

A defendant has been charged with conspiracy to commit arson and insurance fraud after his restaurant burned to the ground late one night. At trial, the prosecutor presents evidence that, two days before the fire, the defendant paid \$10,000 to a man who was later seen entering the restaurant shortly before the fire started. The man has invoked his Fifth Amendment privilege and refuses to testify at the defendant's trial. The prosecutor calls the man's fiancée, who testifies that on the day of the fire, she noticed that the man seemed nervous and asked him what was wrong. She says that he told her, "I'm getting paid \$10,000 to burn down a restaurant tonight, and I'm a little nervous about it." The defendant objects to the admission of the man's statement to the fiancée, relying on the hearsay rule and the confrontation clause.

Is the man's statement to the fiancée admissible?

- A. No, because the man's statement is hearsay not within any exception.
- B. No, because the man's statement is testimonial, so admitting it would violate the defendant's right to confrontation.
- C. Yes, because the man's statement is a nontestimonial declaration against penal interest.
- D. Yes, because the man's statement is a nontestimonial statement by a coconspirator.

Correct

Collecting Statistics

01 min, 19 secsTime Spent

2023Version

## Explanation:

The rule against hearsay bars the admission of out-of-court statements offered for the truth of the matter asserted therein unless an [exclusion or exception](#) applies. One exception applies to an [unavailable declarant's statements against interest](#)—ie, statements that a reasonable person in the declarant's position would have made only if that person believed the statement to be true because it:

was contrary to the declarant's **proprietary** (ie, ownership) or **pecuniary** (ie, monetary) **interest**

tended to **invalidate the declarant's claim** against someone else *or*

exposed the declarant to **civil or criminal liability**.

When a statement against interest is offered in a criminal case and tends to expose the declarant to criminal liability, it is admissible only if it is supported by **corroborating circumstances** that clearly indicate its trustworthiness.

Here, the man invoked his [Fifth Amendment privilege](#) and refused to testify (unavailable declarant). The prosecutor then called the man's fiancée to testify to his out-of-court statement that he was to be paid \$10,000 to burn down a restaurant (statement creating criminal liability). This statement was sufficiently corroborated with evidence that the defendant paid the man \$10,000 and the man was seen entering the restaurant before the fire. Therefore, the statement falls within the hearsay exception for statements against interest **(Choice A)**.

However, the defendant also raised an objection under the **Sixth Amendment confrontation clause**. This clause **bars** the admission of **testimonial statements** made by an **unavailable hearsay declarant** *unless* the defendant had an **opportunity to cross-examine** the declarant. A statement is testimonial if the declarant would reasonably expect it to be used in a prosecution. This would include statements made during a police investigation, but *not* the man's statement to his fiancée **(Choice B)**. Accordingly, that statement is admissible.

**(Choice D)** Statements made by a party's coconspirator during and in furtherance of the conspiracy are attributable to that party and therefore considered [nonhearsay](#). However, the statement must be part of the flow of information between coconspirators intended to help each perform his/her role (not seen here).

## Educational objective:

Nontestimonial statements against interest are admissible in criminal cases.

## References

Fed. R. Evid. 804 (hearsay exceptions for unavailable declarants).

## Unavailable declarant and confrontation clause analysis

