ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Tom and Paula were dating. On New Year's Eve 2010, the two attended a party and then returned to Tom's apartment. Both had been drinking heavily. At around 1:00 a.m., Paula called 911. She was crying and nearly hysterical. She told the 911 operator that Tom was hitting her and that she needed help.

When the police arrived, Paula was passed out on the couch. The officer noticed that she had a black eye and a red mark on the side of her face. When questioned by the police, Tom claimed that Paula had accidentally lost her balance, fallen, and hit her head on a piece of furniture.

Tom is charged with fourth-degree assault for recklessly causing physical injury to Paula. At trial, the state calls Paula, who testifies that she has no recollection of the events of that evening. The state then requests permission to introduce, through the testimony of the 911 operator, Paula's statements during the 911 call, including her statement that Tom was hitting her. Tom objects, arguing that the statements are hearsay. The trial court agrees with the state and rules that the statements are admissible.

The state next calls Will, Tom's next-door neighbor. Will testifies that he heard Tom yelling at Paula and that he then heard noises that sounded like one person striking another person with hands or fists. During cross-examination, Tom requests permission to impeach Will by asking him about his 2004 conviction for theft. The state objects. The trial court agrees with the state and refuses to allow Tom to ask Will about the 2004 conviction.

Finally, the state calls Jill, Tom's former girlfriend. Out of the presence of the jury, the prosecutor explains that Jill will testify that in 2007, while she was dating him, Tom hit her in the face after a drunken argument escalated into physical violence. Tom does not deny that the incident occurred, but he objects to this testimony as inadmissible character evidence. The trial court agrees with Tom and refuses to allow Jill to testify.

1. Discuss whether the trial court erred when it admitted evidence of Paula's statements to the 911 operator over Tom's hearsay objection. (Do not discuss any potential Confrontation Clause implications of this evidence.)

2. Discuss whether the trial court erred when it refused to permit Tom to impeach Will with the 2004 theft conviction.

3. Discuss whether the trial court erred when it held that Jill's testimony about the 2007 incident between her and Tom was inadmissible character evidence.

GRADERS' GUIDE
*****QUESTION NO. 4*****
SUBJECT: EVIDENCE

1. Discuss whether the trial court erred when it admitted evidence of Paula's statements to the 911 operator over Tom's hearsay objection. (Do not discuss any potential Confrontation Clause implications of this evidence.) (40 points)

Tom objected to the admission of Paula's statements to the 911 operator on hearsay grounds. 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." Alaska R. Evid. 801(c). Here, Paula's statements to the 9ll operator were made out of court and are being offered to prove the truth of the matter asserted – *i.e.*, that Tom hit Paula. Therefore, the statements would normally be inadmissible on hearsay grounds. *See* Alaska R. Evid. 802 ("Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.").

The statements, however, qualify as non-hearsay under Evidence Rule 801(d)(1)(A), which excludes from the definition of hearsay a prior inconsistent statement made by a person who testifies at trial. "If a witness claims not to remember the substance of a prior statement at trial, the witness's trial testimony is inconsistent with the prior statement for purposes of Rule 801(d)(1)(A)." *Wassillie v. State*, 57 P.3d 719, 723 (Alaska App. 2002). *See also Richards v. State*, 616 P.2d 870, 871 (Alaska 1980). Here, Paula testified at trial that she had no memory of the events on the evening in question. Thus, her prior statements to the 911 operator, describing those events, qualify as prior inconsistent statements which are admissible as non-hearsay.

In addition, the state followed the proper procedure in seeking the admission of these prior inconsistent statements. Before such statements may be admitted, the witness must be examined during her testimony and given an opportunity to explain or deny the prior statements. *See* Alaska R. Evid. 801(a)(1)(A)(i). Here, the state called Paula as a witness and she testified that she had no memory of the events of that night. This was sufficient to establish the legal basis for admitting her prior statements to the 911 operator.

Even if the statements did not qualify as prior inconsistent statements, they would also be admissible under the "excited utterance" exception to the hearsay rule. Hearsay statements may be admitted when the declarant's "statement relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Alaska R. Evid. 803(2). Here, Paula's statement that Tom was hitting her suggests that

the assault was ongoing when she called. But even if the assault had ended when Paula spoke with the 911 operator, the fact that she was crying and nearly hysterical suggests that she was still under the influence of the "excitement" engendered by the assault. Thus, even if the assault had ended before Paula spoke with the 911 operator, the statements would still qualify as "excited utterances" and would therefore be admissible under this exception to the hearsay rule. *See Blair v. State*, 42 P.3d 1152, 1154-55 (Alaska App. 2002) (holding that wife's statement to police, made within 10 or 15 minutes of assault, qualified as an excited utterance where evidence suggested that wife was still under the "stress of excitement" when she made the statement).

Paula's statements might also be admissible under the "present sense impression" exception to the hearsay rule. A hearsay statement may be admitted when it "describ[es] or explain[s] an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Alaska R. Evid. 803(1). To fall within the "present 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). Here, Paula's statements to the 911 operator would likely qualify as a present sense impression. Her statements seek to describe what happened – *i.e.*, that Tom was hitting her – and they were based on her perception. The only question is whether the statements were sufficiently contemporaneous. It appears from the facts that Paula spoke to the 911 operator while the assault was occurring or immediately after. Therefore, it is likely that Paula's statements to the 911 operator would qualify as a present sense impression.

Because Paula's statements to the 911 operator qualified as prior inconsistent statements under Evidence Rule 801(d)(1)(A) or as excited utterances or present sense impressions under Evidence Rule 803(1) and (2), the trial court acted correctly when it allowed the state to introduce evidence of these statements.

Finally, a few examinees may argue that the statements are admissible as a "recorded recollection." The question was not intended to elicit this answer because the facts do not indicate that the 911 call was recorded, and the statements were made not as recollection but as the events occurred. But if an examinee assumes that the call was recorded, there is an argument that the statements might qualify. A "recorded recollection" includes a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately." Alaska R. Evid. 803(5). To qualify, the record must be made "when the matter was fresh in the witness' memory" and must "reflect that knowledge correctly." *Id.* But the record itself cannot be admitted as an exhibit; it may only be read into evidence unless offered by an adverse party. *Id.*

Here, Paula made the statements to the 911 operator when the events were still occurring and thus were fresh in her mind. And Paula's injuries and the testimony of the next-door neighbor corroborates the statements. In addition, at trial, she stated that she had no memory of the assault and thus has insufficient recollection to enable her to testify fully. Therefore, although the recorded recollection exception is a stretch here, one can at least argue that the exception would apply here.

NOTE: Examinees should not discuss the use of the statements to refresh Paula's recollection. The statements are not being used to refresh Paula's recollection, but are being introduced for their truth.

2. Discuss whether the trial court erred when it refused to permit Tom to impeach Will with the 2004 theft conviction. (25 points)

Rule 609 of the Alaska Rules of Evidence 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); *City of Fairbanks v. Johnson*, 723 P.2d 79 (Alaska 1986). (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) and (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). Thus, the conviction is for a crime that falls within the scope of Evidence Rule 609.

But the theft conviction is from 2004, which means that more than five years have elapsed since the date of the conviction. In general, Evidence Rule 609(b) precludes admission of convictions that are more than five years old. There is, however, an exception. A trial court may allow evidence of a conviction that is more than five years old "if the court is satisfied that admission in evidence is necessary for a fair determination of the case." Alaska R. Evid. 609(b). As the commentary to the rule explains, this exception is

intended to provide the trial court with discretion to ignore the time limit in the interest of justice. *See* Commentary to Evidence Rule 609(b). The commentary explains that

> There may be cases, for example, in which the accused's right of confrontation will override the five year limitation. Except in rare cases where limiting impeachment as to prior convictions threatens to deny a party a fair trial or to infringe upon a constitutionally protected right, the time limit should be respected.

Id.

In the present case, Tom (as a criminal defendant) would certainly argue that his constitutional right to confront Will overrides the five-year limit. However, discussing a previous version of Evidence Rule 609, the Alaska Supreme Court stated that prior convictions (in that case a prior juvenile adjudication for forgery) "which are stale by Alaska's standards, and directed solely at general credibility rather than bias, are generally not sufficiently probative to create a genuine conflict with the defendant's right of confrontation." *Gonzales v. State*, 521 P.2d 512, 515 (Alaska 1974). There is nothing in the facts to suggest that Will's prior conviction for theft was offered for any purpose other than to impeach his credibility. Thus, it is unlikely that an appellate court would find that the trial court abused its discretion when it refused to allow impeachment based on the six-year-old conviction.

3. Discuss whether the trial court erred when it held that Jill's testimony about the 2007 incident between her and Tom was inadmissible character evidence. (35 points)

Through Jill's testimony, the state seeks to introduce evidence of a similar prior assault committed by Tom. In general, "[e]vidence of other crimes, wrongs, or acts is not admissible 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." Alaska R. Evid. 404(b)(1). To the extent that the state is seeking to introduce evidence of Tom's prior assault of Jill to prove that he is a person who hits his girlfriend, this evidence would constitute inadmissible character evidence offered for propensity purposes.

But the rule provides an explicit exception in cases of domestic violence. Evidence Rule 404(b)(4) provides that

> In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible.

Alaska R. Evid. 404(b)(4). A "crime involving domestic violence" includes an assault in which the perpetrator and the victim are dating or have dated. *See* AS 18.66.990(3), (5). Here, the facts indicate that Tom and Paula are dating and that Tom and Jill had previously dated. In addition, both the crime for which Tom is being prosecuted and the previous crime about which Jill intends to testify are assaults. Thus, even if Jill's testimony were offered as character evidence under Evidence Rule 404, it would likely be admissible under Evidence Rule 404(b)(4).

To establish the admissibility of this evidence, however, it is not enough to simply show that the evidence qualifies as a crime involving domestic violence under Evidence Rule 404(b)(4). First, the trial court must exercise its gatekeeper role under Evidence Rule 104(b) and determine whether the state has offered sufficient evidence for a reasonable juror to conclude that the 2007 incident occurred. *Bennett v. Municipality of Anchorage*, 205 P.3d 1113, 1117 (Alaska App. 2009) Here, Tom did not deny that the incident occurred or request a hearing under Rule 104(b). Therefore, he has waived this issue.

Second, the trial court must assess the relevance of the evidence and weigh its probative value against the potential for unfair prejudice. *See Bingaman v. State*, 76 P.3d 398, 408, 415 (Alaska App. 2003); Alaska R. Evid. 402; Alaska R. Evid. 403. As the court of appeals recently explained,

> in assessing the probative force of bad-acts evidence, trial judges should consider the recency or remoteness of the other bad act, as well as the similarity of the other act and the charged act. If the court determines that the character trait the government seeks to prove is relevant to a material issue in the case, the court should consider how seriously disputed that material issue is and how necessary the evidence is to prove the government's case. And the court should consider how likely it is that litigation of the defendant's other acts will take an inordinate amount of time, distract the jury from the main issues of the case, and lead the jury to decide the case on improper grounds.

Bennett, 205 P.3d at 1116-17 (summarizing *Bingaman*, 76 P.3d at 415-46).

Here, the facts indicate that the prior assault was relatively recent – only three years prior to the charged offense. And, more important, the prior assault against Jill bears a remarkable similarity to the assault against Paula. In both, Tom was involved in a drunken altercation with a girlfriend. That altercation then escalated to physical violence, culminating in Tom's hitting the girlfriend in the face. The fact that Tom had committed a similar assault on a previous girlfriend is highly relevant to establish Tom's propensity to assault his

girlfriends and buttresses the state's position that Paula's injuries were the result of an assault – as Paula told the 911 operator – and not merely an accident as Tom claimed. Given these facts, the trial court likely erred when it refused to admit Jill's testimony.

In the alternative, there is at least an argument that the testimony is 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." Alaska R. Evid. 404(b)(1). As noted, Tom claimed that Paula's injuries – her black eye and the red mark on her face – were the result of an accident. The state could argue that the prior assault on Jill establishes that the subsequent, and remarkably similar, incident with Paula was not an accident. This seems a bit of a stretch given the facts in the question, and is not a particularly strong argument. But an applicant should receive some credit for discussing this possible argument in favor of admissibility.