

A man was charged with the armed robbery of a convenience store and pleaded not guilty. At trial, the man testified on direct examination that he had never been inside the store that was robbed. Intending the man to testify that he told police the same, the man's attorney then asked, "What, if anything, did you tell the police when you were arrested?" The prosecutor has objected.

Is the intended testimony admissible?

- A. No, because the man has a substantial motive to fabricate his testimony that he had never been inside the store.
- B. No, because the testimony is hearsay not within any exception.
- C. Yes, because the statement to police was made before the man had a motive to fabricate his testimony.
- D. Yes, to prove that the man had never been inside the store.

Explanation:

Nonhearsay statements by declarant-witness

(FRE 801(d)(1))

Prior statement of identification	Identifies person as someone declarant perceived earlier
Prior <i>inconsistent</i> statement	Inconsistent with declarant's current testimony <i>and</i> made under penalty of perjury at former proceeding
Prior <i>consistent</i> statement	Consistent with declarant's current testimony <i>and</i> offered to either: rebut charge of fabrication/improper influence if made before motive arose <i>or</i> rehabilitate declarant's credibility when attacked on other grounds

FRE = Federal Rule of Evidence.

Hearsay refers to out-of-court statements (here, the man's statement to police) offered to prove the truth of the matter asserted therein (that he had never been inside the store). Such statements are inadmissible unless specifically **excluded or excepted** from the rule against hearsay. One **hearsay exclusion** applies when the declarant is on the witness stand and an out-of-court statement that is **consistent** with the declarant-witness's **current testimony** is offered to:

rebut a charge of **fabrication or improper influence**, if the out-of-court statement was made before a motive for the alleged fabrication or improper influence arose *or*

rehabilitate the declarant-witness's **credibility** when attacked on other grounds.

Here, the man's prior statement to police *is* consistent with his current testimony, but it was not offered to rehabilitate the man's credibility. Nor was it offered to rebut a charge of fabrication or improper influence. And even if it had, the statement was made *after* the man had a motive to fabricate (ie, after his arrest) **(Choice C)**. Therefore, it does not meet the criteria for admission as a prior consistent statement. And since no other hearsay exclusion or exception applies, the man's intended testimony is *not* admissible.

(Choice A) The man may have a substantial motive to fabricate his testimony because he has been accused of a crime. That motive does not provide a basis to exclude otherwise admissible testimony but may be used by the prosecution to **impeach** the man by attacking his credibility as a witness.

(Choice D) The man's intended testimony cannot be admitted to prove that he had never been inside the store because it is hearsay not within any exception.

Educational objective:

A declarant-witness's prior consistent statement is excluded from the rule against hearsay if (1) it is offered to rebut a charge of fabrication/improper influence and was made before a motive to fabricate arose or (2) it is offered to rehabilitate the witness's credibility.

References

Fed. R. Evid. 801(d)(1)(B) (declarant-witness's prior consistent statement).

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