EXAMINERS' ANALYSIS OF QUESTION NO. 4

Disqualifying Warren as a Witness: The prosecutor should argue that a criminal conviction does not disqualify a witness from testifying. While this may have been true under the common law, MRE 601 basically presumes a person is competent to be a witness. The test is not a conviction-free record, but rather whether the witness has sufficient physical and mental capacity and sense of obligation to testify truthfully and understandably, a test easily met.

Warren's Quotation of Art: The prosecutor should respond that Art's statement is not being introduced for the truth of its content and, therefore, is not hearsay under MRE 801(c). The statement is a command and commands are generally not susceptible to evaluation for their truth. Moreover, even if the command could be evaluated for its truth, the prosecutor could easily establish a non-hearsay purpose for the statement, *i.e.* to show its effect on the listener, Dan, who had a reason to be at the crime scene and had appeared frightened by the prospect of a meeting with Vic.

Warren's Conclusion that Dan looked Scared: The prosecutor should argue that Warren's testimony that he saw Dan's eyes widen and his throat tighten is not hearsay because Warren is simply testifying to behavior he perceived firsthand. While nonverbal conduct can sometimes make a statement, spontaneous expressions of fear are not regarded as hearsay because they are not intended by the declarant (here, Dan) as assertions. *People v Davis*, 139 Mich App 811, 812-813 (1984). And if Dan's conduct were an assertion, it would still be admissible because it is being offered against Dan and is therefore not hearsay under MRE 801(d)(2).

The prosecutor should also argue that Warren's conclusion is not being offered as an expert opinion under MRE 702. Rather, Warren's conclusion is lay opinion testimony under MRE 701. For this type of testimony to be admitted, the opinion must be (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Here, Warren could see Dan and hear Art. As such, he could rationally base his conclusion on his perception. Also his opinion that Dan seemed afraid of Vic, would aid in the determination of a fact in issue, *i.e.* that fear of Vic supplied the motive for Dan to kill him.

The Use of the Assault Conviction: The prosecutor should argue that the assault conviction, although a felony, does not meet the requirements of MRE 609(a)(1) or (2) and is, therefore, not useable for impeachment purposes. An assault is not a crime containing an element of dishonesty or false statement, or an element of theft, as required by the rule.

Multiple Hearsay: Some examinees may see the question as containing a multiple hearsay problem. (When multiple levels of hearsay are involved, each level of hearsay must fall within an exception to the hearsay rule. MRE 805.) This approach misses the basic point: Warren's testimony recounting Art's statement is not hearsay at all, whether the declarant is Art or Vic. The prosecutor is not offering the statement to prove anything about what Vic said to Art, or what Vic intended regarding Dan. The statement is being offered to prove that Dan heard something that might have given him a reason to be at the crime scene and/or a motive to harm Vic. No points should be awarded for a discussion of multiple hearsay.