

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

One afternoon, 10-year-old Vicki was playing with her dog in her front yard. A man approached her and asked for directions to a nearby store. The man then asked her to go with him and reached for her arm. When Vicki refused, the man punched her in the face. At this point, Vicki's dog intervened and attacked the man. The man ran.

Vicki ran inside and told her parents, who called the police and gave them Vicki's description of the man. About 10 minutes later, a police officer stopped a man who met the description near Vicki's home. The man, later identified as Derek, had scratches and what appeared to be bite marks on his face and hands. But when later asked to pick her assailant from a line-up, Vicki was unable to identify Derek.

The state charged Derek with assault. Derek's defense at trial was that he was at home on the afternoon in question. Derek claimed that he left his home, which was near where he was stopped by the police, only moments before he was stopped.

At trial, the state offered the testimony of Derek's ex-wife, Susan. Derek and Susan were married when Vicki was assaulted, but they later separated and their divorce became final several weeks before the assault trial. Susan was willing to testify that she was at home on the afternoon in question, that Derek left the house nearly two hours earlier than he now claims, and that he was not at home when the crime was reported. Derek objected and asserted the "husband-wife privilege." The trial court sustained the objection.

The state also sought to introduce the testimony of 20-year-old Jane. Jane stated that, when she was 12, Derek had been her babysitter. When she refused to eat her dinner, Derek slapped her face hard enough to leave a mark. Derek objected to this testimony. The trial court overruled the objection.

Derek sought to impeach Jane's testimony by showing that Jane had been convicted of shoplifting one year earlier. The state objected. The trial court sustained the objection.

1. Discuss whether the trial court correctly applied the husband-wife privilege as set forth in Alaska's evidence rules when it excluded Susan from testifying.

2. Discuss the evidentiary arguments for and against the introduction of Jane's testimony and whether the trial court was correct to allow Jane to testify about her encounter with Derek.
3. Discuss whether the trial court was correct when it excluded evidence of Jane's prior conviction.

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: EVIDENCE

1. Discuss whether the trial court was correct when it refused to allow Susan to testify based on Derek's assertion of the husband-wife privilege. (40 points)

Evidentiary privileges bar the use in court proceedings of certain information gained or observed by spouses. Where evidentiary privileges are involved, the party asserting the privilege bears the burden of proving that the contested communication is protected by the privilege. *Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996).

Two types of privileges exist between a husband and wife under Evidence Rule 505. Under Rule 505(a), “[a] husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.” See Alaska R. Evid. 505(a). The privilege to testify or not testify thus belongs to the witness spouse. The general policy behind the husband-wife privilege is to promote family peace and harmony by not having one spouse testify against another. See *Daniels v. State*, 681 P.2d 341, 345 (Alaska App. 1984).

The second type of privilege between a husband and wife under Evidence Rule 505 relates to communications made between spouses during the marriage. Rule 505(b) states the general rule that “[n]either during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.”

Derek wants to prevent Susan from testifying concerning his whereabouts on the afternoon that Vicki was assaulted. Susan's testimony is based on her own personal observations – namely, that she was at home and Derek was not at the time that Vicki was assaulted – and not on anything that Derek communicated to her. That is, the testimony does not involve a communication between spouses. And because Susan's testimony does not involve a communication between spouses, Derek could not assert the second type of privilege – *i.e.*, the privilege recognized in Evidence Rule 505(b). Instead, only the first type of privilege – the privilege against compelled testimony under Evidence Rule 505(a) – could be asserted here.

Derek's assertion of a privilege under Evidence Rule 505(a) fails for two reasons. First, this privilege belongs to the witness spouse. The witness spouse (Susan) may waive the privilege and testify for or against the defendant

spouse (Derek). The facts indicate that Susan is willing to testify. Derek has no choice in the matter.

Second, by the time of trial, Derek and Susan are divorced. Spousal immunity under Evidence Rule 505(a) protects only *spouses*, and Derek and Susan no longer fall into that category. The fact that they were married when Susan made the observations that are the subject of her proposed testimony is irrelevant to the testimonial privilege under Rule 505(a). Neither Derek nor Susan may use the privilege of spousal immunity to keep Susan from testifying about Derek's whereabouts on the afternoon that Vicki was assaulted.

Therefore, the trial court erred when it refused to allow Susan to testify.

2. Discuss the evidentiary arguments for and against the introduction of Jane's testimony and whether the trial court was correct to allow Jane to testify about her encounter with Derek. (40 points)

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). To the extent that the state is seeking to introduce evidence of Derek's prior acts against Jane to prove that he is a person who hits children, this evidence would constitute inadmissible character evidence offered for propensity purposes. But there are several exceptions to this general rule. Two of those exceptions may apply here.

First, the testimony may be admissible under Evidence Rule 404(b)(1), which allows evidence of prior acts "for other [non-propensity] 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).

Here, Derek has disputed that he was Vicki's assailant. Thus, identity is an important issue. 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 bear 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).

Given the facts provided, Derek's assault of Jane does not appear to be particularly similar to the assault and attempted abduction of Vicki. Although

it does involve hitting a child, the incident involved a child known to Derek and did not include an attempted abduction. Thus, a trial court would likely be correct in refusing to admit Jane's testimony under Evidence Rule 404(b)(1).

Second, the testimony may be admissible under Evidence Rule 404(b)(2), which provides that, in a prosecution for physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if not precluded by another evidence rule and if the prior offenses

- (i) occurred within the 10 years preceding the date of the offense charged;
- (ii) are similar to the offense charged; and
- (iii) were committed upon persons similar to the prosecuting witness.

See Alaska R. Evid. 404(b)(2). To be admissible under this section, the proffered evidence must also be relevant to a material issue and its probative value must outweigh any potential prejudice. See Alaska R. Evid. 402; Alaska R. Evid. 403.

Derek's encounter with Jane occurred only eight years earlier and therefore falls within the 10-year period. And one can argue persuasively that Jane (a 12-year-old girl when Derek slapped her) is sufficiently similar to Vicki (a ten-year-old girl) to qualify. But the difficult question is whether slapping a child's face for refusing to eat (Derek's offense against Jane) is sufficiently similar to punching a child in the face when the child resists an apparent abduction. In *Carpentino v. State*, 38 P.3d 547, 553 (Alaska App. 2002), the court of appeals explained that "similarity" rests on the particular circumstances surrounding the incidents and the relative importance of these common and distinguishing factors. "The fact that a person has engaged in one type of assault might not necessarily be probative of that person's willingness or propensity to engage in another kind of assault." *Cleveland v. State*, 91 P.3d 965, 980 (Alaska App. 2004).

Here, the circumstances of the assault on Vicki differ significantly from Jane's allegations, although the basic act alleged – namely, hitting a child in the face in response to the child's resistance to some request by Derek – is the same. This case can be argued either way by examinees.

Finally, one can argue that the evidence should be excluded under Evidence Rule 403. Evidence offered under Rule 404(b)(2) must still meet the relevance requirement of Evidence Rule 402 and the requirement under Evidence Rule

403 that its probative value outweighs its potential for unfair prejudice. See *Bingaman v. State*, 76 P.3d 398 (Alaska App. 2003) (interpreting Evidence Rule 404(b)(4)). Here, the probative value of the evidence of the incident with Jane is relatively low given the dissimilarities between that incident and Derek's assault on Vicki, and the risk of prejudice from this evidence is fairly high given the nature of the prior incident – namely, hitting a 12-year-old child in the face. Therefore, the court of appeals would likely hold that the evidence should have been excluded under Evidence Rule 403.

3. Discuss whether the trial court was correct when it excluded evidence of Jane's prior conviction. (20 points)

Alaska Evidence Rule 609 allows a party to impeach a witness by introducing evidence of the witness's conviction of a crime. But the conviction must be no more than five years old and it must be of a crime involving dishonesty or false statement. See Alaska R. Evid. 609(a), (b); *City of Fairbanks v. Johnson*, 723 P.2d 79 (Alaska 1986); *Alexander v. State*, 611 P.2d 469 (Alaska 1980). (The state rule differs significantly from the parallel federal evidence rule. Federal Evidence Rule 609 allows impeachment based on any felony offense or a misdemeanor offense involving an act of dishonesty or false statement. And the federal evidence rule sets a 10-year age limit on such convictions. See Fed. R. Evid. 609(a), (b).)

The Alaska Supreme Court has held that theft offenses are considered crimes of dishonesty or false statement. See *Richardson v. State*, 579 P.2d 1372, 1376-77 (Alaska 1978) (holding that a conviction for shoplifting (petty larceny) was a crime of dishonesty); *Lowell v. State*, 574 P.2d 1281, 1284 (Alaska 1978) (holding that grand larceny is a crime of dishonesty). Although these cases were decided under a former version of the impeachment rule, the commentary to current Evidence Rule 609 confirms that a trial court may admit evidence of theft convictions under the current version of the rule (although federal courts are apparently split on the issue). See Commentary to Alaska Evidence Rule 609(a). But the admission of such evidence remains subject to the balancing of probative value against prejudicial effect required by Evidence Rule 403. *Id.*

Because Jane's shoplifting conviction qualified as a crime of dishonesty and was only one year old, the trial court should have allowed Derek to introduce evidence of this conviction unless the state could establish that the probative value of the evidence was outweighed by its prejudicial effect. See Alaska R. Evid. 403.