

## MEE Question 2

A defendant was tried before a jury for a robbery that had occurred at Jo-Jo's Bar on November 30. At trial, the prosecutor called the police officer who had investigated the crime. Over defense counsel's objection, the officer testified as follows:

Officer: I arrived at the defendant's home on the morning of December 1, the day after the robbery. He invited me inside, and I asked him, "Did you rob Jo-Jo's Bar last night?" The defendant immediately started crying. I decided to take him to the station. Before we left for the station, I read him Miranda warnings, and he said, "Get me a lawyer," so I stopped talking to him.

Prosecutor: Did the defendant say anything to you at the station?

Officer: I think he did, but I don't remember exactly what he said.

Immediately after this testimony, the prosecutor showed the officer a handwritten document. The officer identified the document as notes she had made on December 2 concerning her interaction with the defendant on December 1. The prosecutor provided a copy of the document to defense counsel. The document, which was dated December 2, stated in its entirety:

The defendant burst into tears when asked if he had committed the robbery. He then received and invoked Miranda rights. I stopped the interrogation and didn't ask him any more questions, but as soon as we arrived at the station the defendant said, "I want to make a deal; I think I can help you." I reread Miranda warnings, and this time the defendant waived his rights and said, "I have some information that can really help you with this case." When I asked him how he could help, the defendant said, "Forget it—I want my lawyer." When the defendant's lawyer arrived 30 minutes later, the defendant was released.

The officer then testified as follows:

Prosecutor: After reviewing your notes, do you remember the events of December 1?

Officer: No, but I do remember making these notes the day after I spoke with the defendant. At that time, I remembered the conversation clearly, and I was careful to write it down accurately.

Over defense counsel's objection, the officer was permitted to read the document to the jury. The prosecutor also asked that the notes be received as an exhibit, and the court granted that request, again over defense counsel's objection. The testimony then continued:

Prosecutor: Did you speak to the defendant any time after December 1?

Officer: Following my discovery of additional evidence implicating the defendant in the robbery, I arrested him on December 20. Again, I read the defendant his Miranda rights.

The defendant said that he would waive his Miranda rights. I then asked him if he was involved in the robbery of Jo-Jo's Bar, and he said, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

Defense counsel objected to the admission of this testimony as well. The court overruled the objection.

The defendant's trial for robbery was held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

Were the following decisions by the trial court proper?

1. Admitting the officer's testimony that the defendant started crying. Explain.
2. Permitting the officer to read her handwritten notes to the jury. Explain.
3. Admitting the officer's handwritten notes into evidence as an exhibit. Explain.
4. Admitting the officer's testimony recounting the defendant's statement, "I have some information that can really help you with this case." Explain.
5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it." Explain.

**2) Please type your answer to MEE 2 below**

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**When finished with this question, click ⌂ to advance to the next question.**  
(Essay)

===== Start of Answer #2 (1424 words) =====

1) The Court did not error in admitting the officer's testimony that the defendant started crying. The defendant crying is an act, and not necessarily words, but will still be included as testimony. Any out of court statement brought in for the truth of the matter asserted is excluded unless it falls under any one of the hearsay exceptions. There are several exceptions, exclusions, and non-hearsy statements. Here, the act of crying by the defendant will be admissible. This falls under one of the non-hearsay categories; the effect on the listener. If something is said to the listener, and the listener does an act or says something that can lead towards the effect on that listener, it can be admitted under the non-hearsay category. Here, the officer asked the defendant "Did you rob Jo-Jo's Bar last night?" The defendant responded by crying. This shows the effect on the listener. He heard the question, and began to cry. This shows that something is effecting him, therefore is in one of the non-hearsay categories. In the alternative, if the Court finds this does not fall under the non-hearsay category of the effect on the listener, it will atleast fall under the statement by a party opponent exclusion to the hearsay rule. This exclusion states that when a party to the suit or case makes a statement, that statement automatically falls under the exclusions of the hearsay rule. Either way, the Court did not err in admitting the officer's testimony that the defendant started crying. Also, there is no Miranda violation of this

statement/conduct by the defendant. To invoke the Miranda rules, there must be custodial interrogation. Custody is where a reasonable person would not feel free to leave. Interrogation is questioning that is likely to lead to incriminating evidence. Here, although the officer is asking interrogation questions, there is no custody for Miranda to be invoked until the defendant was asked to come to the station. At that point, the Miranda rules applied, and the officer did read him his Miranda warnings, which he then asked for a lawyer.

2) The Court did not err in permitting the officer to read her handwritten notes to the jury. Of course, the handwritten notes are an out of court statement brought in for the truth of the matter asserted. This means that it traditionally would be excluded because of the hearsay rules. However, there are several exceptions and exclusions as noted above. First, the prosecutor asked if the defendant said anything to the officer at the station. The officer couldn't remember and stated that he thought he did. To refresh the witness' memory, under the refreshing recollection exception for the hearsay rule, the prosecutor is allowed to show any document or notes to the witness to try to refresh that memory. Of course there are some procedural safe guards, such as allowing the other side, or defense counsel to review the notes before. Defense counsel can also use those notes on cross-exam. Once the witness has reviewed those notes, without them being read or entered into evidence, the witness can proceed with the examination. Here, the officer's memory was not refreshed. In fact he stated that he couldn't remember the events, but did remember making the notes the day after he spoke with the defendant. At that time he remembered the conversation clearly, and he was careful to write it down accurately. When a witness' memory is not refreshed, the

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attorney can seek to use the past recollection recorded exception of the hearsay rules to read the notes or document into evidence. To be able to use the past recollection recorded, there must be a showing of no memory at the current examination, a better memory of the events at the time the document was written, either written or adopted by the witness, and the witness can vouch for the validity of the documents. Here, the officer stated all of the elements required for a past recollection recorded exception, therefore the notes can be read to the jury. Of course the procedural safe guards can also come into play, the other side can examine the document, or use it on cross-examination, but the other side may also admit this into evidence if they so choose.

3) The Court did err in granting the request by the prosecutor to have the notes be received as an exhibit. As stated in the previous question, the past recollection recorded exception will not allow the attorney who is direct examining the witness to enter the past recollection recorded into evidence. Only the other side can do this with the procedural safe guards allowed under the past recollection recorded exception to the hearsay rule. The prosecutor can only have the witness read the document to the jury, but not admit the notes as evidence.

4) The Court did not err in admitting the officer's testimony recounting the defendant's statement "I have some information that can really help you with this case." Here, Defendant was still in the custody of the police, and there was no break in custody. He did unambiguously invoke his right to counsel by stating "Get me a lawyer." Once the defendant unambiguously invokes his right to counsel, the interrogation must stop until the defendant is either provided an attorney, or the defendant reinitiates the

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interrogation voluntarily. Here, the officer stopped talking to him as soon as he made the statement to get him a lawyer. This was no Miranda violation. In the note that was read to the jury pursuant to the past recollection recorded exception, the officer noted that he stopped interrogation and didn't ask him any more questions, but as soon as they arrived at the station the defendant said "I want to make a deal; I think I can help you." This is the defendant reinitiating conversation and did not come from custodial interrogation and did not violate his Miranda rights. The officer reread him his Miranda rights, which wasn't necessary since the defendant reinitiated the interrogation, and the defendant stated "I have some information that can really help you with this case." This statement is not in violation of Miranda. The next issue is whether this statement falls under one of the hearsay exceptions or exclusions. Hearsay as stated above is an out of court statement brought for the truth of the matter asserted, which is what this statement is being introduced for. Therefore, this statement must fall under one of the exclusions or exceptions to be admissible. This statement would most likely come under the statement by a party opponent exception to the hearsay rules. This allows a statement made by a party to the suit or case to be brought in, regardless if it violates the hearsay rules. This statement was properly admitted under the hearsay exception of statement by a party opponent.

5) The Court did not err in admitting the officer's testimony recounting the defendant's statement "I was there on November 30 and saw the robbery, but I had nothing to do with it." Miranda warnings must be reread to a defendant if there has been a break in custody of more than 14 days. Here, the Defendant was presumably let free of custody on December 1st, and then the officer arrested him again on December 20th. This is

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