

**EXAMINERS' ANALYSIS OF QUESTION NO. 15**

**A. The Rap Videos Are Not Hearsay Because They Are Non-Hearsay Party Admissions.**

Davis' MRE 801 objection should fail because the rap videos are party admissions pursuant to MRE 801(d)(2), and, as such, are not hearsay. MRE 801(d)(2) provides:

A statement is not hearsay if

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(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth . . . .

Given that Davis is the rapper in both videos, the videos are his statements, and as such, they are not hearsay. On this basis, the court should overrule Davis' MRE 801 objection.

**B. The Court Should Grant Davis' MRE 403 Objection to the Videos Given Their Low Probative Value and Potential for Undue Prejudice or Juror Confusion.**

Pursuant to MRE 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

Both videos are, at best, statements of a general intent to engage in violent behavior, rather than of Davis' intent on the night in question. The Michigan Supreme Court opined that such statements projecting gun use or violence, removed in time from the actual crime, appear to be more "an exercise in machismo, one accomplice bragging to another about how tough he would be", rather

than probative of a criminal defendant's motive on the night the actual violent event occurred. *People v. Goddard*, 429 Mich 505, 520 (1988). The videos show Davis condoning his own and other gang members' escalation to gun violence whenever they perceive insulting words have been directed at them, such as being challenged to leave a party by a rival gang member. As such, the videos are highly provocative. Because the prosecutor intends to offer the videos as proof Davis acted with the intent to kill, rather than in self-defense, what little probative value the videos may have is substantially outweighed by the danger of unfair prejudice or juror confusion. *Goddard*, 429 Mich at 520-521. See also *People v. Blackston*, 481 Mich 451, 462 (2008). While the court should exercise its discretion to exclude the videos under MRE 403, credit will be given for a good analysis that reaches the opposite conclusion as well.

**C. Evidence of "Other Acts" of Gang Affiliations is Admissible per MRE 404(b) (1):**

MRE 404(b) (1) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Michigan Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000):

MRE 404(b)(1) does not require exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b)(1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting the use of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. This list is not, however, exhaustive.

**Evidentiary safeguards employed when admitting "Other Acts" evidence:**

The prosecution has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose under MRE 404(b)(1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376, 385 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) even if it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010) (emphasis in original).

For "other acts" evidence to be admissible, the prosecutor must establish that the evidence: (1) is offered under MRE 401 for a proper purpose (not propensity), (see *Sabin*, 463 Mich at 55; *People v VanderVliet*, 444 Mich 52, 74, (1993); and *Crawford*, 458 Mich at 385 (1998)); (2) "is relevant under MRE 402, as enforced through MRE 104(b) to an issue or fact of consequence at trial" *Sabin*, 463 Mich at 55); and (3) the danger of unfair (undue) prejudice does not substantially outweigh the probative value of the evidence under MRE 403 "in view of the availability of other means of proof and other facts." *Sabin*, 463 Mich at 56.

**The prosecutor must establish the evidence is relevant under MRE 401 for a proper (i.e., non-propensity) purpose:**

The prosecutor argues that the "other acts" evidence is admissible to show witness bias or lack of credibility in the Shark witnesses' denials that they saw Davis shoot Van. While evidence of gang affiliation is often deemed inadmissible in criminal proceedings on the grounds it is impermissible character evidence, *People v Bynum*, 496 Mich 610, 625-626 (2014), testimony regarding gang affiliation may be admissible to explain a witness's bias or to reflect on his credibility. *United States v Abel*, 469 US 45, 52 (1984). Because the prosecutor's articulated purpose is to show the motivation of the Shark witnesses to refuse to "snitch" on Davis, the admitted shooter, the prosecution has established a permissible purpose for admission.

**The prosecutor must establish that the evidence is admissible under MRE 402:**

The court next must determine whether the evidence has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence, pursuant to MRE 402. Given the fact that multiple witnesses have adopted a "see no evil" stance despite having witnessed Davis' admitted shooting, the evidence passes the relevancy threshold.

**The evidence must be admissible under MRE 403:**

Unfair prejudice is defined as the "danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence in view of other means of proof and other facts. Here, while evidence is relevant and probative of witness bias, there is also a substantial potential for prejudice.

As stated previously, evidence of gang affiliation is often considered not only provocative in content, but also impermissible character evidence. Davis therefore likely has the stronger argument under MRE 403 against admission of the evidence. However, it presents a close question on a matter left to the court's discretion, so an examinee could also argue - and deserve credit for - reaching the opposite conclusion. In the event the examinee comes down on the side of admissibility, the defense would be entitled to, and the court should give, a limiting instruction.