

QUESTION 14 THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK V

Dirk, a one-time karate instructor who has worked only sporadically in recent years, has gained a reputation as a "tough guy" in his Michigan hometown. A large, bearded man, Dirk is often seen hanging out at various bars and street corners in his omnipresent Detroit Tigers cap. Dirk has been suspected, but never charged, in several incidents in which individuals who were behind in their payments to Lloyd, a local loan shark, received anonymous telephone calls threatening them with bodily harm. Now, however, Dirk is charged with felonious assault in the beating of Victor, who was surprised from behind in his own back yard and beaten unconscious with a flurry of punches to the chest, jaw and neck. Victor never saw his attacker and could offer no information to identify him. Asked if he knew who might have a motive to harm him, Victor admitted that he owed money to Lloyd and had recently received a call warning him to pay up or he would get hurt. Dirk denies the charge and claims he was home alone playing solitaire at the time of the attack. It appears Dirk will also defend on the basis that he and Victor are drinking buddies and he would have no reason to hurt Victor.

Victor's initial shout of surprise and the sound of punches and groans attracted the attention of his next door neighbors, Harry and Wilma. Harry looked out the upstairs window and became agitated. He shouted to Wilma: "Someone is beating up our neighbor Victor! It's a big guy with a beard and a baseball cap! He's hitting him in the head...and the chest... and again...and again! It looks like that no-good Dirk!" At the time, Wilma was across the room talking on a wall phone to their daughter Donna. Wilma also became very excited; she breathlessly repeated to Donna exactly what Harry was telling her he saw, but she did not cross the room. This continued for approximately thirty seconds until Harry said the attack was over and Wilma ended her call with Donna.

A few weeks later, Harry and Wilma's car was hit by a drunk driver. Harry was killed and Wilma received injuries that wiped out portions of her memory, including any recollection of the beating incident. The prosecutor intends to have Donna testify about what Wilma told her on the phone the day of the incident to establish that Dirk was the attacker.

The prosecutor also wants to introduce the testimony of John, another borrower who was late in repaying Lloyd, and who came forward to volunteer information. Two weeks before the incident involving Victor, John was attacked by someone who jumped him from behind in his apartment entryway and tried to stun him with a blow to the head. But John was more fortunate. He used his three years

of karate training to dodge the attacker and parry the blows aimed at his head and chest. John recognized the attacker as his former karate instructor, Dirk, who turned and ran. Although at first John did not report this experience because he feared something worse might happen to him, John is now prepared to testify about it at Dirk's trial.

Evaluate the probable admissibility of the above evidence. What issues and outcomes do you see? Explain your answer.

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