

A defendant has been charged with robbery. At trial, the prosecutor called a police detective who testified that her investigation led her to believe that the defendant committed the robbery. On cross-examination, the defendant's attorney questioned the detective about irregularities in her investigative methods, which the detective acknowledged. Before the defendant's attorney could ask another question, the detective volunteered that she felt confident that the defendant was guilty because his sister, who was unavailable to testify, told numerous people in the community that the defendant committed the robbery.

The defendant's attorney objected and moved to strike the detective's volunteered testimony. The objection was sustained, the testimony was stricken from the record, and the jury was instructed to disregard the testimony. The defendant's attorney, reasonably concerned that the jury would not be able to disregard the prejudicial statement, now seeks to call the sister's neighbor to testify that he heard that the sister actually told numerous people in the community that another person, and not the defendant, committed the robbery.

Is the neighbor's testimony likely admissible?

- A. No, because the detective's testimony cannot be rebutted with hearsay evidence.
- B. No, because the jury was instructed to disregard the detective's volunteered testimony.
- C. Yes, because the defendant may offer similar evidence to cure the prejudice caused by the detective's volunteered testimony.
- D. Yes, because the neighbor's testimony reports the sister's prior identification of the robber.

Explanation:

Under the rule against hearsay, an out-of-court statement offered to prove the truth of the matter asserted therein is inadmissible unless an **exclusion or exception** applies. One hearsay exclusion 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 to the neighbor's testimony because the sister is unavailable to testify and her statement did not identify anyone she had perceived earlier **(Choice D)**.

However, the neighbor's testimony may still be admissible under the **doctrine of curative admissibility**. Under this doctrine, **otherwise inadmissible evidence** (neighbor's hearsay testimony) may be admitted to **rebut** prejudicial evidence that has already been **improperly admitted** (detective's volunteered testimony). But this remedy is only available when:

the prejudicial evidence was improperly admitted through **no fault of the party prejudiced** by the evidence (here, the detective *volunteered* her testimony)

the prejudiced party **objected to and moved to strike** the prejudicial evidence (as the defendant's attorney did here) *and*

an **instruction to disregard** that evidence is **insufficient to remedy the prejudice** caused by its admission (here, such an instruction is likely insufficient because the detective's testimony reporting that the defendant's *own sister* accused him of robbery is highly prejudicial) **(Choice B)***.

However, this prejudice could be cured by allowing the defendant to rebut the detective's testimony with similar evidence—the neighbor's testimony that the sister had reported that another person, not the defendant, committed the robbery. Therefore, the neighbor's testimony, though hearsay, is likely admissible under the doctrine of curative admissibility.

*Curative admissibility provides a middle ground between an instruction to disregard and a mistrial. This promotes judicial efficiency by avoiding the time and cost of a new trial or appeal.

(Choice A) The detective's testimony *can* be rebutted with the neighbor's hearsay testimony under the doctrine of curative admissibility.

Educational objective:

The doctrine of curative admissibility allows otherwise inadmissible evidence to be admitted to rebut prejudicial evidence when (1) the evidence was improperly admitted through no fault of the prejudiced party, (2) that party objected to and moved to strike the evidence, and (3) an instruction to disregard cannot remedy the prejudice.

Doctrine of curative admissibility

