

A defendant has been charged with drug trafficking. Prior to trial, a woman who intended to testify against the defendant was savagely attacked and left comatose. At a pretrial hearing, the prosecution called the defendant's neighbor, who testified that the defendant said he was no longer worried about the woman testifying because he "took care of her." At trial, the prosecution has called a narcotics detective to testify to the woman's formal statement to the police, which detailed the defendant's role in a large-scale drug trafficking operation.

Is the detective's testimony admissible?

- A. No, because the testimony is hearsay not within any exception.
- B. No, because the testimony violates the confrontation clause.
- C. Yes, as a prior identification of the defendant.
- D. Yes, as a statement against a party who caused the declarant's unavailability.

### Explanation:

The rule against hearsay bars the admission of out-of-court statements offered to prove the truth of the matter asserted therein—eg, the woman's statement to the police implicating the defendant in drug trafficking. However, **statements made by a declarant** who is **unavailable to testify** as a witness may be **excepted** from this rule. One exception applies when an unavailable declarant's hearsay statement is **offered against a party** who:

**wrongfully** caused, or acquiesced in wrongfully causing, the **declarant's unavailability** and did so **intending that result**.

The party seeking to admit the hearsay statement under this exception must prove the above elements by a preponderance of the evidence.

Here, the defendant's neighbor testified at the pretrial hearing that the defendant said he was no longer worried about the woman testifying at trial because he "took care of her." This testimony established, by a preponderance of the evidence, that the defendant wrongfully caused the woman's unavailability as a witness and did so intending that result. Therefore, the detective's testimony as to the woman's statement is admissible under this hearsay exception **(Choice A)**.

**(Choice B)** The Sixth Amendment confrontation clause bars the admission of testimonial statements made by an unavailable hearsay declarant unless the defendant has had the opportunity to cross-examine that declarant. However, this right is forfeited by wrongdoing when, as here, a criminal defendant wrongfully causes a declarant's unavailability with the intent to procure that result.

**(Choice C)** One [hearsay exclusion](#) (ie, nonhearsay) applies when a declarant testifies and is subject to cross-examination about a prior statement that identified someone the declarant had perceived earlier. But this exclusion does not apply here because the woman is unavailable to testify.

### Educational objective:

An unavailable declarant's statement offered against a party who (1) wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness and (2) did so intending that result is excepted from the rule against hearsay.

### References

Fed. R. Evid. 804(b)(6) (statement against party who caused declarant's unavailability).

## Hearsay exceptions for unavailable declarants

