

A defendant is charged with murder in connection with a carjacking incident during which the defendant allegedly shot the victim while attempting to steal his car. The prosecutor calls the victim's four-year-old son, whose face was horribly disfigured by the same bullet, to testify that the defendant shot his father and him.

Should the son's testimony be admitted or excluded?

- A. Admitted, provided the prosecutor first provides evidence that persuades the judge that the son is competent to testify despite his tender age.
- B. Admitted, provided there is sufficient basis for believing that the son has personal knowledge and understands his obligation to testify truthfully.
- C. Excluded, because it is insufficiently probative in view of the son's tender age.
- D. Excluded, because it is more unfairly prejudicial than probative.

Explanation:

Witness testimony is generally admissible once the witness has given an oath or affirmation to **testify truthfully** AND the proponent has established a **proper foundation** for that testimony. A foundation for **lay witness** (ie, nonexpert) testimony is properly laid by showing that the testimony is:

based on the witness's **personal knowledge** – a matter that the witness **perceived firsthand** *and*

relevant to the case – tends to make a **material fact more or less probable** than it would be without the evidence.

Here, the son's testimony is based on personal knowledge since he was disfigured by the same bullet that killed his father. And that testimony is relevant because it tends to make a material fact—that the defendant was the killer— more probable than it would be without that testimony. As a result, this testimony should be admitted unless the opponent raises a valid objection. Two objections could be made here:

incompetency – the witness is unable to testify truthfully and accurately (eg, due to age or mental capacity) *and*

unfair prejudice – the probative value (ie, degree of relevance) of the evidence is substantially outweighed by the risk of unfair prejudice or [other concerns](#).

It is *presumed* that a witness of any age is competent to testify so long as that testimony is (1) based on the witness's personal knowledge and (2) supported by an oath or affirmation to testify truthfully (**Choice A**). And though the son's disfigured face may prejudice the defendant, the son's testimony regarding the killer's identity goes to the heart of this case. Therefore, its high probative value outweighs the risk of unfair prejudice (**Choices C & D**).

Educational objective:

Lay witness testimony is generally admissible if (1) the witness has given an oath or affirmation to testify truthfully and (2) the proponent has laid a proper foundation—personal knowledge and relevance—for that testimony.

References

Fed. R. Evid. 602 (personal knowledge requirement).

Fed. R. Evid. 401, 403 (admission and exclusion of relevant evidence).

Fed. R. Evid. 601 (competency to testify).

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Admission of lay witness testimony

Oath or affirmation

Foundation

Objection

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