

A defendant is on trial for murdering his girlfriend and her unborn child. Whether the girlfriend was pregnant at the time of the murder is at issue. The prosecution has called a witness to testify that the girlfriend told her, two days before the murder, "I'm pregnant with [the defendant's] child."

Is the witness's testimony admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because there has been no showing that the defendant murdered the girlfriend to prevent her from testifying.
- C. Yes, as a statement by the girlfriend of her then-existing physical condition.
- D. Yes, because the girlfriend is unavailable to testify.

Explanation:

Then-existing state of mind hearsay exception

(FRE 803(3))

Type of statement	Examples	Admissibility
State of mind	Motive, intent, plan	Admissible as substantive evidence
Emotional or physical condition	Fear, pain, bodily health	
Memory or belief	Reflection on prior event or belief about matter	Inadmissible unless related to declarant's will

FRE = Federal Rule of Evidence.

The **rule against hearsay** prohibits the admission of a statement made outside the present proceeding that is offered for the truth of the matter asserted therein. However, one **exception** to this rule permits admission of a **statement concerning the declarant's then-existing** state of mind (eg, motive, intent, plan) or **emotional/physical condition** (eg, mental feeling, pain, bodily health).*

Here, the witness seeks to testify that the girlfriend told her, "I'm pregnant with [the defendant's] child." This out-of-court statement is hearsay since it is offered to prove that the girlfriend was in fact pregnant when she made the statement. But since the statement concerns the girlfriend's then-existing physical condition (pregnancy), it is excepted from hearsay and is therefore admissible **(Choice A)**.

*The declarant's statement concerning the then-existing condition can be used to prove the existence of that condition but not its cause.

(Choice B) A party who wrongfully caused a hearsay declarant's unavailability as a witness, and did so intending that result, cannot later exclude the declarant's statement from evidence. Here, there has been no showing that the defendant murdered his girlfriend to prevent her from testifying, so this exception is inapplicable. But the girlfriend's statement is still admissible as a statement of her then-existing physical condition.

(Choice D) Some hearsay exceptions only apply if the **declarant is unavailable** to testify; however, the hearsay exception for then-existing physical conditions is not one of those exceptions. Therefore, the girlfriend's statement would be admissible under this exception even if she had been available.

Educational objective:

Statements regarding a declarant's then-existing state of mind (eg, motive, intent, plan) or emotional/physical condition (eg, mental feeling, pain, bodily health) are excepted from the rule against hearsay.

References

Fed. R. Evid. 803(3) (hearsay exception for a declarant's then-existing physical condition).

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