

At a defendant's trial for bank robbery, the prosecutor has presented evidence showing that the robbery was committed at 9:10 a.m. During the defense case, the defendant's girlfriend testifies on direct examination that the defendant was at home with her until approximately noon on the day of the robbery. The prosecutor's first question during her cross-examination is, "On the day of the robbery, you were questioned by an investigator and told him that [the defendant] had left the house by 8 a.m., didn't you?" The girlfriend denies having made the statement and says that the investigator must have misunderstood her. In rebuttal, the prosecutor proposes to call the investigator, who would testify that the girlfriend told him in their interview that the defendant had left the house by 8 a.m. on the day of the robbery. The defendant objects to the investigator's proposed testimony about the girlfriend's prior statement.

Should the court allow the investigator's testimony about the girlfriend's prior statement?

- A. No, because extrinsic evidence may not be used to prove a prior inconsistent statement.
- B. No, because the girlfriend's earlier statement is hearsay not within any exception.
- C. Yes, but only to impeach the girlfriend's direct testimony.
- D. Yes, to impeach the girlfriend's direct testimony and to prove the time the defendant left home on the day of the robbery.

Correct

Collecting Statistics

01 min, 20 secsTime Spent

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Explanation:

A party may impeach a witness's testimony on a material issue with a **prior inconsistent statement** by introducing that statement through either:

intrinsic evidence—ie, by **examining the witness** about his/her statement *or*

extrinsic evidence if (1) the witness has an opportunity to explain or deny, and the opposing party can question the witness about, the statement or (2) justice so requires **(Choice A)**.

The criteria for **introducing extrinsic evidence** (eg, testimony from another source) of a witness's prior inconsistent statement are **satisfied when a party examines the witness** about that statement.* That is because the examination presents the witness with an opportunity to explain or deny the statement, and the opposing party may question the witness about the statement.

Here, the girlfriend testified on direct examination that the defendant was at home until approximately *noon* on the day of the robbery. On cross-examination, the prosecution sought to impeach the girlfriend by asking her about her prior statement to an investigator that the defendant left by *8 a.m.* The girlfriend denied making that statement. But since this examination satisfied the criteria to admit extrinsic evidence of the girlfriend's prior inconsistent statement, the court should admit extrinsic evidence (the investigator's testimony) of that statement.

However, a **prior inconsistent statement** may **not** be used as **substantive evidence**—ie, to prove the truth of the matter asserted—unless the statement is **excluded** or **excepted** from the rule against hearsay. The girlfriend's statement constitutes inadmissible hearsay because no hearsay exclusion or exception applies. As a result, the prosecution can use the statement only to impeach the girlfriend's testimony—not to prove the time the defendant left home on the day of the robbery **(Choices B & D)**.

*However, use of that evidence is often limited to instances in which the witness denies making the statement (as seen here) because introduction of such evidence after the witness has admitted making the statement is needlessly cumulative.

Educational objective:

Extrinsic evidence of a prior inconsistent statement is admissible for impeachment if (1) the witness has a chance to explain or deny, and the opposing party can question the witness about, that statement or (2) justice so requires. But the statement is inadmissible for substantive purposes unless it is excluded or excepted from hearsay.

References

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

Fed. R. Evid. 802 (rule against hearsay).

Use of witness's prior inconsistent statement

