

In an automobile collision case, the plaintiff introduced evidence that a bystander made an excited utterance that the defendant ran a red light. The defendant called a witness to testify that later the bystander, now deceased, told the witness that the defendant went through a yellow light.

Is the witness's testimony admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the bystander is not available to explain or deny the inconsistency.
- C. Yes, as impeachment and as substantive evidence of the color of the light.
- D. Yes, but only for the purpose of impeaching the bystander.

## Explanation:

### Impeachment with inconsistent statements

Type	Use	Methods of introduction
<b>Witness's prior inconsistent statement</b>  (FRE 613)	Impeach witness's trial testimony	Examining witness about prior statement  Introducing extrinsic evidence if: witness can address & opposing party can question witness about statement <i>or</i> justice so requires
<b>Hearsay declarant's inconsistent statement</b>  (FRE 806)	Impeach declarant's hearsay statement	Introducing extrinsic evidence regardless of: when inconsistent statement occurred <i>or</i> whether declarant had opportunity to address statement

**FRE** = Federal Rule of Evidence.

**Hearsay** is an out-of-court statement offered to prove the truth of the matter asserted therein and is *inadmissible* unless it falls within a hearsay **exception** or **exclusion**. If the hearsay statement is **admitted**, the **declarant's credibility may be attacked**\* with the same methods used to impeach a testifying witness—eg, an **inconsistent statement**. Such a statement may be **used for impeachment** regardless of whether:

it was made before or after the hearsay statement *or*

the declarant had an opportunity to explain or deny the inconsistency **(Choice B)**.

However, the inconsistent statement may **not** be used as **substantive evidence** (ie, for its truth) unless it is also excepted or excluded from the hearsay rule.

Here, the bystander's hearsay statement—that the defendant ran a red light—was admitted as an **excited utterance**. Therefore, the defendant can offer testimony regarding the bystander's inconsistent statement—that the light was yellow—for the purpose of impeaching the bystander. But that statement is not admissible as substantive evidence of the light's color because it is not excepted or excluded from the hearsay rule **(Choice C)**.

\*Once attacked, evidence supporting the declarant's credibility may then be admitted.

**(Choice A)** The bystander's inconsistent statement is *not* hearsay since it is being used to impeach the bystander—not to prove the truth of the matter asserted (that the light was yellow).

**Educational objective:**

A hearsay declarant's credibility may be attacked using any method allowed to impeach a testifying witness, including offering evidence of the declarant's inconsistent statement. But that statement may not be used as substantive evidence (ie, for its truth) unless it is also excepted or excluded from the hearsay rule.

**References**

Fed. R. Evid. 806 (attacking and supporting a declarant's credibility).

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