ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Wendy was walking her German Shepherd, Moe, on a trail near her home. As she came around a bend in the trail, she saw two men. One man, Vince, was lying on the ground next to the trail. The second man, Doug, was standing over him. As Wendy approached, Moe began to bark nervously and strain against his leash. Seeing Wendy and Moe, Doug turned and ran down the trail.

Wendy approached Vince, who had a large bruise on his head and was barely conscious. Looking at Wendy, Vince muttered, "Doug said he was going to get me and he did." Wendy immediately called 911, and Vince was taken to a nearby hospital where he was treated for a mild concussion.

Doug was subsequently charged with assault.

At trial, Vince testifies that he was jogging on the trail when he encountered Doug, a former employee at the printing business that Vince managed. Vince states that, one week before the incident on the trail, he had fired Doug for incompetence and Doug had threatened to get back at Vince for the firing. Vince states that, on the evening in question, Doug jumped out from behind a bush and shoved him to the ground. In the ensuing scuffle, Vince hit his head on a rock next to the trail.

Doug also testifies at trial. Doug claims that he could not possibly have attacked Vince. Doug states that he suffers from a debilitating joint disease which leaves him with little strength in his arms and severe pain in his hands. Doug testifies that he was out for a walk that evening to ease the stiffness in his joints and that as he approached the trail bend, Vince jogged past him. Doug claims that as he passed by, Vince tripped over a frost heave in the trail and landed at Doug's feet. Doug states that he was merely trying to see whether Vince was okay when Wendy came around the bend. He testifies that he ran because he was afraid that Wendy's dog was about to attack him.

1. At trial, the state calls Wendy, who testifies that she saw Doug standing over Vince. Wendy also recounts Vince's statement to her, "Doug said he was going to get me and he did." Explain what objections Doug should make to this testimony and whether the court should grant those objections.

2. In its rebuttal, the state attempts to call as a witness Doug's doctor, Dr. Cameron. Several days after Doug's encounter with Vince on the trail, Doug hired Dr. Cameron to treat him for joint pain. Doug has admitted

that Dr. Cameron is the first doctor from whom he sought treatment for his alleged joint disease. However, according to the state, Dr. Cameron will testify that Doug's joint disease was quite mild and that Doug was physically capable of knocking Vince to the ground. Explain what objections Doug might make on grounds of privilege and whether his objections will be successful.

3. Prior to trial, Doug asks the court to take judicial notice of the frost heave which he claims caused Vince to trip. Doug says to the judge, "I know you jog along that trail several times each week – you know how dangerous that frost heave is and how easy it would be to trip over it!" Should the court grant his request? Explain.

GRADER'S GUIDE

***** QUESTION NO. 8 *****

SUBJECT: EVIDENCE

1. At trial, the state calls Wendy, who testifies that she saw Doug standing over Vince. Wendy also recounts Vince's statement to her, "Doug said he was going to get me and he did." Explain what objections Doug should make to this testimony and whether the court should grant those objections. (40 points)

Wendy's testimony contains two layers of out-of-court statements: (1) Doug's statement to Vince that he is "going to get" Vince and (2) Vince's statement to Wendy recounting Doug's threat and telling Wendy that Doug was his attacker. These statements, as recounted by Wendy, are being offered to prove that Doug intended to attack and did attack Vince. Thus, the statements, made out of court, are being offered to prove the truth of the matter asserted and are therefore hearsay. *See* Alaska R. Evid. 801(c). Because the statements are hearsay, they would not be admissible unless each layer of hearsay falls within an exception to the hearsay rule. *See* Alaska R. Evid. 802.

With respect to Doug's statement to Vince, the state will argue that this statement is an admission of a party opponent under Evidence Rule 801(d)(2). Under that rule, a statement is considered non-hearsay if, in relevant part, it is offered against a party and is the party's own statement. *See* Alaska R. Evid. 801(d)(2)(A). Doug's statement to Vince clearly falls within this provision and is therefore admissible.

With respect to Vince's statement to Wendy, the state will likely argue that the statement falls within one of two exceptions under Evidence Rule 803, which allows hearsay regardless of whether the declarant is available as a witness.

First, the statement may be admissible as a "present sense impression" under Evidence Rule 803(1) ("[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"). To fall within the "presence sense impression" exception, a statement must (1) describe or explain the event or condition; (2) be made during or immediately after the event; and (3) be based on the perception of the victim. *See Dobos v. Ingersoll*, 9 P.3d 1020, 1024 (Alaska 2000). The burden is on the proponent of the evidence to establish the foundational facts necessary for the hearsay exception. *Id.*

Here, Vince's statement would likely qualify as a present sense impression. It seeks to describe what happened – *i.e.*, that Doug attacked Vince – and it was

based on Vince's perception. The only question concerns whether the statement was sufficiently contemporaneous. It appears from the facts that Wendy came upon Vince shortly after the alleged attack – Doug was still bending over Vince when Wendy happened upon them. However, it is not clear from the facts how much time passed between Wendy's arrival and Vince's statement. The state will need to lay the proper foundation concerning the timing of the statement. If it does, the trial judge will most likely admit the statement as a present sense impression.

Doug could argue, however, that while the portion of Vince's statement concerning the nature of the attack might be admissible as a present sense impression, Vince's statement that Doug said he was going to get Vince is not. This is a much closer call. According to the facts, the firing – and presumably the alleged threat – occurred a week earlier, thus negating the requirement that the statement be roughly contemporaneous. The state will likely argue that the reference to Doug's threat is necessary to understand the "and he did" portion of Vince's statement. If the trial judge admits the entire statement, Doug should request a limiting instruction with respect to the alleged threat.

Second, the state may argue that Vince's statement qualifies as an "excited utterance" under Evidence Rule 803(2) ("[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). "To be admissible as an excited utterance, an out-of-court statement must have been made while the declarant was under 'a condition of excitement which temporarily still[ed] the capacity [for] reflection and produce[d] utterances free of conscious fabrication.'" *Dezarn v. State*, 832 P.2d 589, 591 (Alaska App. 1992) (quoting Commentary to Evidence Rules 803(1) – (2)). The declarant's spontaneity as a result of emotion is the key factor in determining the admissibility of the statement. *Id.* "The trial court must decide how long the declarant was at a level of emotional excitement to produce a spontaneous out-of-court statement." *Id.*

Here, it is not clear from the facts whether the necessary spontaneity existed. On the one hand, assuming that the statement was made shortly after the attack occurred, it is reasonable to conclude that the unexpected attack would have created a condition of excitement in Vince of a level sufficient to qualify the statement as an excited utterance. However, as with the present sense impression, it is not clear the length of time that may have elapsed between the attack and the statement – time which might have allowed the excitement to dissipate. Also, according to the facts, Vince did not cry out or exclaim when he made the statement. Instead, he muttered. This might indicate that he was no longer acting under an immediate excitement. The state will need to establish the timing of the statement and the requisite level of emotion as a foundation before the trial judge should admit the statement as an excited utterance.

Finally, the state may argue that Vince's statement is admissible as non-hearsay under Evidence Rule 801(d)(1)(B), which allows admission of prior out-of-court statements by a declarant who testifies at the trial if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *See* Evidence Rule 801(d)(1).

Here, Vince testified at trial and his statement to Wendy is consistent with his trial testimony. The primary question with respect to admissibility will be whether Doug has made an express or implied charge against Vince of *recent* fabrication or improper motive. The facts set forth in the question are not sufficient to make this determination. The resolution of this issue will turn primarily on Doug's testimony concerning the reasons for Vince's allegations against him and when those reasons arose – *i.e.*, before or after Vince's statement to Wendy.

2. In its rebuttal, the state attempts to call Doug's doctor, Dr. Cameron, to testify that Doug's joint disease was quite mild and that Doug was physically capable of knocking Vince to the ground. Explain what objections Doug might make on grounds of privilege and whether his objections will be successful. (40 points)

Under Evidence Rule 504, a patient may assert a physician-patient privilege – *i.e.*, a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional conditions. The privilege is that of the patient, not the physician. *See* Alaska R. Evid. 504(b) and (c). Even if Dr. Cameron is willing to testify, Doug, as his patient, is the person who has the privilege and can prevent disclosure of any confidential communications between him and his doctor. Therefore, unless any of the exceptions to the privilege apply, the judge must allow Doug to assert the privilege and thus must exclude Dr. Cameron's testimony.

One of the exceptions to the privilege concerns "communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient." *See* Alaska R. Evid. 504(d)(1). "If the patient himself tenders the issue of his condition, he should not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege." *See* Commentary to Evidence Rule 504(d)(1). *See also Trans-World Investments v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976). Here, because Doug has made his medical condition a part of his defense, this exception would likely apply.

Alternatively, the state might argue that the exception found in Evidence Rule 504(d)(2) applies. This exception states that the privilege does not apply if the services of the physician were sought, obtained or used to enable anyone to commit a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud. Before a trial judge allows the testimony under this exception, however, the judge may require that a prima facie case of wrongdoing be established by independent evidence. *See* Commentary to Evidence Rule 504(c)(1), incorporated into Commentary to Evidence Rule 504(d)(2).

The state will argue that all of Doug's actions taken together – telling Vince that he is going to "get him" for his firing, hiding behind a bush in an apparent ambush, seeing a doctor for the first time several days after the crime, and then claiming falsely that he is physically unable to have committed the crime – demonstrates that Doug is attempting to use his doctor's services to enable Doug to escape detection or apprehension for the commission of his assault on Vince. Assuming that the state is able to establish the necessary foundation for this scenario, a trial judge might find that the "fraud" exception applies and thus allow the doctor to testify.

3. Prior to trial, Doug asks the court to take judicial notice of the frost heave which he claims caused Vince to trip. Doug says to the judge, "I know you jog along that trail several times each week – you know how dangerous that frost heave is and how easy it would be to trip over it!" Should the court grant his request? Explain. (20 points)

Under Evidence Rule 201, a court may take judicial notice of facts. This means that the court may make an "on-the record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact." *See* Alaska R. Evid. 201(a). Doug is asking the court to take judicial notice that the frost heave exists and that it could cause someone to trip. Doug bases this request on the judge's personal knowledge.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Evidence Rule 201(b). Judicial notice may be taken at any stage of the proceeding. *See* Evidence Rule 203(b).

Whether or not there is a frost heave that is substantial enough to cause someone to trip *is* subject to reasonable dispute and would neither be a generally known principal nor capable of accurate and ready determination through any source. Doug's assertion that the judge should take judicial notice because he is personally familiar with the frost heave is incorrect.

Judicial notice of facts that are not generally known, even if they are within the judge's personal knowledge or belief, is improper. *See, e.g.*, *State v. Grogan*, 628 P.2d 570, 573 n.4 (Alaska 1981) (trial judge "may have improperly taken judicial notice of facts within his personal knowledge"). It is the role of the jury as fact-finder to decide this issue.