

A defendant is on trial in federal court for bank robbery. Before the police had any suspects, a police officer interviewed an eyewitness at the police station and showed her a "mug book" containing dozens of photographs. The eyewitness identified the defendant's photograph as that of the robber.

At trial, the eyewitness surprises the prosecutor by testifying that she is unable to identify the defendant as the robber. The prosecutor calls the officer to testify that the eyewitness identified the defendant from the photograph in the police station. The eyewitness remains present in the courthouse and can be recalled.

Is the officer's testimony admissible?

- A. No, because the eyewitness was unable to identify the defendant at trial.
- B. No, because the eyewitness's testimony has disappointed the prosecutor but has not affirmatively harmed the prosecution's case.
- C. Yes, because the eyewitness's statement of identification as reported by the officer is not excluded by the hearsay rule.
- D. Yes, because the hearsay rule does not exclude out-of-court statements if a declarant testifies and is available for cross-examination.

Explanation:

Nonhearsay statements

(FRE 801(d))

Statement by declarant-witness

Out-of-court statement admissible if witness subject to cross-examination & prior statement:

is inconsistent with current testimony & was made under penalty of perjury

is consistent with current testimony & offered to (1) rebut charge of fabrication/improper influence or (2) rehabilitate witness *or* identifies person witness perceived earlier

Statement by party-opponent

Out-of-court statement admissible if offered against opposing party & statement was:

made or adopted by party

made by person authorized by party

made by party's agent/employee on matter within scope of relationship *or*

made by party's coconspirator during & in furtherance of conspiracy

FRE = Federal Rule of Evidence.

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted therein and is generally inadmissible under Federal Rule of Evidence 802. But an out-of-court statement is **excluded** from the hearsay rule and admissible as substantive evidence if (1) the **declarant testifies** and is **subject to cross-examination** at trial AND (2) the declarant's statement:

is *inconsistent* with the declarant's testimony and was given under penalty of perjury at a trial, hearing, deposition, or other proceeding

is *consistent* with the declarant's testimony and is offered to (1) rebut an allegation that the declarant recently fabricated that testimony or has testified due to recent improper influence or (2) rehabilitate the declarant's credibility as a witness *or*

identifies a person as someone the declarant **perceived earlier**.

Here, the eyewitness identified the defendant's photograph as that of the robber during an interview at the police station but was unable to identify the defendant as the robber while testifying at trial. As a result, the prosecutor called an officer to testify as to the witness's earlier statement identifying the defendant. Since that statement identifies a person as

someone the eyewitness perceived earlier and the eyewitness can be recalled for cross-examination, the statement is not excluded by the hearsay rule **(Choices A & D)**.

(Choice B) In the past, a party was not allowed to impeach its own witness unless the witness's testimony surprised the party and affirmatively damaged the party's case (the affirmative-damage rule). But this rule is no longer used. And even if it were, it would not apply here because the officer's testimony is being offered to prove the defendant's guilt—not to impeach the eyewitness's testimony.

Educational objective:

A declarant's out-of-court statement is "nonhearsay" when (1) he/she testifies at trial and is subject to cross-examination and (2) the statement identifies a person as someone the declarant perceived earlier.

References

Fed. R. Evid. 801(d)(1) (declarant-witness's prior statement).

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