

At a defendant's trial for burglary, the defendant has called a witness who has testified without objection that the defendant said shortly after his arrest, "They've got the wrong person for this because I have an alibi." The prosecutor seeks to cross-examine the witness about why she did not mention that statement when the police asked her whether the defendant had said anything to her about having an alibi.

Is the prosecutor's proposed cross-examination proper?

- A. No, because the witness's character for truthfulness cannot be attacked by specific instances of conduct.
- B. No, because the witness's failure to mention the alibi is collateral.
- C. Yes, as impeachment for bias and interest.
- D. Yes, as impeachment for prior inconsistency.

Explanation:

Any party may **impeach** a witness with a **prior inconsistent statement**—ie, a statement made by a witness in the past that is inconsistent with the witness's current testimony.* This includes prior statements that **omitted details** later testified to at trial that would have been **natural to include** at the time the statement was made.

Here, the witness testified that shortly after the defendant's arrest, he stated that he had an alibi. But the witness *omitted* that statement when the police asked her if the defendant had said anything about an alibi. Since it would have been natural to mention the defendant's alibi when the witness was questioned by the police, the prosecutor can cross-examine the witness on this prior inconsistency for impeachment purposes.

*A party need not show or disclose the contents of a prior inconsistent statement to a witness before questioning the witness on the inconsistency. But the party must, on request, show the statement or disclose its contents to an adverse party's attorney.

(Choice A) A witness's **character for truthfulness** *can* be attacked by specific instances of conduct regarding a bad act OR a conviction for a felony or crime of dishonesty.

(Choice B) Under the collateral-evidence rule, **extrinsic evidence** is inadmissible to impeach a witness on a collateral issue—ie, one that is *irrelevant* to the outcome of the case. But here, the prosecutor seeks to impeach the witness using *intrinsic* evidence about her failure to mention the alibi—an issue *relevant* to the outcome of the case.

(Choice C) A witness can be impeached by showing that the witness was motivated to lie while testifying due to bias or self-interest. But since there is no indication that the witness is partial to the defendant or has an interest in the outcome of the case, bias and self-interest are *not* grounds to allow the prosecutor's question.

Educational objective:

Prior inconsistent statements—eg, prior statements that omitted details later testified to at trial that would have been natural to include when the statement was made—are admissible for impeachment purposes.

References

Fed. R. Evid. 613 (witness's prior statement).

Copyright © 2019 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.