

At a defendant's trial for theft, a witness called by the prosecutor testified to the following: (1) that from his apartment window, he saw thieves across the street break the window of a jewelry store, take jewelry, and leave in a car; (2) that his wife telephoned the police and relayed to them the license number of the thieves' car as the witness looked out the window with binoculars and read it to her; and (3) that he has no present memory of the number, but that immediately afterward he listened to a playback of the police tape recording giving the license number (which belongs to the defendant's car) and verified that she had relayed the number accurately.

Is playing the tape recording for the jury proper?

- A. No, because it is hearsay not within any exception.
- B. No, because the witness's wife lacked firsthand knowledge of the license number.
- C. Yes, because it is a public record or report.
- D. Yes, because it is a recorded recollection.

Explanation:

Recorded recollection

(FRE 803(5))

Hearsay exception—regardless of declarant's availability—for records that:

concern matter witness once knew but cannot recall at trial
witness made or adopted when matter was fresh in his/her mind *and*
accurately reflect witness's personal knowledge at time record was made
FRE = Federal Rule of Evidence.

The **rule against hearsay** generally bars the admission of an out-of-court statement (eg, tape recording) offered to prove the truth of the matter asserted therein (eg, license number). But if a statement falls within an **exclusion** or **exception** to this rule, it is admissible as substantive evidence. One such **exception** applies to a **recorded recollection**, which allows a record to be read—or, in the case of audio recordings, played—into evidence if it:

concerns a matter that a witness **once knew but cannot recall** at trial
was **made or adopted** by the witness **when** the matter was **fresh in his/her mind** *and*
accurately reflects the witness's personal knowledge at the time it was made.

Here, the witness testified that he had no memory of the license plate number he had read to his wife as he watched the thieves leave the jewelry store. But immediately after reporting the burglary—ie, while the matter was fresh in his mind—the witness adopted the recording by verifying that it accurately reflected the number he had read to his wife. Therefore, the recording is admissible under the hearsay exception for recorded recollections and can be played to the jury (**Choice A**).

(Choice B) The witness's wife did not need to have firsthand knowledge of the license plate number for the recording to be admissible as a recorded recollection. That is because the witness adopted the recording and verified its accuracy.

(Choice C) The **public records** exception to the hearsay rule applies to a public office's records or statements that set out (1) office activities, (2) matters observed by office representatives while under a legal duty to report, and (3) factual findings from legally authorized investigations when offered in civil cases or against the government in criminal cases. But the tape recording falls outside these categories.

Educational objective:

A record that (1) concerns a matter a witness once knew but cannot recall, (2) the witness made or adopted when the matter was fresh in mind, and (3) accurately reflects the witness's personal knowledge is admissible as a recorded recollection.

References

Fed. R. Evid. 803(5) (hearsay exception – recorded recollection).

Copyright © 2002 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.