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Exam Name: Evidence_LS1_(Calhoun)_Final_F08

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Grade: _____

1)

Direct exam

Relevance

Under the Federal Rules, all relevant evidence should be admitted, subject to exceptions described below. Relevant evidence doesn't have to prove anything, it just has to make a fact of consequence (one at issue in the case itself) more or less likely than that fact would be without the evidence. Even relevant evidence can be barred if its prejudicial effect outweighs its probative value, such as if it were to cause the jury to decide the case in an improper way or waste the court's time.

First we have the statement of Officer Jones. Jones said that Cody told Officer Jones about Cody and D's involvement in the robbery. Cody's statement would be very relevant, because D is on trial for bank robbery, and this would tend to implicate him. It has a prejudicial effect in that it is damning, but its probative value greatly outweighs that.

Hearsay

However, Officer Jones is repeating hearsay, a statement made outside of court offered to prove the truth of the matter asserted. Hearsay is often very relevant, but is kept out for another reason. The danger of hearsay is that because the declarant is not available in court, he is not subject to the traditional guarantees of trustworthiness, especially cross examination by the party against whom the statement is being offered. Hearsay even when relevant is therefore not admissible unless subject to one of the several exceptions.

Cody made the statement to the officer when he was being interrogated, so it was made outside of court by a person not currently on the stand. The state is offering the statement to prove its truth, namely, that D robbed the bank. Because the statement is hearsay, it should not have been admitted unless one of the exceptions applies.

Even though it is a state of mind, it is a backward looking statement, so it would

not be admissible under that exception.

Cody is describing the armed bank robbery, surely a stressful event to be involved in. If Cody were still under the stress of the situation, this might work as an excited utterance. The excited utterance exception to the hearsay rule allows for a statement describing a distressing event, made while still under the stress of the event. Cody made the statement "not long" after his arrest. We don't know how long after the robbery Cody was arrested; immediately, a few hours, a few days? The longer the amount of time between the stressful event and the time the declarant made the statement, the less likely it will be admitted.

Because Cody is unavailable (and provided the prosecution has attempted and failed to find him), his statement might get admitted under the declaration against interest exception. This exception applies when one makes a statement that at the time of its making was so against the declarant's legal interest that no one would say it unless it were true. In CA, the statement only has to be against the declarant interest, not necessarily a legal interest. Here, Cody made a statement that clearly implicated himself and D in the robbery, so that part of the statement would probably get in. However, a problem is that the statement is exculpatory and self-serving because it diminishes Cody's and enhances D's role in the robbery. Absent other indicia of reliability, the judge may find the statement too prejudicial and not probative enough to be admitted, even if relevant. The judge may redact the statement, taking out the part of it being D's idea, give a limiting instruction, or exclude it altogether, but the original statement as a whole would probably not get in because of its self-serving nature.

Residual exception

In federal court, if the prosecution can show that in the interest of justice the statement is more probative on point than any other evidence and has given the defense an opportunity to review the statement earlier, it may be able to get the statement in under the residual exception. Again, due to the self-serving nature of the statement there is a good chance that the court would find its probative value outweighed by its prejudicial effect. There is no evidence that the prosecution told the D about the statement prior to trial.

There is no residual exception in CA.

Confrontation Clause

Even if one of the hearsay exceptions applies and an out of court statement offered for its truth is admissible, it may be barred in a criminal proceeding such as this one because of the Confrontation Clause. This part of the Sixth Amendment of the U.S. Constitution guarantees all criminal defendants the right to confront their accusers. The standard for admissibility depends on whether the statement was testimonial or not (made in court, a preliminary hearing, a

depo, etc.) or not (e.g., made to emergency personnel for purposes of procuring emergency aid.) The Supreme Court has said in Crawford that in order for an otherwise admissible testimonial hearsay statement to be used, the declarant must be unavailable and the D must have been able to cross examine the declarant before regarding the statement. If nontestimonial, the Supreme Court has not said but many courts assume that the old Roberts v. Ohio test applies (is the declarant unavailable and does the statement fit one of the "traditional" hearsay exceptions, whatever those are).

Here, Cody made his statement to an emergency personnel, the police officer, but in a testimonial way; he was not trying to get help, he was claiming that D was mainly responsible for the bank robbery. Cody is unavailable, as he has disappeared (and, we assume, the state has made a good faith effort to find him and been unable to do so). However there is no evidence that D had an opportunity to cross examine Cody, so the statement will be kept out because it violates the D's right to confront his accuser.

Conspiracy

Even if Cody's statements are inadmissible hearsay, they may be admissible as a party admission (and thus not hearsay in fed, hearsay exception in CA) if they were made during by members of a conspiracy of and in furtherance of the conspiracy. The members of the conspiracy can thus bind the other members with their statements. In looking at whether a conspiracy actually existed, the federal courts will allow the court to look at the statements themselves as evidence of the conspiracy, called partial bootstrapping, but the statements alone will not be enough to prove the existence of the conspiracy (Bourjailly).

The only evidence we have of a conspiracy here is Cody's statement that there was one. The prosecution would need other evidence to prove the existence of the conspiracy. Furthermore, by the time Cody's sitting in jail confessing to the police, the conspiracy to rob the bank is over for all intents and purposes. Conspiracy would probably not work here.

In CA, there is no partial bootstrapping, so the prosecution will have to come up with completely extrinsic evidence to prove that a conspiracy existed.

Best evidence

Officer Jones said that he identified the D after looking at the surveillance tapes. This would be very relevant to the question of whether D was actually was the one who robbed the bank. Even though an out of court statement offered for the truth of the matters asserted, a prior identification made while or shortly after observing the person is not hearsay under the federal rules. D's pointing the gun at the teller would also not be hearsay, because it is not clearly intended as a statement. Under modern evidence rules, unlike at common law, nothing is a

statement that is not intended as one (Baron Parke's sea captain example). Also, the tape is not a statement because it is a machine recording. So there does not appear to be a hearsay within hearsay problem here.

It may be necessary to prove that in order for Officer Jones to make the identification that he needed personal knowledge. In order to prove that he was basing the identification on the surveillance tape, it may be necessary to produce to tape to establish the foundation for his identification.

Under the federal rules, when trying to prove the contents of a recording, the original must be produced unless it has been destroyed (not in bad faith or is in possession of the other party. In those cases, the contents of the tape could be proven by a copy or verbal testimony.

Here, the officer verbally testified as to the contents of the tape. That would be OK in federal court but in CA you would still need a copy if one was available.

Attorney client privilege

Snitch repeated what he heard D say in the jail cell. D's statement ("I don't care if I did it) is relevant because it tends to prove that D committed the robbery, which is the central issue of the case. The statement is, although prejudicial, not overly so because of its strong probative force on the D's charge. D's statement is not hearsay (and in CA, a hearsay exception) because it is a party admission. Out of court statements offered for the truth of the matter asserted and offered against the party who made the statement are admissible; the party can hardly claim that he isn't able to cross examine himself regarding the statement. Nevertheless, the statement may be privileged because of the attorney client privilege.

In CA, statements made between an attorney and person seeking legal advice, for the purpose of procuring or giving legal advice, are privileged and not admissible. This is to protect the relationship of confidence between counsel and client to facilitate legal aid and also to prevent attorneys from breaking that confidence. These statements are only privileged if not disclosed to third persons unless reasonably necessary to aid in the giving of legal advice (e.g., statements a client makes to a doctor that the attorney has sent him to for an evaluation). Here, Snitch overheard D speaking with his attorney, so there was a disclosure of otherwise privileged information to a third person.

The question is whether D was aware of the disclosure, and therefore waived it by knowingly communicating the otherwise privileged information to a third party. The facts say that D was speaking "angrily," but that is Snitch who is telling us this. We are also told the D was standing 10 feet away from snitch in a cell with several other arrestees. On the other hand, we are also told that D was speaking in a "low voice." It seems pretty likely that with so many other people around in a crowded jail that someone was likely to overhear the D say something to his

attorney, but that is not the same as the D knowingly disclosing the statement. A court probably wouldn't find that a client telling something to an attorney that happened to be overheard by a paralegal was no longer privileged, so it's likely that this statement should not have been admitted.

Cross-examination

Character evidence/prior conviction

Whether it was proper to admit the prosecution's question of the D's prior conviction depends on the purpose for which it was offered. If meant to show the trier of fact, look, here's a guy who's been convicted of robbing a bank before, so he probably did it, then it would be inadmissible character evidence. Character evidence is that which tries to show that because of his or her prior actions that a D likely acted here in conformity therewith. It is not admissible not because it's not relevant, but because its prejudicial effect so outweighs its probative value that the courts have decided that it should stay out. It may be admissible in a criminal trial like this one if the D offers it to show good character (not applicable), if the prosecution is offering it to rebut D's claim of good character (also not here) or to attack the character of the victim (also not here). Evidence of habit is also not subject to the character evidence rule, but robbing a bank once can hardly be called a habit.

On the other hand, if the prosecution offered the prior conviction to attack the W's credibility, then it may be admissible. In federal court, prior felonies are admissible, subject to a balancing test, and a reverse balancing test when offered against the accused in a criminal case (does probative value outweigh prejudicial effect). The conviction happened five years ago, so it may have lost some of its probative value. However, the conviction of a robbery would be so prejudicial to a D accused of a bank robbery that even if somewhat probative of his credibility, the prejudice so outweighs it that it should not have been admitted (Old Chief). In fed court, felonies and misdemeanors are admissible if they are probative of the W's credibility with no balancing test, but that does not seem to be the case here (conviction of bank robbery is not probative of credibility).

In CA, only felonies are admissible, subject to a balancing test and a reverse balancing test when used against the accused (again, probably too prejudicial here), but in criminal prosecutions Prop 8 allows in all relevant evidence, including prior convictions of both misdemeanors and felonies, but only when they are crimes of moral turpitude. Moral turpitude is vaguely defined but generally includes crimes where dishonesty is an element of the offense. Here, D was convicted of bank robbery, which is a serious offense but doesn't seem to implicate dishonesty as a central element (a bank robber could honestly walk into a bank and honestly hold it up). Therefore, even under CA's more liberal Prop 8 standard the prior conviction should likely not be admitted.

Prior bad act

On the other hand, the prosecution's questioning the D about his claim of not being able to afford an attorney may be different. Here, the D has admitted committing contempt of court. He has not been convicted of it, so if anything this is a prior bad act. This statement would be very probative of the W's credibility because it shows he has little problem lying to a court. Prior bad acts are admissible in fed court to attack a witness's credibility but may not be proven by extrinsic evidence unless the issue is the witness's bias

Prior bad acts to attack a W's credibility however are not admissible in CA, unless a criminal prosecution, where Prop 8 applies and all relevant evidence gets in. Therefore, even if D's attorney objected to the question about whether he had lied to the court, the statement would probably be properly admitted in CA.

END OF EXAM