

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Dana is the owner of a dog-grooming business in Anchorage. Van, a newcomer to the area, recently opened a competing dog-grooming business only a few blocks away. Late one night, Dana surreptitiously approached Van's business and spray-painted graffiti on the front of the building. As she finished, she heard a car approaching and ran, dropping a can of spray paint.

When Van arrived the next morning, he immediately called the police and told them that he was certain Dana was the culprit. Van explained that Dana had a bad reputation in the dog-grooming community. Several years earlier, another grooming business had been similarly spray-painted. In that earlier incident, no criminal charges had been filed, but Dana had long been suspected because, shortly before the vandalism was discovered, the owner of the spray-painted business had seen a person running from the scene and wearing a coat with the logo of Dana's grooming business embroidered on its back. Van also told the police that Dana had previously been arrested for assaulting a customer who had been unhappy with her poodle's haircut.

During the police investigation, one of Dana's employees, Winston, told the police that he had seen Dana with cans of spray paint on the day before the incident. Winston claimed that he never saw the cans again. When the police showed him the can that had been found outside Van's business, Winston said that it appeared to be the same type of can that he had seen Dana carrying.

The state charged Dana with criminal mischief.

1. The state intends to present at trial Winston's testimony about the cans of spray paint to prove that Dana is the culprit. However, shortly before trial, the state learns that Winston intends to testify that he cannot remember seeing Dana with cans of spray paint the day before the incident. Discuss whether the trial court should permit the state to present evidence of Winston's earlier statements.
2. The state also learns that Winston received a large bonus check from Dana shortly before trial and that Winston and Dana have had a romantic relationship for several years. Discuss whether the trial court should permit the state to introduce evidence of the romantic relationship and the bonus check.

3. Before trial, the state files a notice of its intent to present the following testimony in order to establish Dana's identity as the person who spray-painted Van's business: (a) the owner of the business that Dana had allegedly previously spray-painted and (b) the customer whom Dana assaulted. Discuss what objections Dana should make in response to this notice and explain whether the trial court should grant those objections.

GRADER'S GUIDE

*** QUESTION NO. 6 ***

SUBJECT: EVIDENCE

1. The state intends to present at trial Winston's testimony about the cans of spray paint to prove that Dana is the culprit. However, shortly before trial, the state learns that Winston intends to testify that he cannot remember seeing Dana with cans of spray paint the day before the incident. Discuss whether the trial court should permit the state to present evidence of Winston's earlier statements. (40 points)

Winston's earlier statements were made out of court and are being offered to prove the truth of the matter asserted – *i.e.*, that Dana brought cans of spray paint to work the day before the incident and that those cans are now gone. Therefore, the statements would normally be inadmissible as hearsay. See Evidence Rule 801(c) (“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”); Evidence Rule 802 (“Hearsay is not admissible except as provided by these rules.”).

However, a prior out-of-court statement that is inconsistent with the witness's in-court testimony is admissible as non-hearsay. See Evidence Rule 801(d)(1). To admit evidence of prior inconsistent statements, the witness must first testify inconsistently with the prior statements. The witness must then be examined about the prior statements while testifying and be given an opportunity to explain or deny the statements. See Evidence Rule 801(d)(1)(A). Thus, the state must first question Winston about the prior statements. If Winston denies having made the prior statements, then the state may present other evidence – such as the testimony of the investigating officer or a recording of the statements if one was made – to establish Winston's prior inconsistent statements.

These requirements are similar to those set forth in Evidence Rule 613, which states that, to impeach a witness based on prior inconsistent statements, the party seeking to introduce the statements must first lay a foundation by affording the witness the opportunity, while testifying, to explain or deny the prior statement. See Evidence Rule 613(b). An examinee should receive credit for making the distinction between the two rules.

2. The state also learns that Winston received a large bonus check from Dana shortly before trial and that Winston and Dana have had a romantic relationship for several years. Discuss whether the trial court should permit the state to introduce evidence of the romantic relationship and the bonus check. (30 points)

The state will seek to introduce this evidence to impeach Winston's trial testimony. Although Winston is the state's witness, Evidence Rule 607(a) allows either party, including the party that called the witness, to attack the witness's credibility. Evidence Rule 607 recognizes that a party rarely has a free choice in selecting his witnesses and therefore should not be required to vouch for the credibility of his witness. See Commentary to Evidence Rule 607, second paragraph. As the commentary to the rule points out, if the party were denied the right to impeach his own witness, the party would be left "at the mercy of the witness and the adversary." *Id.*

In general, under Evidence Rule 613, "evidence of bias or interest on the part of a witness are admissible for the purpose of impeaching the credibility of a witness." See Evidence Rule 613(a). The fact that Winston and Dana are romantically involved is an obvious source of potential bias. See *McIntyre v. State*, 934 P.2d 770, 773 (Alaska App. 1997) (holding that the trial court abused its discretion by barring the defendant from inquiring into a witness's possible bias in favor of the victim based on claim that the witness and the victim had a romantic relationship). Likewise, the fact that Winston is Dana's employee – whose employment may depend on his testimony being favorable to Dana and who may have been rewarded for changing his testimony – is relevant to show both bias and interest. Thus, both the romantic relationship and the bonus should be admissible to impeach Winston's credibility at trial.

To admit this evidence at trial, however, the state must first give Winston an opportunity, while testifying, to explain or deny the bias or interest. See Evidence Rule 613(b). If Winston denies the relationship or the bonus, the state may then present other evidence to establish the relationship between Winston and Dana and the payment of the bonus, both of which could establish bias or interest on Winston's part.

An examinee may point out that Dana could object to the admission of this evidence – particularly the romantic relationship – on the grounds that its probative value is outweighed by the danger of unfair prejudice. See Evidence Rule 403. Unless there is something particularly scandalous about the relationship, such an objection is unlikely to be successful.

3. Before trial, the state files a notice of its intent to present the following testimony in order to establish Dana’s identity as the person who spray-painted Van’s business: (a) the owner of the business that Dana had allegedly previously spray-painted and (b) the customer whom Dana assaulted. Discuss what objections Dana should make in response to this notice and explain whether the trial court should grant those objections. (30 points)

Dana should object to the introduction of this evidence as character or propensity evidence. In general, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion.” See Evidence Rule 404(a).

Here, the state seeks to introduce evidence of two prior acts allegedly committed by Dana. Evidence Rule 404(b) precludes such evidence “if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith.” See Evidence Rule 404(b)(1). However, the rule allows evidence of prior acts “for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” See Evidence Rule 404(b)(1).

The key issue in this case is identity – namely, whether Dana was the person who spray-painted Van’s business. The state will likely argue that the evidence of the two prior acts is admissible to prove Dana’s identity as the person who spray-painted Van’s business. In *Coleman v. State*, 621 P.2d 869, 875 (Alaska 1980), the court held that a defendant’s prior crimes could be used to establish the defendant’s identity as the perpetrator of the crime being litigated. As the court of appeals explained more recently, the prior crimes do not have to be so distinctive as to represent a “signature”; rather the standard for admission is whether, under the totality of the circumstances, the other crimes bare a striking enough similarity to the crime being litigated that they take on a probative aspect above and beyond the mere propensity to commit particular crimes. See *Nicholia v. State*, 34 P.3d 344, 347 (Alaska App. 2001). This is sometimes referred to as a defendant’s modus operandi. See *Harmon v. State*, 908 P.2d 434, 437 (Alaska App. 1995).

Under this standard, the prior spray-painting incident and the current incident may be sufficiently similar to satisfy the *Coleman* standard and thus be admissible as evidence of identity under Evidence Rule 404(b)(1). Both the previous incident and the current incident involved spray-painting a competitor’s business. On the other hand, Dana may argue that acts of vandalism – such as spray-painting graffiti on a wall – are not uncommon and therefore the mere fact that two dog-grooming businesses were spray-painted is not sufficiently striking to satisfy *Coleman*. Dana may also argue that the prior

spray-painting incident was too remote in time to be probative, but the facts suggest that the prior incident occurred only a few years before, which would not likely be considered too remote.

On the other hand, Dana's prior assault on a customer, while it may show Dana's propensity to act violently and to retaliate against perceived threats, is quite different from the spray-painting incident and therefore is not likely to be admissible to prove identity.

Dana may also argue that evidence of the prior spray-painting incident should not be admitted because the state has never proved that she actually committed the prior act. In order to admit evidence of prior acts under Evidence Rule 404(b), there must be sufficient evidence from which a reasonable jury could find by a preponderance of the evidence that the prior act occurred. See *Huddleston v. United States*, 485 U.S. 681, 690, 108 S.Ct. 1496, 1501 (1988). The trial court does not, however, have to make this determination before the evidence is introduced. Instead, the evidence may be offered conditionally and its sufficiency may be considered at a later point. *Huddleston*, 485 U.S. at 690-91, 108 S.Ct. at 1501-02. Thus, under *Huddleston*, the state does not need to prove beyond a reasonable doubt that Dana was the culprit in the prior spray-painting act. However, the state will need to present evidence – presumably through the testimony of the owner – that would allow a jury to find it more likely than not that Dana was the culprit. If the state fails to present such evidence, the trial court must instruct the jury to disregard the evidence.

Even if the state establishes that the evidence is admissible under Evidence Rule 404(b)(1) as evidence of identity, the trial court may still exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. See Evidence Rule 403. Since all incriminating evidence is prejudicial to the defendant, only *unfair* prejudice permits the exclusion of relevant evidence under Evidence Rule 403. The mere fact that evidence tends to support the state's case is not enough to establish unfair prejudice. Instead, Dana will need to show that admission the evidence is likely to have “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” See Commentary to Evidence Rule 403, fifth paragraph. Examinees may discuss whether either of the prior incidents – the prior assault or the prior spray-painting incident – would be more prejudicial than probative. Arguments can be made either way.

An examinee might also argue that the earlier spray-painting incident could be admissible as habit evidence under Evidence Rule 406. To constitute a habit, conduct must be repeated frequently and consistently. See *Wacker v. State*, 171 P.3d 1164 (Alaska App. 2007). Under this standard, neither the assault nor the prior spray-painting incident is likely to be considered habit.