ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

A woman was stopped at an intersection when her car was struck from behind by a blue Honda. The driver in the Honda fled the scene after the accident. Another motorist, Will, saw the accident and saw that the Honda was fleeing the scene. Will pursued the Honda until he could make out the rear license plate number. He repeated the number to himself until he could write it on a napkin that was in his car. The Honda sped away and Will was not able to keep up with it.

Will returned to the scene of the accident and reported the license number to the investigating police officer, Officer Shea. Will watched as Officer Shea wrote the license number down into the officer's police notebook. Will confirmed that Officer Shea wrote the same number down as Will had seen and written on the napkin. Will threw the napkin away.

The license number was traced to a blue Honda owned by Doug, which was found to have signs of having been recently repaired.

A nearby convenience store had a parking lot computer security system that included a digital camera focused on the intersection. The system had captured the accident on the computer's hard drive. The images on the hard drive showed a blue Honda with the same license plate number involved in the accident and leaving the scene. The images also showed the Honda being driven by a man who appeared to match Doug's description.

Doug was charged with leaving the scene of an accident.

At trial the prosecutor called Will to testify to the license plate number of the vehicle leaving the accident. Will had no present memory as to the license number. Will testified about how he had seen the license number and reported it to Officer Shea. Will said that since Officer Shea had written the number in his police notebook, Will had thrown away the napkin.

The prosecutor then called Officer Shea to testify as to what license number was written down in his police notebook. Doug objected, arguing that the testimony was hearsay and also violated the "best evidence" rule. The prosecutor argued that the evidence was allowed as past recollection recorded. The judge allowed Officer Shea to read the license number that was included in his police notebook to the jury.

The prosecutor called the convenience store manager who testified about how a CD had been made from the security system's hard drive. The manager

explained how the security system worked. He explained that the system was tamper-proof and that it downloaded the digital images from the parking lot camera onto the computer's hard drive. The manager stated that he had viewed the images on the hard drive of the computer and then had viewed what had been burned onto the CD and both showed exactly the same event. The prosecutor then sought to introduce the CD as evidence to play it to the jury. Doug objected, arguing that its introduction violated the "best evidence" rule and that the prosecutor had to bring in the actual computer hard drive and play what was on it to the jury. The judge agreed with Doug and excluded the CD.

Doug testified at trial that he had not been driving his car that day, but that he had loaned it to a friend. He said that his friend returned the car to him with some damage to the front bumper, but had arranged to have the damage repaired. Doug testified that he had not known anything about the accident.

The prosecutor sought permission to impeach Doug with a felony assault conviction from two years prior in order to attack Doug's credibility. Doug objected, but the judge overruled his objection. The prosecutor asked Doug if he had been convicted of felony assault and Doug admitted that he had.

1. Explain whether the trial court was correct in allowing Officer Shea to read the license plate number from in his police notebook to the jury.

2. Explain whether the trial court was correct in excluding the CD as evidence.

3. Explain whether the trial court was correct in allowing Doug to be impeached with his felony assault conviction.

GRADER'S GUIDE

***** QUESTION NO. 3 *****

SUBJECT: EVIDENCE

1. **Explain whether the trial court was correct in allowing Officer Shea to read the license plate number that was included in his police notebook to the jury. (45 points)**

Doug objected to Officer Shea reading the license plate number contained in his police notebook on the grounds that it was hearsay and violated the "best evidence" rule. The court presumably allowed the testimony as past recollection recorded, the basis asserted by the prosecution.

When a party attempts to introduce evidence of an out-of-court statement for the truth of the matter asserted in the statement, the out-of-court statement is hearsay, see ARE 801(c), unless the statement falls within an exception to the hearsay rule. Officer Shea has no first hand knowledge of the license number of the Honda--he was told the number by Will--so the information about the license number would be considered hearsay unless it fell within a hearsay exception.

Therefore the issue to be discussed is whether the testimony about the license number properly fell within the recorded recollection exception found in ARE 803(5). Under this exception the availability of the declarant is immaterial. *Id.*

This exception applies where a memorandum or record concerning when a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately is shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect the knowledge correctly. ARE 803(5). If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. *Id.*

Since Will has no independent memory of the license number at the time of trial, this exception would apply so long as the circumstances show that the memorandum or record (in this case the license number written in the police notebook) was made or adopted by Will when the matter was fresh in his memory and accurately reflected the knowledge correctly. Although Will did not write the number into the police notebook (Officer Shea did), Will adopted it when he confirmed that it was the correct number in the notebook. At the time Will did so, the matter was fresh in his memory and accurately reflected his knowledge of the license number. *See Harris v. Keys*, 948 P.2d 460, 467 n. 14 (Alaska 1997)(diary entries not made by witness, but verified by witness when made, could fall within recorded recollection exception).

As required by the rule, the prosecutor did not attempt to actually introduce that portion of Officer Shea's police notebook containing the license number, but just had Officer Shea read the number to the jury.

Because the police notebook itself was not received as an exhibit, the "best evidence" rule did not apply. This rule governs the introduction of an original "writing, recording or photograph." ARE 1002 and 1001. When a party is seeking to introduce evidence of a writing, which includes numbers set down by handwriting, see ARE 1001(1), the rules of evidence normally require the original writing be introduced, see ARE 1002 (the "best evidence" rule). However, the original is not required and other evidence of the contents of a writing is admissible if the original has been lost or destroyed (and not in bad faith). See ARE 1004(a). In other words, where the failure to produce the original writing can be explained, ARE 1004(a) allows a party to introduce secondary evidence to prove the contents of a writing. But ARE 1004(a) only applies when there is no other rule allowing secondary evidence. *Commentary*, ARE 1004(a) at p. 641.

Since the prosecutor did not attempt to introduce any actual writing (i.e., the police notebook itself), and since the failure to produce the actual original writing (the napkin) was explained, and since there is another rule that allows the secondary evidence of the license number, ARE 803(5), there is no issue about the failure to introduce the original writing (the napkin). Since both ARE 1004(a) and ARE 803(5) provide a basis for introducing other evidence of the number that was on the napkin, the trial court was correct in permitting Officer Shea to read the license number to the jury.

2. Explain whether the trial court was correct in excluding the CD as evidence. (40 points)

The "best evidence" rule states a preference that a party introduce the "original" of a "writing, recording, or photograph" in order to prove its contents. ARE 1002. The terms "writing," "recording," and "photograph" are defined in ARE 1001.

Alaska's "best evidence" rule has no provision that directly applies to digitally-recorded photographic images. ARE 1001(2) defines "photographs" as including still photographs, x-ray films, videotapes, and motion pictures. There is no specific reference in this subsection to digitally-recorded images. ARE 1001(1) defines "writings and recordings" as including writings and recordings that consist of letters, words or numbers or their equivalent that have been "set down" by means including electronic recording or other forms of data compilation. This subsection appears to be limited to writings that exclude imagery (as the intent is that subsection (2) covers imagery, i.e., photographs).

Thus, it appears that Alaska's rules of evidence have not stayed current in terms of expressly including a now-typical means of recording images (through digital recordings). But if the terms "motion pictures" or "still photographs" are interpreted broadly, the digitally-recorded images could fall within the definition of "photographs." If the images on the hard drive fall within the definition of "photographs," then the judge was wrong to exclude the CD for the following reasons.

ARE 1001(3) states that an original "photograph" includes the negative or any print made from it. ARE 1003 allows introduction of a duplicate to the same extent as an original unless there is a genuine question as to the authenticity of the original. A duplicate is defined as a counterpart produced by mechanical or electronic re-recording, among other means. ARE 1001(4). Thus, if the CD copied from the hard drive is considered the equivalent of a negative, then the CD is the "original" for purposes of ARE 1001(3). If it is considered a duplicate, then it is still admissible because there is no genuine issue as to its authenticity.

If the CD is more like stored computer data, then it could still be admissible. ARE 1001(3), which deals more directly with information stored on a computer, states that if data is stored on a computer, any output of such data readable by sight that is shown to reflect the data accurately is an original. As the Commentary to ARE 1001 points out, the rule was originally limited to actual writings, but because of present day techniques that have expanded how data is stored, the considerations underlying the rule should expand to cover computers, photographic systems, and other modern developments. Commentary to ARE 1001(1) at p. 639.

Thus, there is an argument that digital images should be considered either data or photographs and would be admissible as an original under ARE 1001(3) or a duplicate under ARE 1001(4).

A more discerning analysis might point out that even if a digital CD would not be covered by ARE 1001, 1002, or 1003, its admissibility would be covered by ARE 901. This is the evidence rule that governs the authentication requirement for any type of documentary evidence. This rule generally states that there is a condition precedent to admissibility of such evidence that the court find that the item is what its proponent claims it to be. In a criminal trial where the evidence is something that might be subject to tampering, the prosecution must also show that the evidence presented at trial is as a matter of reasonable certainty the same as it was at the time that it was first observed. ARE 901(a). But the burden of proving authentication only requires that there be a foundation laid from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be. *Buster v. Gale*, 866 P.2d 837, 841 (Alaska 1994). A videotape is admissible if the proponent of the evidence establishes as a foundational matter that the tape accurately depicts the

subject and would be helpful to the jury. *Brigman v. State*, 64 P.2d 152, 163 (Alaska App. 2003). The video need not be totally free from inaccuracies so long as there is an explanation of the imperfections so that the jury is not misled. *Id.*

Here the store manager testified how the system worked and that it was tamper-proof. He also testified that he had viewed the original images on the hard drive and the images on the CD and that they were the same and he explained how he made the CD. Since Doug was not presenting any specific challenge that the images on the CD had been tampered with or that the images on the original hard drive had been tampered with or were somehow inaccurate, the prosecutor likely satisfied the requirements for the admission of the CD under ARE 901. *See Callahan v. State*, 769 P.2d 444 (Alaska App. 1989)(reversible error to exclude pictures taken by friend where friend testified that pictures accurately represented the injuries to the defendant seen by the friend at the time she took the pictures); *contra Brigman v. State*, 64 P.2d 152 (Alaska App. 2003)(trial court was correct in excluding video where the opposing party established that the video was an edited version of a hike and that it was recorded at a time different than the time in question).

Therefore, it is likely that the trial court was wrong to exclude the CD as evidence.

3. Explain whether the trial court was correct in (a) allowing Doug to be impeached with his felony assault conviction. (15 points)

Unlike the federal rules, Alaska's rule governing impeachment by evidence of a conviction of a crime is limited to crimes of dishonesty or false statement (but can include misdemeanor offenses). *See* ARE 609; *see also City of Fairbanks v. Johnson,* 723 P.2d 79 (Alaska 1986); *Alexander v. State*, 611 P.2d 469 (Alaska 1980); *Richardson v. State*, 579 P.2d 1372, 1376-77 (Alaska 1978). The federal rules allow impeachment based on any felony offense. *See* Fed. R. Evid. 609. The offense of assault would not be considered a crime of dishonesty or false statement. *See City of Fairbanks v. Johnson,* 723 P.2d 79 (Alaska 1986); *Alexander v. State*, 611 P.2d 469 (Alaska 1980). Thus, even though the offense fell within the five year time limit, see ARE 609(b), the trial court was wrong to allow Doug to be impeached by this conviction.