

A man and a woman were charged with burglary of a warehouse. They were tried separately. At the man's trial, the woman testified that she saw the man commit the burglary. While the woman is still subject to recall as a witness, the man calls the woman's cellmate to testify that the woman said, "I broke into the warehouse alone because [the man] was too drunk to help."

Is the testimony regarding the woman's statement admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the statement is not clearly corroborated.
- C. Yes, as a declaration against penal interest.
- D. Yes, as a prior inconsistent statement.

Explanation:

A **prior inconsistent statement** is a statement that was made by a witness in the past that is inconsistent with the witness's current testimony. The prior statement may be **used to impeach** (ie, discredit) the witness by:

examining the witness about the statement (ie, intrinsic evidence) *or*

introducing the statement through **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.

But 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.

Here, the woman testified that she saw the man burglarize the warehouse. The man then called the woman's cellmate to testify that the woman had previously said that she broke into the warehouse alone. Since the woman is subject to recall, she can explain or deny—and the prosecution can question her about—her prior inconsistent statement. Therefore, the cellmate's testimony is admissible for impeachment purposes. But the woman's prior statement cannot be used substantively because it is neither excluded* nor excepted from the hearsay rule.

*The hearsay exclusion for statements by a declarant-witness does not apply because the woman's prior inconsistent statement was neither made under penalty of perjury at a legal proceeding nor identified a person as someone the declarant perceived earlier.

(Choice A) A prior inconsistent statement is *not* hearsay when it is offered for impeachment and not for the truth of the matter asserted.

(Choice B) Prior inconsistent statements need not be clearly corroborated (ie, supported by other evidence) to be admissible.

(Choice C) A statement against penal interest is a hearsay exception for out-of-court statements that tend to expose the declarant to criminal liability. But since this exception only applies when the declarant (eg, the woman) is *unavailable* as a witness, it does not apply here.

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. And a prior statement is admissible for substantive purposes if it falls within a hearsay exclusion or exception.

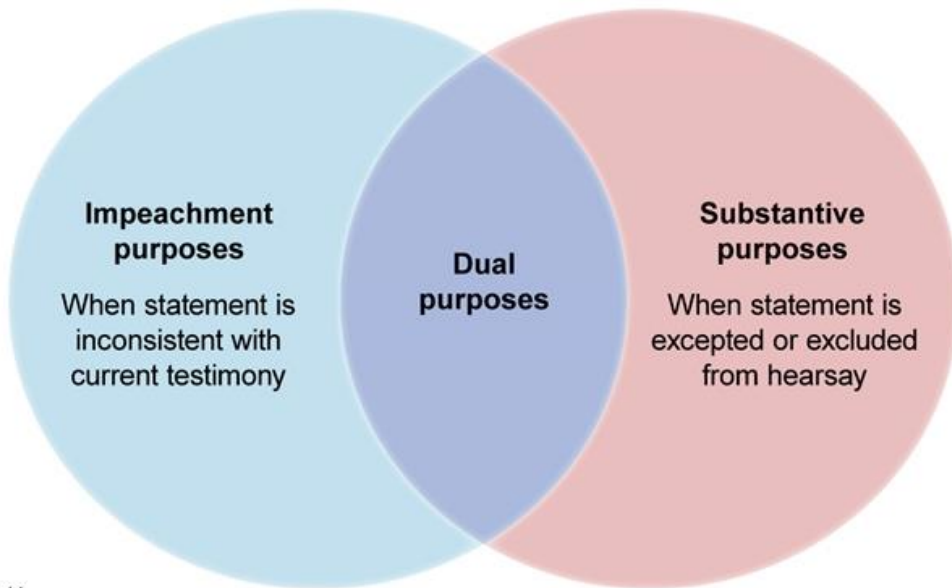
References

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

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Use of witness's prior inconsistent statement



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