

At a defendant's trial for the sale of drugs, the government called a drug user to testify, but the drug user refused to answer any questions about the defendant and was held in contempt of court. The government then calls an officer to testify that, when the drug user was arrested for possession of drugs and offered leniency if he would identify his source, the drug user had named the defendant as his source.

Is the officer's testimony concerning the drug user's identification of the defendant admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the drug user was not confronted with the statement while on the stand.
- C. Yes, as a prior inconsistent statement by the drug user.
- D. Yes, as an identification of the defendant by the drug dealer after having perceived the defendant.

Explanation:

Nonhearsay statements

(FRE 801(d))

Statement by declarant-witness

Out-of-court statement admissible if witness subject to cross-examination & prior statement:

is inconsistent with current testimony & was made under penalty of perjury

is consistent with current testimony & offered to (1) rebut charge of fabrication/improper influence or (2) rehabilitate witness *or* identifies person witness perceived earlier

Statement by party-opponent

Out-of-court statement admissible if offered against opposing party & statement was:

made or adopted by party

made by person authorized by party

made by party's agent/employee on matter within scope of relationship *or*

made by party's coconspirator during & in furtherance of conspiracy

FRE = Federal Rule of Evidence.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein and is generally inadmissible. But certain statements—though they meet this definition—are excluded from this rule and considered nonhearsay. For example, a **declarant-witness's prior statement** is **nonhearsay** if (1) the **witness testifies** and is **subject to cross-examination** about the statement and (2) the statement:

is inconsistent with the witness's current testimony and was made under penalty of perjury

is consistent with the witness's current testimony and offered to (1) rebut a charge of fabrication or improper influence or (2) rehabilitate the witness's credibility *or*

identifies a person as **someone the witness perceived** earlier.

Here, the drug user's out-of-court statement is being offered for the truth of the matter asserted—ie, that the defendant was the drug user's source. And though the statement identifies a person the drug user perceived earlier, it is *not* excluded from the hearsay rule because the drug user did not testify (**Choice D**). And since no other exclusion or **exception** to the hearsay rule applies, the statement is inadmissible.

(Choice B) A declarant need not be confronted with an out-of-court statement on the stand before it can be admitted. Therefore, a failure to do so is not a basis to exclude the officer's testimony.

(Choice C) A prior statement that (1) is inconsistent with a witness's testimony and (2) was made under oath is nonhearsay if the declarant testifies and is subject to cross-examination about the statement. But this rule is inapplicable here since the drug user did not testify at trial.

Educational objective:

A witness's prior statement that identifies a person as someone the witness perceived earlier is nonhearsay if the witness testifies and is subject to cross-examination about the statement.

References

Fed. R. Evid. 801(d)(1) (nonhearsay statements – witness's prior statement).

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