

A defendant is on trial for extorting \$10,000 from her victim. An issue is the identification of the person who made a telephone call to the victim. The victim is prepared to testify that the caller had a distinctive accent like the defendant's, but that he cannot positively identify the voice as the defendant's.

The victim recorded the call but has not brought the tape to court, although its existence is known to the defendant.

Is the victim's testimony admissible?

- A. No, because the tape recording of the conversation is the best evidence.
- B. No, because the victim cannot sufficiently identify the caller.
- C. Yes, because the defendant waived the "best evidence" rule by failing to subpoena the tape.
- D. Yes, because the victim's lack of certainty goes to the weight to be given the victim's testimony, not to its admissibility.

## Explanation:

### Lay witness testimony

(FRE 602 & 701)

Fact testimony must be based on witness's personal knowledge (ie, firsthand perceptions)

Opinion testimony on common-sense impression must be:

rationally based on witness's firsthand perception

helpful to understanding witness's testimony or determining fact in issue *and*

not based on scientific, technical, or other specialized knowledge

**FRE** = Federal Rules of Evidence.

A **lay witness** (ie, nonexpert) can testify to any **relevant matter** of which the witness has **personal knowledge**—ie, knowledge based on **firsthand observations and experiences**. This is true even when other evidence could be used to establish the same facts. And though a witness's lack of certainty in recalling those facts may affect the weight (ie, believability) of that testimony, it does not affect its admissibility (**Choice B**).

Here, the victim seeks to testify about a distinctive accent that he personally heard when a person called him. Since this fact testimony is based on the victim's firsthand observation, it is admissible even though he cannot positively identify the voice as the defendant's.

**(Choice A)** The **best evidence rule** applies only when (1) the contents of a writing, recording, or photograph are at issue or (2) a witness is testifying based on facts learned from such items. It does not apply when a witness is testifying as to his/her personal knowledge (as seen here).

**(Choice C)** Had the contents of the tape been offered as evidence of the conversation, the best evidence rule would have required the victim to produce the original tape or a reliable duplicate. As a result, there would have been no need for the defendant to subpoena the tape.

### Educational objective:

A witness can testify to any relevant matter of which the witness has personal knowledge—even if other evidence could be used to establish the same facts or the witness lacks certainty in recalling those facts.

### References

Fed. R. Evid. 602 (personal-knowledge requirement).

Fed. R. Evid. 701 (lay witness opinion testimony).

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