

EXAMINERS' ANALYSIS OF QUESTION NO. 9

The Transcript of the **Voice Recording Is Recorded**
Recollection:

In this case, Justine concedes that the transcribed recording is hearsay because it is an out-of-court statement offered for its truth. MRE 801. The transcript of the recording is admissible as a Recorded Recollection, but cannot be received as an exhibit. MRE 803 provides a hearsay exception for:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

MRE 803(5). To qualify for admission under this exception, a record, in this case the transcript, must meet the following three foundational requirements:

(1) The document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; (3) the document must be shown to have been made by the declarant or, *if made by one other than the declarant*, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge *when the matter is fresh in his memory*.

People v Hoffman, 205 Mich App 1, 16 (1994). See also, *Rush v Illinois Cent R Co*, 399 F3d 705, 719 (CA 6, 2005) (reiterating the three elements and holding that transcribed interview could have been read to the jury as past recollection recorded had the witness not provided detailed testimony at trial recalling the events in question). Alternatively, some Michigan cases suggest the additional foundation requirement of showing the document to the declarant in order to ensure her

memory is not refreshed by it, before allowing the document to be read into evidence. *Hewitt v Grand Trunk Western R Co*, 123 Mich App 309, 321 (1988).

Here, the transcript contains Justine's own statements reciting her knowledge of what had just happened to her in a voice she recognizes as her own, satisfying the first and third foundational requirements. And Justine now has no recollection of the events of that night before she lost consciousness, satisfying the second requirement. Thus, the transcript of the recording may be read in the presence of the jury. It cannot, however, be made an exhibit by Justine, so it does not fully satisfy her objective.

Transcribed **Voice Recording Is Not A Statement Made For Medical Purposes:**

Rule 803(4) provides a hearsay exception for:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Here there is no indication that Justine made the statements for purposes of medical treatment or medical diagnosis in connection with treatment, nor was she describing her medical history or any pain or even injury, as the exception requires. Instead, Justine was describing what she heard (someone outside) and saw (Larry) and how she ended up at the bottom of the stairs. See *Merrow v Bofferding*, 458 Mich 617, 630 (1998) (statement of events that eventually ended with an injury was not made for purposes of medical treatment).

Transcribed **Voice Recording is "Excited Utterance" Or "Present Sense Impression":**

MRE 803(2) provides a hearsay exception for:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This "excited utterance" exception fits the transcribed recording. Pursuant to *People v Smith*, 456 Mich 543 (1998), the foundational requirements for the exception are (1) a startling event; and (2) a statement resulting from the event made while still under the excitement of the event. 456 Mich at 550. To the extent that Larry may argue that, apart from the recording, there is no independent evidence of the events (Larry lurking outside and Justine falling because of a broken banister), such independent evidence is not required under MRE 803(2). *People v Barrett*, 480 Mich 125 (1992). Justine was awakened by a person lurking outside then fell down a flight of stairs. Heidi heard the commotion, found Justine lying at the bottom of the stairs, and immediately recorded Justine's breathless description of what had just occurred.

MRE 803(1) provides a hearsay exception for:

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

This "present sense impression" exception also fits the recording. Pursuant to *People v Hendrickson*, 459 Mich 229 (1998), there are three foundational prerequisites for the exception:

(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be "substantially contemporaneous" with the event.

459 Mich at 236. All of these are satisfied here. In addition, the recording was made "in the presence of another witness who has the opportunity to observe and verify its accuracy," *id.* at 235-236, which augments its trustworthiness.

The advantage of relying on either the excited utterance or present sense impression exception is that either would allow Justine to both read the transcript in the presence of the jury and allow the court to receive it as an exhibit.

Credit will not be given for MRE 803(3), a statement of then-existing mental, emotional, or physical condition. Justine was not describing any pain, emotion, or physical condition in the recording, as this exception requires. MRE 803(3). Rather,

she was stating the facts that transpired as she remembered them, which is not the purpose of this exception. *Id.*

Transcribed **Voice Recording Authenticated Under MRE 901:**

Pursuant to MRE 901:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

MRE 901(a). By way of illustration, an example of conforming authentication includes "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." MRE 901(b)(5). See *People v Berkey*, 437 Mich 40, 50 (1991) ("a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.").

Both Justine and Heidi can identify the voices on the recording, and Heidi, the owner of the recorder, can confirm when the recording was made, the absence of any alterations to it, and the accuracy of the transcript. While Larry's attorney can cross-examine Heidi on the recording's creation date, mere theorizing that it is always possible a witness is wrong does not go to authentication.