

A defendant is charged with aggravated assault. The physical evidence at trial has shown that the victim was hit with a lead pipe in the back of the head and on the forearms and left in an alley. The medical examiner has testified that the injuries to the victim's forearms appear to have been defensive wounds. The victim has testified that he cannot remember who attacked him with the lead pipe. He would further testify that he remembers only that a passerby found him in the alley, and that he told the passerby that the defendant had hit him with the lead pipe; he then lost consciousness.

The defendant objects to this proposed testimony, arguing that it is hearsay and that the victim had no personal knowledge of the identity of the perpetrator.

Is the victim's testimony concerning his previous statement to the passerby admissible?

- A. No, because the prosecutor has failed to show that it is more likely than not that the victim had personal knowledge of the perpetrator's identity.
- B. No, because the victim has no memory of the attack itself and therefore cannot be effectively cross-examined.
- C. Yes, because it is the victim's own out-of-court statement.
- D. Yes, because the victim is subject to cross-examination and there is sufficient showing of personal knowledge.

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.

The rule against hearsay generally bars the admission of out-of-court statements offered for the truth of the matter asserted therein. But certain statements are *excluded* from this rule and considered **nonhearsay**. This includes statements that:

are made by a **declarant who testifies** and is **subject to cross-examination** *and* **identify a person** as someone the declarant perceived earlier.

To be admissible, these prior statements of identification must be based on the declarant-witness's **personal knowledge**. This requirement is met if a **reasonable juror could find** that the witness was speaking about his/her **firsthand observation or experience**—a standard that is significantly easier to satisfy than "more likely than not" (**Choice A**).

Here, the victim's proposed testimony seeks to identify the defendant as someone the victim had previously perceived and identified as his attacker. Since the victim can be cross-examined about his statement, it is nonhearsay. Additionally, the victim's prior statement of identification was based on personal knowledge because evidence of defensive wounds is sufficient to persuade a reasonable juror that the victim saw his attacker firsthand. Therefore, the victim's testimony concerning this statement is admissible.

(Choice B) In *United States v. Owens*, the Supreme Court admitted an out-of-court statement identifying a declarant-witness's attacker even though the declarant could not remember the attack at trial. The Court reasoned that the confrontation clause only guarantees a defendant an *opportunity* for effective cross-examination. This guarantee is met when the defendant can challenge the witness's credibility (eg, bias, lack of memory).

(Choice C) The fact the victim made the out-of-court statement identifying the defendant as his attacker is insufficient on its own to admit that statement.

Educational objective:

An out-of-court statement that identifies a person as someone the declarant perceived earlier is nonhearsay if the declarant testifies at trial and is subject to cross-examination about the prior identification.

References

Fed. R. Evid. 801(d)(1)(C) (prior statement of identification).

Fed. R. Evid. 602 (lay witness personal knowledge).

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