

EXAMINER'S ANALYSIS OF QUESTION NO. 11

A. Wally's Youthful Age Does Not Render Him Unqualified To Testify.

The Court should overrule DeWitt's objection to Wally taking the stand. Pursuant to MRE 601:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

The facts show Wally speaks thoughtfully and understands what it means to testify truthfully. When asked if he understood the difference between the truth and a lie, he responded that he thought he did. He then thoughtfully responded, when asked whether a clearly untruthful statement was a lie, that he didn't know whether it was a lie, but he knew it was not the truth. The Michigan Court of Appeals has held under similar circumstances involving a seven-year-old witness that, while it is within the discretion of the trial court to rule on witness competency, the witness's young age is not a determining factor. Rather, it is the child's understanding of the responsibility to tell the truth, and knowing and being able to articulate what is or is not a truthful statement. *People v. Norfleet*, 142 Mich. App. 745, 747-750 (1985).

B. The Court Should Overrule the MRE 609 Objection to the Criminal Fraud Conviction Without Regard to Balancing Its Prejudicial Impact.

Pursuant to MRE 609 (a):

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

- (1) the crime contained an element of dishonesty or false statement, or
 - (2) the crime contained an element of theft,
- and

- (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
- (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is a defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect.

Pursuant to MRE 609 (c):

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date.

DeWitt's criminal fraud conviction was for dishonesty or false statement. The Michigan Supreme Court held in a landmark opinion that a criminal defendant's prior conviction for dishonesty or false statement is per se admissible, without regard to any balancing requirement that applies to crimes of theft:

[C]rimes having an element of dishonesty or false statement are directly probative of a witness' truthfulness and can be understood as reflecting upon veracity by jurors without the mediation of their deciding that the defendant has a bad general character. Such convictions are of high probative value and possess little likelihood of prejudice. Therefore, the revised MRE 609 does not permit the exclusion of these convictions. *People v Allen*, 429 Mich 558, 593-594 (1988).

Moreover, DeWitt was released only eight years ago from his incarceration for fraud, meaning the conviction is not time-barred pursuant to the 10-year rule of MRE 609 (c).

C. The Court Should Sustain the MRE 609 Objection to the Negligent Homicide Conviction, but on Different Grounds.

DeWitt's objection regarding his conviction for negligent homicide should be sustained, but not because it is unduly prejudicial. Rather, while punishable by incarceration in excess of one year and not time-barred by MRE 609(c), the negligent homicide conviction does not fall within the strict limitation on

the kind of convictions that can be admitted under MRE 609. Specifically, the rule limits those convictions to those involving fraud or dishonest statement or those that contain an element of theft. As the Michigan Supreme Court held in *People v Allen*:

In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. If it is a theft crime and it is punishable by more than one year's imprisonment, the trial judge would exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. 429 Mich at 605-606.

Because negligent homicide involves neither dishonesty, false statement, nor theft, it fails the bright-line test of MRE 609 and *Allen*, and no further analysis is needed.