

Question 3

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet

some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?

Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had "pulled off a big job" that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item **(1)** and properly admit the evidence in items **(2)** - **(7)**? Discuss.

Answer according to California law.

Answer A to Question 3

1. In the prosecution of D for a robbery, the prosecution called W, who was D's wife at the time of the robbery as a witness.

Spousal Testimonial Privilege

California recognizes a spousal testimonial privilege in both civil and criminal cases. Under that privilege, a person is permitted to refuse to testify against his or her spouse. However, this privilege does not bar W's testimony for two reasons.

First, because W and D are no longer married, the privilege does not apply; the spouses have to be married at the time of the trial for the privilege to apply.

Second, the testifying spouse holds the privilege, so that if W decided to testify because she wanted to, D could not assert the privilege to prevent her from testifying. Here, W is eager to testify, and D cannot prevent her from doing so.

Thus, W was properly called as [a] witness, even though she was D's spouse at the time of the robbery and even over D's objection.

Confidential Marital Communications Privilege

California also recognizes a confidential marital communications privilege. That privilege protects communications that were made during marriage if those communications were made in confidence. Even though W and D are no longer married, the privilege would still apply to statements made during the marriage. Additionally, D and W jointly hold the privilege, and D can prevent W from testifying as to confidential communications. However, the privilege would not preclude W from testifying in general, so W was properly called as a witness.

2. Question about seeing D on the day of the robbery

Presentation

D should object that to the form of this question because it is leading. A leading question is one that suggests the answer to the witness. Leading questions are only proper on cross-examination, or on direct examination if a witness is hostile or has trouble remembering. Here, the prosecutor's use of a leading question on direct examination is improper, and an objection to the form of the question should be sustained.

Relevance

The question, though leading, is nevertheless relevant. Relevant evidence is evidence that tends to establish the existence of a material, disputed fact. Here, it is likely material whether W saw D on the day of the robbery, depending on D's defenses and alibis about that day.

Relevant evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion. Nothing in W's answer suggests these factors, and it is therefore admissible.

3. W's answer to the question about speaking with D

Presentation

D should move to strike W's answer because it answers questions not asked. The prosecutor's question was simply if W spoke with Dustin on that Day. W should simply have answered yes, but instead offered "in the afternoon" and "by phone." That additional material was not in response to the question and could

be stricken by the court. In California, both the party conducting the examination and the opposing party can move to strike a witness's answer.

Relevance

The answer is, however, likely relevant to the existence of a material, disputed fact because it relates to where D was and what he was doing on the day of the robbery.

4. W's testimony of D's statement

Relevance

W's testimony is relevant because it is offered to prove the existence of a disputed, material fact: namely, that D was going to divide up money with his friends, which suggests that he participated in the robbery.

The testimony can nevertheless be excluded if its prejudicial value substantially outweighs its probative value. Although, it's prejudicial to D because it establishes guilt, it is not unfairly prejudicial because it does not improperly appeal to the jury's sensitivities. Thus, the information is relevant.

Competence

Furthermore, W is competent to testify about D's statement because she has personal knowledge of it, as she heard it.

Hearsay

D should object to this testimony on the basis that it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the

D's out-of-court statement is being offered to prove that he was meeting up with friends to divide money, as evidence that D participated in the robbery.

Hearsay Exceptions

The prosecution should argue that a number of exceptions apply to this statement.

Admissions by Party Opponent

First, the prosecution should argue that D's statement is admissible hearsay under California law because it is an admission by a party opponent. D, the defendant, is the prosecution's party opponent. His statement that he was going to divide up money with friends is an acknowledgement of fact, and is, therefore, admissible hearsay as an admission from a party opponent.

Present State of Mind

Additionally, the prosecution could argue that the statement is admissible hearsay because it is not being offered to prove the truth of the matter asserted, but rather is being offered as circumstantial evidence of D's state of mind and his intent to go see his friends to divide up money and as circumstantial evidence that he carried out that intent. A limiting instruction could be given to limit the use of the evidence for that purpose.

Present Sense Impression

California also recognizes a hearsay exception where the declarant is describing his conduct at the time he is acting. However, because this statement is one of future action, this exception would not apply.

Confidential Marital Communication Privilege

D should also object on the basis that this statement is privileged through the confidential marital communications privilege. As described above, this privilege applies even where the marriage has ended at trial, if at the time the statement is made the parties are married and the statement was made in reliance of the confidential nature of the marital relationship. D will argue that his statement that he was going to divide up money with his friends was intended to be confidential. Given its incriminating nature, it is likely he will win that argument. Unless W can show that there was no confidentiality because others were present when the statement was made, the court should probably grant D's motion to exclude W's testimony about his statement on the basis of privilege.

5. Question about conversation with Nancy

Form of Question

D could object to this question as another leading question, because it suggests the correct answer, and is improper on direct examination.

Form of Answer

D could also object to the answer and move to strike, since it offers information ("just before she died") that was not asked for in the question. In California, both the person conducting the examination and the other party can move to strike an answer that is nonresponsive to the question asked.

Relevance

D could argue that this evidence is not relevant to a material fact in dispute. On the face of the question, it does seem irrelevant that W's friend Nancy died

shortly after they spoke. However, as explained below, at this information is probably relevant to lay the foundation to establish whether any hearsay exception (dying declaration) applied to Nancy's statement, and so is likely admissible for that reason.

6. Testimony of Nancy's statement

Competence

W is competent to offer this testimony because she has personal knowledge of the statement, that is, Nancy said it to her. However, she may not be competent to testify as to its meaning, as will be discussed below.

Relevance

The testimony of Nancy's statement is relevant to a disputed material fact because it tends to establish D's participation in the robbery and his guilt.

Hearsay

D should object to the admission of this statement on the basis that it is hearsay, that is, Nancy's out-of-court declaration is being offered to prove the truth of the matter asserted (that she and D committed a robbery).

Dying Declaration Exception

California's dying declaration hearsay exception applies to both criminal and civil cases and permits the admission of statements that were made while the declarant was dying, about the circumstances leading to her death. California requires that the declarant actually have died.

Here, Nancy actually died, and her statement was made shortly before her death. However, nothing indicates that the statement was related to the circumstances of her death. Perhaps if Nancy was injured during the robbery, the statement would be admissible, but on the facts presented currently, nothing suggests the statement was made about the circumstances of her death, and it is therefore not admissible under this exception.

Statement Against Interest

California also recognizes a hearsay exception where the declarant's statement is against his or her financial, social, or penal interest at the time it was made. The declarant must be unavailable.

Here, Nancy is unavailable because she is dead. Additionally, the statement that she and D "pulled off a job" suggests criminality on her part and is therefore, against her penal interest, and was so at the time that it was made. The statement should be admitted under this exception.

7. W's interpretation of Nancy's statement

Relevance

W's comment about Nancy's statement is relevant because it goes to prove a disputed material fact, that is, whether D committed a crime on March 1.

Form of answer

D should move to strike W's answer because the prosecutor did not ask W what she thought Nancy meant by the statement; the prosecutor only asked whether Nancy explained what she meant, and W's answer was therefore nonresponsive and possibly in narrative form.

Competence

However, D should object to W's statement on the basis that W is not competent to interpret Nancy's statement. W has no personal knowledge of what Nancy meant by "pulled off a big job" because, as W testifies, Nancy never explained what that meant.

Lay Opinion

D could also object to W's statement on the basis that it offers a lay opinion evidence, since W has no personal knowledge of what the statement meant when Nancy made it. Lay opinion is admissible where it is rationally based on a witness's perception and is helpful to the jury. Here, it is unlikely that W's statement is helpful to the jury because members of the jury are just as able to offer an interpretation of Nancy's statement as W is. Unless W has some other basis for her opinion (i.e., Nancy and D had used those terms in the past, or that it was customary where she lived), W should not be allowed to offer her interpretation of Nancy's statement.

Proposition 8

In a California criminal case, all relevant evidence is admissible, subject to certain exceptions (such as hearsay rules and privilege). Here, the court could determine that the evidence is admissible notwithstanding that it is an otherwise inadmissible lay opinion, if the evidence's probative value was not substantially outweighed by its prejudicial value.

Answer B to Question 3

Because this is a criminal prosecution in California, Prop 8 applies. Prop 8 makes any relevant information admissible subject to unfair prejudice balancing. However, Prop 8 doesn't apply to hearsay, rape shield, the exclusionary rule, privilege, evidence of D's character first presented by the prosecution, and secondary evidence.

1. Spousal Privilege

Testimonial Privilege

In California, a witness may refuse to testify against their spouse in both civil and criminal proceedings. This privilege exists only during a valid marriage. Further, it is the [witness] spouse that holds the privilege.

Because D and W are divorced and W wants to testify, she may.

Confidential Communication Privilege

All communications made during the course of a valid marriage and intended to be confidential between the husband and wife are privileged. The party spouse holds the privilege, and thus may prevent the witness spouse from testifying to these communications. The communications made during marriage remain privileged even after divorce.

Therefore, Wendy may testify to information other than confidential communications made between her and D during the marriage. The defense may not prevent her from taking the stand. The court allowed the prosecution to call the witness.

2. You did not see Dustin on

Relevance

Logical

In order to be admissible, evidence must be relevant. It is relevant if it tends to make any disputed material fact of consequence more or less probable.

Here, the fact that D wasn't in S's presence on the afternoon in question makes it more probable that he could have been participating in a robbery. Thus, it is relevant.

Legal

Although logically relevant, evidence may be excluded for public policy reasons or because the risk of unfair prejudice substantially outweighs the probative value. Neither of these apply here.

Form

The prosecution should object to this question as leading. Leading questions are questions that suggest the desired answer. They are inadmissible on direct except where the witness is hostile, adverse, or needs help remembering. It doesn't appear that any of these exceptions apply; thus, the form of the question was improper.

Competence of Witness

A witness may testify only based on personal knowledge and present recollection. Here, W is testifying based on what she observed that day from present recollection. Thus, it is proper.

Therefore, the question was asked in an improper form, and any objection to form would have been granted. However, the answer would be admissible.

3. Did you speak with D on that day?

Relevance

This information is relevant to lay a foundation for the next question. The fact that W spoke with D makes it more probable that he told her something in the phone conversation.

Further, it is neither unfairly prejudicial nor excluded for public policy reasons.

Competence

Evidence is based on present recollection and personal knowledge.

4. What did you discuss?

Relevance

Evidence is relevant in that it makes more probable that D committed the robbery if he had money to divide up.

Hearsay

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. It is inadmissible unless it fits under one of California's hearsay exceptions.

W's response of what D said is hearsay because it is used to prove the truth of the matter asserted, i.e., that he would be home late because he had to divide some money. The prosecution is using it to show he did have some money from the robbery.

Exceptions

Party Admission

The statement, although hearsay, would be admissible under the party admission hearsay exception. A statement by any party is admissible hearsay regardless of whether the statement was against their interest when made.

Here, D's statement that he had money to count up is an admission by a party, D, that he had some money to divide up.

Statement Against Interest

Further, the statement may be admissible under the statement against interest hearsay exception. For this exception to apply, the statement must be against the declarant's interest and the declarant must be unavailable. It is unclear if D is testifying, but if he doesn't he is unavailable. Further, the statement could be argued to be against his interest because he is admitting he has a sum of money to divide.

Present State of Mind

This exception includes statement of intent as circumstantial evidence that the intent was carried through. D's statement of intent to meet people and divide some money may be admissible as circumstantial evidence that he did in fact do that.

Confrontational Clause

Under the 6th Amendment, criminal defendants have the right to cross-examine the witnesses against them. If a statement of a hearsay declarant is admitted, the confrontation clause is violated if the declarant is not available, doesn't testify, wasn't subject to cross, and the statement is testimonial.

The confrontation clause doesn't apply here because the declarant is the defendant himself and he wasn't giving testimonial evidence.

Privilege

As discussed above, the confidential communication privilege may bar this testimony. It was made during a valid marriage and intended to be confidential.

Therefore, the defense may properly object to this testimony, and it should be excluded.

Therefore, the evidence would be admissible hearsay as a party admission. However, the confidential communication spousal privilege likely would apply to exclude the evidence.

5. Later that evening did you speak with anyone else....

Relevance

Relevant to lay the foundation for the following question. If W spoke to Nancy, it is more likely she obtained the information she is about to testify to.

Form

This answer may be non-responsive in that it goes beyond the question asked of the witness. Further, it may assume facts not in evidence as there is no indication that Nancy had died. As such, an objection to form should have been granted.

6. What did Nancy say to you?

Relevance

It is relevant because it tends to make it more likely that D was in fact involved in a robbery.

Hearsay

W's testimony is an out-of-court statement by Nancy used for the truth of the matter asserted. Thus, it is inadmissible unless an exception applies.

Exceptions

Dying Declaration

The dying declaration hearsay exception applies to statements made with belief that death is imminent and that concern the cause of circumstances of death and, under California law, the declarant must actually die. In CA, it applies in both civil and criminal cases.

The declarant actually died, but the statement didn't involve the cause or circumstances of death. Thus, it is not applicable.

Party Admission

An admission by a coconspirator may be admissible against a fellow conspirator as an exception to hearsay. The statement must be made concerning the conspiracy and during the existence of the conspiracy.

It appears that N and D were coconspirators (an agreement between two or more persons w/the intent to agree and intent to complete the target offense). However, a conspiracy ends when the target offense is completed, and thus, when the bank robbery was completed, it is unlikely N and D were coconspirators any longer. Therefore, it is not an admissible party admission.

Statement Against Interest

A statement that, when made, was against the declarant's interest may be admissible under this exception. The declarant must be unavailable for this exception to apply.

Here, the statement that N and D had pulled off a big job, depending on how interpreted, was against N's interest when made. At the time made, it subjected her to criminal punishment because most people would interpret that as having committed a big robbery. Therefore, this exception likely applies.

Therefore, the statement is admissible hearsay under the statement against interest exception.

7. Did Nancy explain what she meant by “pull off a big job”?

Form

The defense could move to strike the witness’ answers as non-responsive (except the “No”). The prosecution asked [for] a “yes” or “no” answer, and the witness responded with something in addition to “yes” or “no” that did not respond to the question. The prosecution didn’t ask her what she thought of what it meant. This would be granted by the court.

Competence/Opinion Testimony

A witness must testify as to present recollection and personal knowledge. Here, W is testifying based on speculation and this is improper.

Further, a lay witness may give opinion testimony only if it is based on personal knowledge and helpful to the jury. Again, there is no personal knowledge and the speculation is not helpful to the jury. Thus, W’s last statement should be stricken.