

A pedestrian sued a defendant for injuries he suffered after the defendant allegedly drove his car through a red light and struck the pedestrian in a crosswalk. At trial, a woman who had seen the accident testified that she clearly saw the defendant run the red light and hit the pedestrian. The defendant did not cross-examine the woman, and she was excused as a witness and immediately left the jurisdiction. The defendant then called the woman's neighbor to testify that the woman had told him a week after the accident that the defendant had not run the red light. The pedestrian objects to the neighbor's testimony about the woman's statement.

Is the neighbor's testimony about the woman's statement admissible?

- A. Yes, both to prove that the defendant did not run the red light and to impeach the woman.
- B. Yes, only to prove that the defendant did not run the red light.
- C. Yes, only to impeach the woman with her prior inconsistent statement.
- D. No, because the statement is hearsay if offered to prove that the defendant did not run the red light and cannot be offered to impeach because the woman was not given an opportunity to explain or deny the statement.

Incorrect

Correct answer D

Collecting Statistics

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## Explanation:

A witness's **prior inconsistent statement** is **subject** to the **rule against hearsay** when offered to prove the truth of the matter asserted therein. As a result, such a statement is **admissible** for its truth **only** if it is **excluded or excepted** from the **hearsay rule**.

Here, the woman testified that she clearly saw the defendant *run* the red light and hit the pedestrian. The defendant then sought to call the woman's neighbor to testify that the woman told him that the defendant had *not run* the red light. That prior inconsistent statement is *inadmissible* to prove that the defendant did not run the light (ie, for its truth) because it is neither excluded nor excepted from hearsay (**Choices A & B**).

However, even if a prior inconsistent statement is not admissible for its truth, it may be **admissible to impeach** the witness on a material issue. This can be accomplished by introducing the statement through either:

intrinsic evidence—ie, by **examining the witness** about his/her statement *or*

**extrinsic evidence** if (1) the witness has an **opportunity to explain or deny**, and the opposing party can **question the witness** about, the statement or (2) justice so requires.\*

Here, the defendant seeks to use extrinsic evidence (ie, the neighbor's testimony) to introduce the woman's prior inconsistent statement. But the defendant chose not to cross-examine the woman, and she was then excused as a witness and immediately left the jurisdiction. As a result, the woman has no opportunity to explain or deny her prior statement and the pedestrian cannot question her about it. And since there is no indication that justice requires the introduction of this statement, it is also *inadmissible* to impeach the woman (**Choices A & C**).

\*Justice requires the admission of extrinsic evidence of a witness's prior inconsistent statement when, despite the witness's lack of opportunity to explain or deny the statement, a party's right to a fair trial would be jeopardized by exclusion of the extrinsic evidence.

## Educational objective:

A prior inconsistent statement is admissible substantively if it is excluded or excepted from hearsay. And extrinsic evidence of the statement is admissible for impeachment if (1) the witness has a chance to explain or deny, and the opposing party can question the witness about, the statement or (2) justice so requires.

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## Use of witness's prior inconsistent statement

