

A defendant is on trial for the robbery of an armored bank truck. A man and his wife witnessed the robber flee from the armored truck. The man testified that the robber removed his mask and exposed his face as he fled. The man further testified that he recognized the defendant as the robber. The defendant now seeks to introduce the grand jury testimony of the man's wife, who has refused to testify at trial despite a court order requiring her to do so.

During her grand jury testimony, the wife affirmatively stated that the robber never removed his mask or exposed his face. Despite evidence to the contrary, the prosecution did not press the wife on this matter, as it had more than enough evidence linking the defendant to the robbery to secure an indictment.

If the court does not admit the wife's grand jury testimony, what is the most likely explanation?

- A. Grand jury testimony is specifically excluded from the definition of former testimony.
- B. The prosecution lacked the motive to develop the wife's testimony at the grand jury proceeding.
- C. The wife is available to testify at trial.
- D. The wife is unavailable to testify at trial.

Explanation:

Former testimony

(FRE 804(b)(1))

Hearsay exception for unavailable declarant's testimony that:

was given at trial, hearing, or deposition in current case or different proceeding that involved similar parties & issues *and*

is offered against party who had opportunity & similar motive to develop testimony by direct or cross-examination

FRE = Federal Rule of Evidence.

Out-of-court statements (eg, the wife's grand jury testimony) offered to prove the truth of the matter asserted therein are generally inadmissible under the rule against hearsay. However, certain statements are **excluded or excepted** from this rule. One **hearsay exception** allows admission of **former testimony** if:

the declarant is **unavailable**—eg, the declarant refuses to testify despite a court order to do so (as seen with the wife here)

the testimony was given at a **trial, hearing, or deposition** in the current case or in a different proceeding that involved **similar parties and issues** *and*

the party against whom the testimony is offered had an **opportunity** and **similar motive to develop** that testimony through **direct or cross-examination** of the declarant.

However, this exception **rarely applies to grand jury testimony** because (1) a suspect/defendant is seldom present at grand jury proceedings and (2) the prosecution's motive to develop a grand jury witness's testimony is often lacking.*

Here, the wife previously testified before the grand jury that the robber did not remove his mask or expose his face. The prosecution lacked the motive to press the wife on this testimony because it had more than enough evidence to secure an indictment. And since the wife's testimony is not otherwise excluded or excepted from the hearsay rule, it is inadmissible.

*For example, motive may be lacking because other evidence is sufficient to implicate the suspect, the testimony took place early in the grand jury investigation, or a statement exculpating the suspect is a minor part of the witness's overall testimony.

(Choice A) Although the former testimony exception rarely applies to grand jury testimony because the defense can rarely show that the prosecution had a similar motive to develop the testimony, grand jury testimony is not specifically excluded from the exception.

(Choices C & D) The wife is *not* available to testify at trial since she refused to testify despite a court order requiring her to do so. But even when a declarant is unavailable, the declarant's statement can still be admissible if it falls within an exception or exclusion to the hearsay rule (not seen here).

Educational objective:

The former testimony exception rarely applies to grand jury testimony because (1) a suspect/defendant is seldom present at grand jury proceedings and (2) the prosecution's motive to develop a witness's testimony is often lacking.

References

Fed. R. Evid. 804(b)(1) (hearsay exception for former testimony).

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