

MEE Question 5

A woman is on trial for the attempted murder of a man whom she shot with a handgun on March 1. According to a State A police report:

The woman started dating the man in August. A few months later, after the woman broke up with him, the man began calling the woman's cell phone and hanging up without saying anything. In February, the man called and said, "I promise you'll be happy if you take me back, but very unhappy if you do not." The following week, to protect herself against the man, the woman lawfully bought a handgun.

On March 1, the woman was working late in her office. At 10:00 p.m., the man entered the woman's office without knocking. The woman immediately grabbed the gun and shot the man once, hitting him in the shoulder.

The police arrived at the scene at 10:10 p.m. By this time, a number of people had gathered outside the doorway of the woman's office. A police officer entered the office, and his partner blocked the doorway so that the woman could not leave and no one could enter. The officer immediately seized the gun from the woman and asked her, without providing Miranda warnings, "Do you have any other weapons?" She responded, "I have a can of pepper spray in my purse. Is that a weapon?"

At 10:20 p.m., after the woman had been arrested and the man taken to the hospital, a custodian told the police officer, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

A few hours later, at the hospital, the man told the police officer that he had entered the woman's office just to speak with her and that the woman had shot him without provocation.

The woman will defend against the attempted murder charge on the ground that she acted in self-defense. In State A, self-defense is defined as "the use of force upon or toward another person when the defendant reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

State A has adopted evidence rules identical to the Federal Rules of Evidence. State A follows the doctrine of the Supreme Court of the United States when interpreting protections provided to criminal defendants under the U.S. Constitution.

The prosecution and the defense have fully complied with all pretrial notice requirements, the authenticity of all the evidence has been established, and the court has rejected defense objections based on the Confrontation Clause.

The woman, the man, and the police officer will testify at trial. The custodian is unavailable to testify at trial.

Under the Miranda doctrine and the rules of evidence, explain how the court should rule on the admissibility of the following evidence:

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."
2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"
3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

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(Essay)

===== Start of Answer #5 (1555 words) =====

1. Testimony from the woman, offered by the defense, repeating the man's statement, "I promise you'll be happy if you take me back, but very unhappy if you do not."

The first issue is whether the man's statement is relevant. Evidence is relevant when it tends to make a material fact more or less probable. Here, the woman has raised a defense of self-defense, and this statement may be indicative of how the woman perceived the man and how she felt when he showed up at her office. This may support (or negate) her claim that she felt she needed to act in self-defense. Therefore, it is likely relevant.

Relevant evidence is always admissible unless prohibited by another rule.

The next issue, therefore, is whether this statement is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter it asserts. Hearsay is not admissible unless it fits an exception.

Here, the man's statement was made in February, not as part of any judicial proceeding; therefore, it was made out-of-court. The issue then is whether the statement is being offered to prove the truth of the matter. For this, the court will have to determine the reason the defense is seeking to offer this testimony.

Evidence is not offered for the truth of the matter asserted when it is offered for another purpose, such as to show the effect on the listener or a subsequent course of action by the declarant. When offered to show the effect on the listener, a statement is not offered to show that the statement is true, but rather to show that the person who heard it relied on it in some way.

This jurisdiction allows self-defense when a defendant "reasonably believed that such force was immediately necessary for the purpose of protecting herself against the use of unlawful force by such other person on the present occasion." If, as mentioned above, the man's statement is offered to show that the woman, based on the man's statement that she would be "very unhappy" if she did not take him back, then the testimony may be admissible to show the effect on the listener in inciting fear in the woman such that she felt that the man, by showing up at her work late at night, posed such an immediate threat as to warrant self-defense.

If the statement is offered for this purpose, then it is not offered to prove the truth of the matter asserted -- that is, it is not offered to show that the woman would actually be very unhappy if she did not take the man back, but rather that it instilled fear in the woman relevant to this case. As such, it is not hearsay under Rule 801, and the court should admit the testimony. If, however, the statement is offered to prove that the woman would, in fact, be very unhappy if she did not take the man back, then the statement is hearsay and should not be admitted.

2. Testimony from the police officer, offered by the prosecution, repeating the woman's statement, "I have a can of pepper spray in my purse. Is that a weapon?"

Again, the first issue is whether the evidence is relevant. Evidence is relevant when it tends to make a material fact more or less probable. Ultimately, the bar for relevance is low. Here, the prosecution may be offering the statement to show that the woman carried a gun in addition to pepper spray, negating to some extent her claim of self-defense. Or it may be offered to show that the woman was compliant with police. Either way, it is likely relevant.

As mentioned above, relevant evidence is always admissible unless prohibited by another rule. The next issue, therefore, is whether this statement is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the

matter it asserts. The statement was made out-of-court, at the scene of the alleged crime. However, rule 801(d) provides an exemption for hearsay as to statements made by the party opponent.

Here, the prosecution is seeking to admit this evidence, and the prosecution's party opponent is the defendant. The woman is the defendant, and she made this statement. Therefore, this statement is non-hearsay under 801(d). As such, it should be admitted unless it is prohibited by some other rule.

The next issue is whether this statement was obtained in violation of *Miranda*. Under the *Miranda* doctrine, when police are conducting a custodial interrogation, they must warn a suspect that: (1) s/he has the right to remain silent; (2) anything s/he says can and will be used against him/her in a court of law; (3) s/he has the right to an attorney; (4) if s/he cannot afford an attorney, one will be appointed to him/her at no cost.

The first issue is whether this was a custodial interrogation. A custodial interrogation, not surprisingly, requires that a person be (1) in custody and (2) interrogated. A person is considered to be in custody when a reasonable person would not feel free to leave. Here, the police report states that the officer's partner "blocked the doorway so that the woman could not leave and no one could enter." A reasonable person in this situation, blocked into a room by police officers, having just shot someone, would likely not feel free to leave. Therefore, the

woman was in custody. The next issue is whether the officer asking if she had any other weapons constituted an interrogation.

An interrogation occurs when officers ask questions or otherwise act to produce incriminating statements from a suspect. Generally, an officer may ask preliminary questions in order to ensure public safety without invoking *Miranda*. Here, the officer, seeking that the woman had a gun and then seizing it, asked if the woman had any other weapons. There is no indication that the officer intended to elicit any incriminating statement by this answer. Rather, having just come upon a scene with an active shooter and finding a woman with a gun, the officers seem to be securing the scene. The officer would need to seize any other weapons the woman may have had in order to protect himself and his partner, as well as anyone else in the vicinity.

For these reasons, though the woman was in custody, this was likely not an interrogation, and therefore likely did not invoke *Miranda*. As such, and given that this is a statement by a party opponent under 801(d), the statement should be admitted.

3. Testimony from the police officer, offered by the prosecution, repeating the custodian's statement, "I didn't see the shooting, but I heard some noises in the hall around 10 and then a loud bang and screaming."

Again, the issue is whether the evidence is relevant. Relevant evidence tends to make a material fact more or less probable. Here, it is again unclear why the evidence is being admitted, but the bar for relevance is low. The testimony may be offered to establish a timeline, or to contradict the woman's statement about the events in question. As such, it is likely relevant.

As mentioned above, relevant evidence is always admissible unless prohibited by another rule. The next issue, therefore, is whether this statement is hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter it asserts. The statement was made out-of-court, at the scene of the alleged crime. Again, depending on the purpose for which it is offered, it may well be used to prove the truth of the matter asserted.

Pursuant to Rule 803(1), a present sense impression is admissible as an exception against hearsay. Present sense impression requires that the statement be made as the witness was perceiving the event or scene. Here, however, the custodian's statement pertains to an event that happened at least 20 minutes earlier. In fact, the custodian was actually relaying what he *didn't* witness, not what he did. Therefore, this exception likely does not apply.

Pursuant to Rule 803(3), an excited utterance is admissible as an exception to hearsay. An excited utterance is a statement that was made under the excitement of the event while the witness was still under the distress or excitement of it. Here

again, the statement was made some 20 minutes later after the scene had calmed down. Therefore, this exception also likely does not apply.

Finally, under Rule 804, some otherwise inadmissible hearsay may be admitted where a declarant is unavailable to testify. A declarant is unavailable when he is outside the court's jurisdiction, deceased, refuses to testify despite being summoned, or cannot be located despite meaningful efforts. Here, we are told that the custodian is unavailable to testify.

However, Rule 804 has a secondary requirement for statements made by an unavailable declarant. The statement must meet on the exceptions enumerated in the second half of the rule. Among those are statements against penal, financial or reputation interest, and also statements made as dying declarations related to the manner of death. These facts do not indicate that this statement was against the custodian's interest, and there is no indication that this witness died as a result of the events in question in this case, so dying declaration does not apply.

As such, this statement is hearsay without an exception, and should not be admitted.

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