

A man and his friend were charged with conspiracy to dispose of a stolen diamond necklace. The friend jumped bail and cannot be found.

Proceeding to trial against the man alone, the prosecutor calls a witness, the friend's sister, to testify that the friend confided to her that "[The man] said I still owe him some of the money from selling that necklace."

Is the sister's testimony admissible?

- A. No, because the friend is not shown to have firsthand knowledge that the necklace was stolen.
- B. No, because the friend's statement was not in furtherance of the conspiracy.
- C. Yes, as evidence of a statement against interest by the friend.
- D. Yes, as evidence of a statement by party-opponent by the friend.

Explanation:

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 exclusion or exception. One **hearsay exclusion** raised here applies to **statements by a party-opponent** that are offered against that party—eg, the *man's* statement that the friend owed the man money. But since the man's statement is contained within the friend's hearsay statement (ie, **hearsay within hearsay**), neither statement is admissible unless the friend's statement is *also* admissible.

The friend's statement is not excluded from hearsay because he is not a party-opponent or testifying witness (**Choice D**). However, his statement may fall within the **hearsay exception** for **statements against interest**. This exception applies to statements made by an **unavailable declarant** that a reasonable person would only have made if it were true (eg, because it exposes one to civil or criminal liability).

Here, the friend is unavailable because he jumped bail. And his statement—"the man" said I still owe him some of the money from selling that necklace"—exposes him to criminal liability for conspiring with the man. As a result, it falls within this hearsay exception and the sister's testimony about the friend's statement (and the man's statement contained therein) is admissible.

(Choice A) Proof of firsthand knowledge is not necessary to admit the friend's statement under the statement against interest exception (or any other exception) to the hearsay rule.

(Choice B) The statement was not in furtherance of the conspiracy—ie, an agreement between two or more persons to commit a crime (eg, sell stolen property). But the statement still exposed the friend to criminal liability for conspiracy because it references an agreement to commit a crime. Therefore, it is a statement against interest.

Educational objective:

Out-of-court statements offered for the truth asserted therein are only admissible if they fall within a hearsay exclusion or exception. And if such a statement is contained within another (ie, hearsay within hearsay), then neither statement is admissible unless both are excluded or excepted from hearsay.

References

Fed. R. Evid. 805 (hearsay within hearsay).

Fed. R. Evid. 804(b)(3) (hearsay exceptions for statements against interest).

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