

A defendant was charged with burglary. At trial, a police officer testified that, after the defendant had been arrested and had agreed to answer questions, the officer interrogated him with a stenographer present, but that the officer could not recall what the defendant had said. The prosecutor presented the officer with a photocopy of the stenographic transcript of the interrogation. After looking at it, the officer began to testify that he recalled that the defendant had admitted to being in the area of the burglary.

The defendant has objected to the officer's testimony on the ground that it violates the "original document" rule (also known as the "best evidence" rule).

Should the officer's testimony concerning the defendant's recorded confession be admitted?

- A. No, because a photocopy cannot be used without a showing that the original is unavailable.
- B. No, because the stenographer has not testified to the accuracy of the transcript.
- C. Yes, because a photocopy is a duplicate of the original.
- D. Yes, because the prosecutor is not attempting to prove the contents of the document.

### Explanation:

A party may use **any item** (usually a writing) to **refresh a witness's recollection** if: the witness **once had personal knowledge** of a fact or event but is now **unable to recall** it *and* the item will **help the witness recall** that information.

Use of a writing to refresh a witness's recollection **does not implicate** the **best evidence rule** because this rule only applies when a party is trying to prove the contents of the writing.

Here, the prosecutor is trying to prove what the defendant said during the interrogation—not the *contents* of the transcript. The officer cannot remember what the defendant said at the interrogation, but the officer once had personal knowledge of the interrogation because he was there and the transcript will help him recall it. Therefore, it is proper to refresh the officer's recollection with the transcript and admit his testimony.

**(Choice A)** The best evidence rule allows the admission of a reliable duplicate (eg, a photocopy) *without* a showing that the original is unavailable.

**(Choice B)** When a copy of a transcript is used to refresh a witness's recollection, the witness's subsequent testimony—not the transcript—is introduced into evidence. Therefore, a document used in this manner does not have to be accurate or reliable because the document is not being admitted.

**(Choice C)** Under the best evidence rule, a reliable duplicate is admissible to the same extent as the original unless (1) a genuine question is raised about the original's authenticity or (2) the circumstances make it unfair to admit the duplicate. This rule does not apply here because the prosecutor is not trying to prove the transcript's contents.

### Educational objective:

A writing may be used to refresh a witness's recollection if (1) the witness once had personal knowledge of a fact or event but can no longer recall it and (2) the writing can help the witness recall that information. And since the writing is not being offered to prove its contents, this use does not implicate the best evidence rule.

### References

Fed. R. Evid. 612 (refreshed recollection).

Fed R. Evid. 1002-04 (best evidence rule).

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## Use of writings at trial

To refresh recollection

V.

To prove contents

