**EVIDENCE**

**ESSAY ANSWER & GRADING MATERIALS**

**FEBRUARY 2011**

1. ***Admissibility of written statement to impeach witness:***

The judge should have permitted Prosecutor to impeach Witness’s credibility by (i) questioning Witness about her written statement, and (ii) introducing a copy of the statement.

1. The issue is whether a witness at trial who denies any knowledge of an incident may be impeached with her prior inconsistent statement.

A witness’s credibility may be attacked by any party, including the party calling her. For

the purpose of impeaching the credibility of a witness, a party may show that the witness has, on another occasion, made statements that are inconsistent with some material part of her present testimony. Under the Federal Rules, an inconsistent statement may be proved by either examination of the witness or by extrinsic evidence (*see* below).

Here, Prosecutor should have been allowed to question Witness about her written statement. Witness denied on the stand that she saw Defendant rob Victim and testified that she had never seen Defendant in her life. This is certainly inconsistent with her written statement, in which Witness indicated that she saw Defendant attack Victim and run away with Victim’s bag, and that she knew Defendant from the neighborhood. Furthermore, these points are material to Witness’s testimony because they go to the very heart of whether she witnessed Defendant committing the crime in issue. Thus, Prosecutor should have been allowed to question Witness about her written statement.

1. The second issue is whether extrinsic evidence of the prior inconsistent statement may be admitted.

To prove a prior inconsistent statement by extrinsic evidence, the witness generally must be given an opportunity at some point to explain or deny the allegedly inconsistent statement, and the statement must be relevant to some issue in the case.

Here, Witness presumably was given, or should be given, an opportunity to explain or deny the discrepancy between her trial testimony and the written statement. The opportunity to explain or deny the statement need not come before introduction of the statement under the Federal Rules. Furthermore, Witness’s written statement is certainly relevant to whether Defendant committed the crime.

Thus, the judge should have admitted a copy of Witness’s prior inconsistent statement to impeach Witness’s credibility.

2. ***Admissibility of written statement to prove Defendant was in City Park and attacked***

***Victim:***

The judge should have admitted part of Witness’s written statement to prove that Defendant was in City Park but should not have admitted the other part of Witness’s statement to prove that Defendant attacked Victim.

The issue is whether the statement is barred by the hearsay rule.

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter

asserted. Hearsay is not admissible unless it falls within an exception. However, a declarant’s statement identifying a person as someone the declarant perceived earlier is not hearsay if the declarant testifies at trial and is subject to cross-examination about the statement. Photo identifications are within the scope of this rule, and the prior identification need not have been made at a formal proceeding or under oath. However, where a prior inconsistent statement was made under penalty of perjury at a prior trial, hearing, or other proceeding, or in a deposition, it is admissible nonhearsay.

Here, Witness’s written statement was made out of court and is offered for its truth—that Witness saw Defendant in City Park and that she saw Defendant attacking Victim. The part of the statement that reads, “I was walking in City Park on May 5, at 2 p.m., when I saw Defendant . . . I know Defendant from the neighborhood and recognized Defendant as suspect number 1 on the 12-person photograph display shown to me today by Police Officer,” is not hearsay because it is a statement of prior identification. Witness identified Defendant in the statement, is testifying at trial, and is subject to cross-examination regarding the statement.

Therefore, that portion of the statement should have been admitted.

On the other hand, the portion of the statement that reads, “I saw Defendant attack Victim and then run away with Victim’s bag” is not a statement of identification. As stated in 1., above, Witness’s written statement was a prior inconsistent statement. In most cases, prior inconsistent statements are hearsay, admissible only to impeach the witness. Here, though, the statement was not made under penalty of perjury at a prior trial, hearing, or proceeding.

Therefore, that portion of the statement should not have been admitted to prove the charges against Defendant because it is hearsay and does not fall under any exception.

3. ***Buddy’s testimony:***

The judge should not have admitted Buddy’s testimony to prove Defendant’s character for honesty or gentleness.

The issue is whether a witness in a criminal case can testify to his friends’ personal opinions regarding the defendant’s character in a criminal case.

Character evidence is generally inadmissible to prove that a person acted in conformity with a particular character trait. However, a criminal defendant may introduce evidence of a relevant character trait to show his innocence. A witness may testify to the defendant’s good reputation (or that he has heard nothing bad), or may give his personal opinion concerning that trait of the defendant. However, the witness may not testify to specific acts of conduct of the defendant to prove the trait in issue.

Here, Defendant is charged with assault and robbery and wants Buddy to testify as to his friends’ opinions of Defendant’s character for honesty and gentleness. Although Defendant’s character for honesty may not be relevant to the assault charge, it is probably relevant to the robbery charge, because robbery is a form of theft. Furthermore, Defendant’s character for gentleness would be relevant to both the assault and robbery charges. However, Buddy’s testimony is an impermissible method of proving Defendant’s character. Buddy is not testifying as to his own personal opinion; nor is he testifying to Defendant’s reputation in the community. Instead, he said that some of his friends, who had only met Defendant a few times, think that Defendant is honest and gentle. Buddy’s friends do not represent the community at large.

Therefore, the judge should not have admitted Buddy’s testimony.

**1. Impeachment of Witness**

□ The first issue is whether a witness at trial who denies any knowledge of an

incident may be impeached with her prior inconsistent statement

□ A witness’s credibility may be attacked by any party, including the party calling

Her

□ For the purpose of impeaching the credibility of a witness, a party may show that

the witness has, on another occasion, made statements that are inconsistent with some material part of her present testimony

□ Under the Federal Rules, an inconsistent statement may be proved by either examination

of the witness or by extrinsic evidence

□ Witness denied on the stand that she saw Defendant rob Victim and testified that

she had never seen Defendant in her life

□ This is inconsistent with Witness’s written statement, in which she indicated that

she saw Defendant attack Victim and run away with Victim’s bag, and that she

knew Defendant from the neighborhood

□ These points are material to Witness’s testimony because they go to the very heart

of whether she witnessed Defendant committing the crime in issue

□ Prosecutor should have been allowed to question Witness about her written statement

□ The second issue is whether extrinsic evidence of the prior inconsistent statement

may be admitted

□ □ To prove a prior inconsistent statement by extrinsic evidence, the witness generally

must be given an opportunity at some point to explain or deny the allegedly inconsistent

statement (even after the statement is introduced), and the statement must be relevant to some issue in the case

□ Witness presumably was given, or should be given, an opportunity to explain or

deny the discrepancy between her trial testimony and the written statement

□ Witness’s written statement is certainly relevant to whether Defendant committed

the crime

□ The judge should have admitted a copy of Witness’s prior inconsistent statement to

impeach Witness’s credibility

**2. Admission of Witness’s Written Statement**

□ The issue is whether Witness’s written statement is inadmissible hearsay under the Federal Rules

□ Hearsay is an out-of-court statement offered into evidence to prove the truth of the

matter asserted, and is not admissible unless it falls within an exception

□ A declarant’s prior statement identifying a person as someone the declarant

perceived earlier (including photo identifications) is not hearsay if the declarant

testifies at trial and is subject to cross-examination about the statement

□ Here, Witness’s written statement was made out of court and is offered for its

truth—that Witness saw Defendant in City Park and that she saw Defendant

attacking Victim

□ The part of the statement that reads, “I was walking in City Park on May 5, at 2

p.m., when I saw Defendant . . . I know Defendant from the neighborhood and

recognized Defendant as suspect number 1 on the 12-person photograph display

shown to me today by Police Officer,” is not hearsay because it is a statement of

prior identification

□ Witness identified Defendant in the statement, is testifying at trial, and is subject to

cross-examination regarding the statement

□ That portion of the statement identifying Defendant should have been admitted

□ The portion of the statement that reads, “I saw Defendant attack Victim and then

run away with Victim’s bag” is not a statement of identification, but a prior inconsistent

statement

□ Where a prior inconsistent statement was made under penalty of perjury at a prior

trial, hearing, or other proceeding, or in a deposition, it is admissible nonhearsay

□ Witness’s statement was not made under penalty of perjury at a prior proceeding

□ That portion of the statement should not have been admitted to prove the charges

against Defendant because it is hearsay and does not fall under any exception

**3. Buddy’s Testimony**

□ The issue is whether a witness in a criminal case can testify to his friends’

personal opinions regarding the defendant’s character in a criminal case

□ Although character evidence is generally inadmissible to prove that a person acted

in conformity with a particular character trait, a criminal defendant may introduce

evidence of a relevant character trait to show his innocence

□ □ A witness may testify to the defendant’s good reputation (or that he has heard

nothing bad), or may give his personal opinion concerning that trait of the defendant

□ □ Defendant’s character for honesty is probably relevant to the robbery charge, and

Defendant’s character for gentleness would be relevant to both the assault and

robbery charges

□ Buddy is not testifying as to his own personal opinion; nor is he testifying to

Defendant’s reputation in the community

□ Buddy said that some of his friends, who had only met Defendant a few times,

think that Defendant is honest and gentle

□ Buddy’s friends do not represent the community at large

□ The judge should not have admitted Buddy’s testimony because it was an impermissible

method of presenting character evidence

**PASSING SCALE**

0 - 10 Significantly below passing

11 - 14 Below passing

15 - 18 Slightly below passing

19 - 22 Passing

23 - 26 Above passing

27 + Significantly above passing