

A woman is on trial for murder. The prosecutor calls a witness to testify that after being shot, the victim said, "[the woman] did it." Before the testimony is given, the woman's lawyer asks for a hearing on whether the victim believed his death was imminent when he made the statement.

From whom should the judge hear evidence on the issue before ruling on the admissibility of the dying declaration?

- A. Both sides, with the jury not present, and decide whether the witness may testify to the victim's statement.
- B. Both sides, with the jury present, and allow the jury to determine whether the witness may testify to the victim's statement.
- C. Both sides, with the jury present, and decide whether the witness may testify to the victim's statement.
- D. The prosecutor only, with the jury not present, and if the judge believes a jury could reasonably find that the victim knew he was dying, permit the witness to testify to the statement and allow the woman to offer evidence on the issue as a part of her case.

Explanation:

Hearings on preliminary questions

(FRE 104)

Preliminary question must be heard outside jury's presence if:

hearing is on admissibility of confession
criminal defendant-witness so requests *or*
justice so requires

FRE = Federal Rule of Evidence

Under Federal Rule of Evidence 104, the court must decide **preliminary questions of fact** about whether **evidence is admissible**, a privilege exists, or a witness is qualified. In making this decision, the court is only bound by evidentiary rules regarding **privilege**. Both parties can present evidence at the **hearing**, but it must occur **outside the presence of the jury** if:

it involves the admissibility of a confession
a defendant in a criminal case is a witness and so requests *or*
justice so requires—eg, when the disputed evidence would prejudice a party if heard by the jury.

Here, the woman's lawyer asked for a hearing to determine whether the victim's statement is admissible as a **dying declaration**. One preliminary issue of fact for this hearsay exception is whether the victim believed his death was imminent. Therefore, the court may hear evidence from both sides to determine whether the witness may ultimately testify to this statement at trial. And since the statement implicates the defendant in murder and would prejudice her if the jury heard it, justice requires that the hearing be held outside the jury's presence (**Choices B & C**).

(Choice D) Preliminary questions of fact that relate to the *admissibility* of evidence (as seen here) are subject to the preponderance-of-the-evidence standard of proof. Conversely, those relating to the *relevance* of proffered evidence are subject to the prima-facie standard, which asks if a reasonable jury could find the fact. Therefore, whether the jury could reasonably find the victim believed his death was imminent is the wrong standard.

Educational objective:

The court must decide preliminary questions of fact about whether evidence is admissible, a privilege exists, or a witness is qualified. But the hearing must be conducted outside the jury's presence if (1) it involves the admissibility of a confession, (2) a defendant in a criminal case is a witness and so requests, or (3) justice so requires.

References

Fed. R. Evid. 104 (preliminary questions).

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