admitted into evidence under the business records hearsay exception. As part of its business of regulating motor vehicles, the DMV regularly maintains records of the cars that are registered as owned by a certain person. These reports are prepared by DMV employees who have a duty as part of their job to maintain accurate records. Therefore, the statements in the DMV report are admissible under the hearsay exception for business records.

### Government Records Hearsay Exception

The contents of the DMV records could also be admitted under the hearsay exception for government records. For this hearsay exception to apply, the records must have been maintained by a government agency and must be: (1) a record of the activities of that agency, (2) a report prepared in accordance with a duty imposed by law, or (3) a report of an investigation duly authorized by law. Government records of the police investigation regarding a crime are not admissible against the defendant in a criminal trial, but other government records are admissible.

In this case, the DMV records would qualify as records of the activities of the agency. When a person buys a car, they go to the DMV and register as the owner of the car, and the DMV makes the appropriate changes in its records. Therefore, it would qualify as a record of the activities of the DMV. It would also qualify as a report prepared in accordance with a duty imposed by law because the DMV is likely under a duty imposed by the state legislature to maintain vehicle ownership records.

Therefore, the contents of the DMV report would also be admissible under the hearsay exception for government records.

### Conclusion

Detective Pry's testimony regarding observing a blue [C]orvette in Dan's driveway is admissible because it tends to make it more likely that Dan committed the arson and Pry had personal knowledge.

However, Pry's testimony regarding the contents of the DMV records should have been excluded because the best evidence rule required that the records themselves be produced rather than allowing someone else to testify to their contents. The prosecution should have instead introduced the DMV records themselves into evidence. The records would have been admissible under the hearsay exceptions for business records and government records and could then have been considered by the jury to help establish Dan's guilt.

## **Admissibility of Scribe's Testimony**

### Logical Relevance

Scribe's testimony is logically relevant because it tends to establish motive. If the jury believes Scribe's testimony, then it will establish that Dan's business was failing and that his previous desperate attempts to obtain financing through fraudulently obtained bank loans had failed. This would make it more likely than it would otherwise be that Dan would turn to other illegal measures, such as committing arson, to escape his precarious economic situation.

So the evidence is logically relevant.

### Legal Relevance

Although Scribe's testimony is logically relevant, it could still be excluded at the discretion of the judge if its probative value was substantially outweighed by the risk of improper prejudice.

Dan would argue that this testimony is highly prejudicial and should be excluded. The testimony involves prior bad acts of Dan – specifically by inducing Scribe commit [sic] fraud in connection with a bank loan by falsifying the accounts receivable of the business and trying to do so a second time. Thus, Dan would argue, the evidence would be highly prejudicial because it would lead the jury to draw the improper inference that because Dan had done other bad things in the past, he was just a bad guy and is likely guilty of this crime as well.

However, the prosecution could successfully counter by pointing out that while the evidence does present some risk of undue prejudice, it is also quite probative of the issue of Dan's guilt. Scribe's testimony established that Dan was desperate for money because of his failing business and had resorted to illegal conduct in the past to try to get money. This established motive and makes it much more likely than would otherwise be the case that Dan is the one who committed this arson.

Although the evidence does present some risk of undue prejudice, it does not substantially outweigh the high probative value of the evidence. Therefore, Scribe's testimony is legally relevant and should not be excluded on this basis.

### Character Evidence

Another issue presented by Scribe's testimony is character evidence. Character evidence – evidence of prior bad acts of the accused offered to prove the bad character of the defendant to show that he acted in conformity with the bad character – is generally inadmissible in a criminal case. However, character evidence may still be admitted if it is offered for some other purpose, such as to show motive, intent, modus operandi, or common plan or scheme.

Here, the evidence of Dan's prior activities in connection with falsifying the company's records is admissible for the non-character purpose of establishing motive. The evidence

is not being offered to prove that Dan is a bad guy in general. Rather, it is being offered for the specific purpose of showing that Dan had a strong motive to burn down his business because he was in financial trouble and his other efforts to obtain funding had failed.

Therefore, the judge should admit Scribe's testimony. However, the judge should also issue a limiting instruction informing the jury that they may only consider Dan's prior bad acts in establishing motive and may not infer from them that he had a bad character and so is likely to be guilty for that reason.

### Personal Knowledge

Scribe is competent to testify regarding what he heard and did because he had personal knowledge of it. Scribe was there when Dan told him to falsify the books and did so himself, so Dan has personal knowledge.

Thus, this requirement for admissibility is satisfied.

### Hearsay

A final issue is whether Scribe's testimony is inadmissible hearsay. Hearsay is out[-]of [-]court statement offered to prove the truth of the matter asserted, and is normally inadmissible unless an exception to the hearsay rule applies or the statement is exempted from the definition of hearsay under the Federal Rules of Evidence (FRE).

The prosecution would argue that Scribe's testimony regarding Dan's out[-]of[-]court statements and Scribe's out[-]of[-]court statement is not hearsay at all, because it is not being offered for its truth. A statement is not considered hearsay if it is being offered for some purpose other than its truth, such as to prove the mind of the speaker and the listener. Under this argument, Dan's statements to Scribe are not being offered to prove that the bank loan was really rejected, but to show that Dan believed that the business was desperate for money and was willing to do anything to get funds. Similarly, Scribe's out [-]of[-]court statement refusing to falsify the books a second time is being offered for the non-hearsay purpose of proving the listener's state of mind – that Dan knew his fraud scheme would not work and thus was likely to try some other way to get money.

Because the prosecution has a strong argument that Scribe's testimony is not hearsay at all, the testimony should be admitted into evidence.

### Hearsay Exemption for Admissions by a Party Opponent

Furthermore, with regard to Dan's statements to Scribe, the statements will be admissible for their truth because the hearsay exemption for admissions by a party opponent applies.

Under this hearsay exemption, the statements of an adverse party in a proceeding are not considered hearsay, regardless of when they were made.

Thus, in this prosecution the prosecutor is offering the evidence against Dan, so Dan is an adverse party. Therefore, Dan's statement are [sic] not considered hearsay and are admissible for their truth.

### Conclusion

In summary, Scribe's testimony should be admitted. The evidence is relevant to proving Dan's motive to commit the crime, a non-character purpose. And the conversations between Dan and Scribe are admissible because they are being offered for a purpose other than their truth and the hearsay exemption for party admissions applies.

### **Admissibility of Jan's Testimony**

#### Logical Relevance

Jan's testimony is relevant because it tends to make it more likely that Dan committed the arson. As Jan walked by Dan's office she heard someone say "gasoline is the best fire starter". Because the statement was made in Dan's office, it was likely made either to Dan or in Dan's presence. Therefore, it establishes that Dan had knowledge regarding the means to commit the crime, which makes it more likely that he did in fact commit the arson. It also makes it more likely that Dan would have chosen gasoline if he were to commit arson, which matches up with the fact that the fire was indeed started with gasoline.

Of course, the conversation could have been perfectly innocent. Dan could have been seeking or obtaining advice on the best way to BBQ, or he could have not even been there are [sic] the time. But to be relevant, evidence must only have some tendency to make a fact of consequence more or less likely to be true. Because the evidence has some tendency to make it more likely that Dan committed the arson, it is logically relevant.

#### Legal Relevance

The evidence is also legally relevant. As discussed above, even relevant evidence can be excluded if its probative value is substantially outweighed by its prejudicial effect.

Here, the evidence is legally relevant because it has substantial probative value and poses little risk of undue prejudice. The fact that the defendant may have given or received advice on the best way to start a fire the night before the defendant's business burned down, coupled with the motive established by Scribe's testimony, is strong evidence of guilt. In contrast, there is little risk of undue prejudice. The defense will be able to argue that Dan was not present at the time the statement was made or that it was innocuous when they present their case.

Therefore, the evidence is legally relevant.

### Personal Knowledge

Jan is competent to testify to what she heard because she had personal knowledge of it. She was there that night and heard the statement made.

### Authentication

To be admissible, documentary evidence must be authenticated as being what it purports to be. For a voice recording by someone, this would normally mean that a witness who knows the person's voice must testify that the voice on the tape is the voice of the person. Dan would argue that Jan's testimony is inadmissible because Jan could not testify that the voice was Dan's.

However, the authentication requirement will not apply to bar admission of this evidence. First, the evidence is testimonial, rather than documentary, so authentication requirements would not apply. More importantly, it is irrelevant whether Dan was the one who made the statement. The statement could have been made by someone else in Dan's presence, for example if Dan sought the advice of someone in determining what the most effective way would be to commit the arson. Therefore, the statement is relevant even if it was not made by Dan and for this reason need not be authenticated as Dan's.

The defense can argue that Dan was not present when the statement was made or that it was innocuous, but deciding those issues will be up to the jury, not the judge.

### Hearsay

A final objection Dan might make to admission of Jan's testimony is hearsay. Hearsay is an out[-]of[-]court statement offered to prove the truth of the matter asserted. Dan would argue that Jan's testimony is hearsay because she is testifying about what she heard someone say in Dan's office.

However, the hearsay objection will be rejected here. A statement is only hearsay if it is offered for its truth. An out[-]of[-]court statement is still admissible for other purposes. Here, it is irrelevant whether the statement is true. Whether gasoline is in fact the best fire starter has no bearing on the case. The significance of the statement is to establish either the speaker's or the listener's state of mind, which are both permissible non-hearsay purposes. If Dan made the statement, then it tends to establish that he had knowledge about how to commit the crime, which would help show his guilty [sic]. Similarly, if someone else made the statement to Dan, it would be relevant to show that Dan heard the statement and thus had obtained advice on the best way to start a fire, which again would be relevant to guilty [sic].

Although Dan may not have been in the office at the time, the fact that the statement was



made in Dan's office, a place where people would not normally be without Dan being there as well, justified the judge in concluding that there was sufficient evidence to find that Dan either made the statement or was present when it was made.

### Conclusion

Jan's testimony should be admitted into evidence because it is relevant to establish Dan's guilt, Jan had personal knowledge of the statement, and it is being offered for a non-hearsay purpose.

### **Answer B to Question 4**

4)

## **Detective Pry's Testimony about DMC [R]ecords**

### Logical/Legal Relevance

Relevant evidence is generally admissible. In order to be relevant the evidence must have any tendency to make a fact more or less likely than that fact would be without the evidence proffered. The prosecution is offering this evidence to prove that the car seen speeding away from the scene of the arson was owned by Dan (D). This evidence is logically relevant as it tends to prove identity of the arsonist.

Some logically relevant evidence will still be excluded if there are public policy reasons for the exclusion of that evidence. If the probative value of relevant evidence is substantially outweighed by the prejudicial nature of the evidence then the evidence will be excluded. D's attorney would argue that lots of people own blue [C]orvettes and thus using the [C]orvette to identify D as the guilty party is prejudicial. D's attorney would lose however because ownership of a car seen speeding away from the scene of a crime is not prejudicial and any possible prejudice resulting from the inference that D was driving the [C]orvette as it speed [sic] away does not substantially outweigh the probative value that this evidence possesses as far as identifying the arsonist.

### Witness Competency

A witness is competent to testify if the witness has personal knowledge and is capable of understanding the oath or affirmation required of all witnesses.

Pry would be a competent witness because he read the dmv [sic] report and thus has personal knowledge of its contents.

### Best Evidence

When a witnesses [sic] sole source of knowledge is from the contents of a document, and the witnesses [sic] testimony is being elicited in order to establish the contents of that document as true the best evidence rule requires the profferor of that evidence to either produce the document or explain why the document was not produced before allowing the witness to testify as to the contents of that document.

The defense's objection to Pry's testimony on the contents of the DMV printout should have been upheld as officer Pry's sole source of knowledge regarding D's ownership of a blue [C]orvette was from the DMV printout. Pry did not explain why he was not able to produce the dmv[sic] record. Without the DMV record or a reasonable explanation concerning why it was missing Pry's testimony should have been excluded.

### Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pry's

testimony about the DMV printouts[sic] contents would also be hearsay because it is a statement made by the employee transcribing data into the DMV database that is being offered to prove that D owned a blue [C]orvette. Because this statement was hearsay it should have been excluded unless on of [sic] the exceptions or exemptions from the hearsay rule applied.

### Exemptions/Exceptions

#### Official Document

Official certified documents from public agencies charged with complying [sic] the information contained in the document are exempt from the hearsay rule. Because the prosecution failed to produce a certified record from DMV this exception to the hearsay rule would not have been available.

#### Business Record Exception

A record that is made in the ordinary course of a business by an employee with a duty to accurately report such information can be admitted in lieu of the employee's testimony. Since there was no dmV[sic] record being offered this exception would not have applied.

#### Presumption that owner was driver of a vehicle

A presumption can be raised that the driver of a car was the owner of the car. However in criminal trials the burden of proof is on the prosecution to prove each element of a crime and the identity of the person committing the crime beyond a reasonable doubt and thus the prosecution would not have been able to use the testimony regarding dan's[sic] ownership of a blue [C]orvette to raise a presumption that dan[sic] was driving the [C]orvette on the night of the arson.

Because of the best evidence and hearsay problems, Pry's testimony about the DMV printout should have been excluded.

### **Detective Pry's Testimony about Corvette in Driveway**

#### Logical/Legal Relevance

This evidence is logically relevant because it makes it more likely than not than D owned a blue [C]orvette which was seen sp[e]eding away from the scene of the arson. This evidence would not be excluded due to legal relevance for the same reason the DMV printout testimony would not have been excluded for legal relevance reasons.

#### Witness Competency

The officer is competent to testify about seeing a blue [C]orvette in D's driveway because the officer has personal knowledge regarding what the officer saw in D's driveway.

### Presumption that D was the driver of the blue [C]orvette on the night of the arson

The prosecution would still not be able to use the driver presumption because this is a criminal case.

### **Scribe's Testimony re: phony accounts receivable for bank loan**

#### Logical/Legal Relevance

This evidence would be logically relevant to show that D needed money because he falsified account records to receive a bank loan which was denied. The defense would argue that this testimony is highly prejudicial and that its prejudicial effect outweighs its probative value substantially because the jury is likely to convict D for arson based on the fact that his [sic] is a dishonest person and not based on whether he actually committed the arson. While this evidence is highly prejudicial, the court was right to admit it as it goes to the d's[sic] motive in starting the fire.

#### Witness Competency

Scribe would be a competent witness because he or she had personal knowledge about D's request to make false accounts receivable.

#### Hearsay

This testimony would be hearsay because Scribe is testifying about a statement made by D out of court to prove the[sic] D had Scribe create false records in order to get a loan from the bank. The prosecution would argue that this is not hearsay because the evidence is not offered to prove that D tried to get a loan by false pretenses but that he had a motive to burn down his building for the insurance proceeds because he was denied a loan and thus was in need of money.

The court properly admitted this as non-hearsay if it allowed it in for the limited purpose of showing that D had a motive to burn down the building to collect insurance proceeds.

#### Admission of a party opponent made by an agent

A statement made by a party offered against the party by the opposing party that is adverse to the party's interest is admissible as non-hearsay. The statement did not have to be against the party's interest at the time that it was made. The prosecution would argue that D's request that Scribe falsify accounts receivable is a party admission exempt from the hearsay rule because it is a statement made by D that is now relevant to his culpability for the crime of arson. The statement would be admitted under this exemption to the hearsay rule because D made the statement and it is being offered by the opposition against D.

#### Present sense impression

S's testimony would not be excepted from the hearsay rule under the exception for a present sense impression as D's statement to falsify records was not made contemporaneous to d[sic] observing the falsification of the records.

#### Excited Utterance

It would also not qualify as an excited utterance because there is no evidence that D experienced a traumatic or exciting event around the time that his instructions were made.

#### Present Intent to engage in future conduct

Since D was instructing S to destroy the records it is unlikely that the prosecution could have this statement admitted as a present expression of intent to engage in future conduct to prove that the future conduct was engaged. D did not make a statement concerning conduct that he was about to engage in or planned to engage in in [sic] the future.

#### Double Hearsay

S's testimony about transcribing false accounts receivable would be double hearsay because S is testifying to an out[-]of[-]court statement that he made in response to a request that his boss made to prove that S engaged in the conduct alleged by the hearsay statement.

#### Vicarious Admission

S's statement would be admitted as a vicarious admission so long as transcribing records was [sic] part of the duties that S performed. As D['s agent S' testimony would be vicariously attributed to D.

#### Character evidence

Character evidence is not allowed in a criminal trial by the prosecution to show that the defendant acted in conformity with his character unless and until the defendant offers evidence of his good character. Character evidence is however admissible to show motive, intent, a common plan or scheme, identity or opportunity.

D would argue that this evidence was offered to show that D is of bad character and likely to commit fraud and thus it should be excluded as impermissible character evidence.

The prosecution would argue that this evidence is being offered to show that D had the motive to commit an arson in order to collect the insurance proceeds on his failing business. Because the falsified accounts receivable are not required to prove that D did not get a loan from the bank which is the evidence that really tends to show that D had a motive to burn down his failing business for insurance proceeds the court should have excluded the portion of Scribe's testimony concerning the falsified records as impermissible

character evidence.

### **Scribe's Testimony Re: phony accounts receivable two days after fire**

#### Logical/Legal Relevance

This testimony is not logically relevant because Scribe did not offer any reason related to the arson for falsifying the accounts receivable. While the prosecution may argue that D was falsify[sic] the records to get a bigger insurance payoff, Scribe's testimony does not suggest that this is the case. Even if the court did find the evidence to be logically relevant for showing that D was attempting to increase the amount of payoff from the insurance company, this testimony should have been excluded because its prejudicial value substantially outweighs its probative value. Without some testimony concerning why D asked Scribe to falsify the accounts receivable after the fire this testimony tends to suggest to the jury that it should convict D for being a dishonest guy generally instead of for committing the specific crime charged.

#### Witness Competency

Scribe would be competent because he or she had personal knowledge of what was said.

#### Hearsay

This testimony would be hearsay as was the prior testimony regarding false accounting records if it was admitted to show the truth of the statement – that D wanted to falsify accounts receivable. The prosecution could still argue that it was being offered to show motive which would be for a reason unrelated to the truth of the statement.

#### Admission

This testimony would also be an admission of D because it was made by D and is being offered against him and thus it is exempt from the hearsay rule.

The court should not have admitted this evidence because of its potential lack of logical relevance, it [sic] highly prejudicial nature in light of its relatively low probative value.

This testimony would also not fit under the exceptions to the hearsay rule for present sense impressions, excited utterances, or a present statement of intent to engage in future conduct for the same reasons the first statement regarding the falsification of accounting records would not fit under these exceptions.

### **Jan's Testimony re: "Gasoline is the best fire starter"**

#### Legal/Logical Relevance

This evidence is legally relevant because it tends to show that D knew gasoline was the best fire starter and since it is undisputed that gas was used to start the fire at the business it would tend to show that D committed the arson.

### Witness Competency

J is familiar with D's voice and he heard the statement[;] thus he would be competent because he has personal knowledge of the statement and is potentially capable of authenticating the identity of the speaker, a problem which will be dealt with more extensively below.

### Hearsay

[T]his statement would not be hearsay because the purpose for its admission is not to prove that gasoline is the best fire starter. The prosecution wants this evidence in to show that D had knowledge that gasoline starts fires since gasoline was used to start this fire. Even if the statement was found to be offered for its truth a hearsay exemption would apply.

### Party Admission

D is a party and the statement is being offered against him and thus so long as he can be identified as the speaker this statement would be admissible as a party admission.

### Authentication of Voice

When the identify of a speaker is in issue because the speaker was not visible to the person hearing the speech the voice must be authenticated. A voice may be authenticated by the person who heard the voice so long as that person is familiar with the voice. Even if the hearer is not necessarily familiar with the voice of the speaker other facts can be admitted to establish the speaker's identity.

J is familiar with D's voice[,] however J is unable to authenticate the speaker's identity as that of D because the door was closed and the voice was muffled. However the prosecution would argue that there are enough circumstantial factors available that the jury should be allowed to decide whether or not the voice was D's. Such evidence exists from the fact that J was passing D's office and that the voice was a male voice coming from D's office. This should be sufficient to allow this testimony to go to the jury because J's testimony is enough to allow the jury to determine whether D was in his office.

The judge properly admitted J's testimony as either non-hearsay because it was not admitted to prove the truth of the matter asserted or as a party admission.