

ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Late one afternoon, Joe and Willy drop Dex off near a department store. After they drive away, Dex walks into the store's parking garage. Vicky, the only other person in the garage, is walking toward her car. Seeing no one else in the garage, Dex grabs Vicky and drags her toward a stairwell. Vicky manages to break free.

Dex then walks into the department store, tries on several leather jackets, and walks out of the store wearing one of them. He is stopped by a security guard. Following an investigation during which Vicky identifies Dex as her attacker, Dex is charged with theft and attempted sexual assault.

At trial, Dex chooses to testify. When questioned about the jacket, Dex states that he did not realize he was still wearing it when he was leaving the store. He testifies that he did not intend to steal it. When questioned about the incident in the parking garage, Dex states that he only wanted to talk to Vicky in private and he had no intention of sexually assaulting her.

To prove Dex's intent to steal, the prosecutor calls Willy to testify. Willy states that he learned from Joe that earlier on the day in question Dex told Joe he was going to steal a jacket from the department store. (Joe thought Dex was joking.) Dex's attorney does not object to this testimony.

To prove Dex attempted to sexually assault Vicky, the State seeks to introduce evidence of (1) Dex's prior attempted sexual assault conviction; and (2) a sexual assault for which Dex was charged and was later acquitted. Both incidents of sexual misconduct occurred in parking garages.

Dex's attorney objects, asserting that it is impermissible "propensity" evidence. Dex's attorney also argues that the sexual assault for which Dex was charged but not convicted is inadmissible because Dex was acquitted. The judge overrules the objections and allows the state to introduce evidence of both prior incidents.

1. Discuss whether Willie's statement was hearsay and whether it was admissible.
2. Discuss whether the judge correctly admitted evidence of Dex's prior conviction for attempted sexual assault.
3. Discuss whether the judge correctly admitted evidence of the sexual assault of which Dex was acquitted.

GRADERS' GUIDE
***** QUESTION NO. 9 *****
EVIDENCE

1. Discuss whether Willie's statement was hearsay and whether it was admissible. [40 Points]

On appeal, Dex argues that Willy's testimony was inadmissible hearsay. 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). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Alaska R. Evid. 801(a).

Willy's testimony potentially presents two levels of hearsay – Dex's original comment to Joe, and Joe's comment to Willy. Because both statements were made outside of the trial and were offered by the state to prove that Dex intended to steal the jacket, both statements potentially fall within the hearsay definition.

Dex's statement to Joe likely qualifies as a non-hearsay statement because it is an admission of a party opponent. Under Evidence Rule 801(d)(2), an admission of a party opponent is removed from the hearsay rule. A statement qualifies as an admission of a party opponent if it "is offered against a party and is . . . the party's own statement in either an individual or a representative capacity." Here, the statement was offered by the state against Dex, a party opponent, and there is no dispute that it was Dex's statement. It was therefore admissible as non-hearsay.

Additionally, because Dex elected to testify at trial, his statement might also have been admissible as a prior inconsistent statement. Under Evidence Rule 801(d)(1), a witness's prior inconsistent statement qualifies as non-hearsay. Dex's testimony that he did not intend to steal the jacket is inconsistent with his statement to Joe that he intended to steal a jacket from the department store. However, the prior inconsistent statement exception to the hearsay rule only applies if the witness has been questioned about the statement during his testimony and has been afforded an opportunity to explain or deny the statement. See Alaska R. Evid. 801(d)(1)(A)(i) and (ii). Because the facts do not indicate whether Dex was questioned about his earlier statement, it is unclear whether or not the hearsay provision for prior inconsistent statements applies.

Even if Dex's statement was not hearsay, it was still likely inadmissible because it was introduced through Willy, not Joe. Joe was not a party opponent and his statement does not appear to fall within any exception to the hearsay rule. Therefore, Willy's testimony about Joe's statement was

inadmissible hearsay even though Dex's statement would have been admissible if offered by Joe instead of Willy.

However, despite the fact that Willy's testimony was hearsay that did not fall within any exception to the hearsay rule (i.e., inadmissible hearsay), Willy's testimony was nonetheless admissible because Dex's attorney did not object to the testimony during trial. Hearsay to which no objection is made is admissible evidence. *Byrd v. State*, 626 P.2d 1057, 1058 (Alaska 1980); *Douglas v. State*, 166 P.3d 61, 85 (Alaska App. 2007).

2. Discuss whether the judge correctly admitted evidence of Dex's prior conviction for attempted sexual assault. [40 points]

Generally, "[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 the state introduced evidence of Dex's conviction solely to show that he is a man who characteristically sexually assaults women, the evidence would ordinarily be inadmissible under this rule. However, exceptions exist when a defendant is charged with certain types of crimes.

Alaska Evidence Rule 404(b)(3) provides, in relevant part, that "[i]n a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible." This rule specifically allows the state to introduce evidence of a defendant's prior sexual assaults or attempted sexual assaults for the sole purpose of proving the defendant's propensity to assault women. *Wardlow v. State*, 2 P.3d 1238, 1246 (Alaska App. 2000); *see also Bingaman v. State*, 76 P.3d 398, 405 (Alaska App. 2003). Because Dex was on trial for attempted sexual assault, his prior conviction was likely admissible under this rule.

However, before evidence may be admitted under Evidence Rule 404(b)(3), the trial judge is required to assess the relevance of the evidence and weigh its probative value against the potential for unfair prejudice. *See Bingaman*, 76 P.3d at 408, 415; *Wardlow*, 2 P.3d at 1246; Alaska R. Evid. 402; Alaska R. Evid. 403. But the judge's assessment of "unfair prejudice" no longer includes the fact that the evidence tends to prove the defendant's propensity to commit sexual assault. *Wardlow*, 2 P.3d at 1247. Thus, a claim of unfair prejudice must have some other basis, such as that the evidence is cumulative, misleading, or confusing. *See Wardlow*, 2 P.3d at 1248.

Here, the conduct underlying Dex's conviction was relevant because it provided circumstantial evidence of Dex's propensity to assault women, making it more likely that he intended to sexually assault Vicky. It also demonstrated a history of sexually assaultive behavior in a parking garage, making the evidence particularly relevant in this case. Because there does not appear to be any non-propensity argument Dex could have made to support an assertion that the evidence is more prejudicial than probative (1-2 incidents is not likely to amount to cumulative evidence), the judge did not err in admitting evidence of Dex's prior conviction.

The prior conviction may separately have been admissible under the portion of Alaska Evidence Rule 404(b)(1) that 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." Dex testified that he did not intend to sexually assault Vicky. Dex's prior conviction involved an attempted sexual assault in a parking garage. Because Dex's assault on Vicky also occurred in a parking garage, the prior incident could be offered to establish Dex's intent when he grabbed Vicky. Along these same lines, the prior incident may be admissible to show absence of mistake because Dex is claiming that he only wanted to talk to Vicky, not sexually assault her (i.e., he is claiming that Vicky's assertion that she was about to be sexually assaulted was a mistake).

Examinees might also argue that the conviction is admissible under Alaska Evidence Rule 404(b)(1) for another non-propensity purpose such as plan, identity, or modus operandi. These arguments do not withstand analysis. The conviction would not be admissible to show identity because identity is not an issue. Dex admitted that he was in the garage with Vicky. Similarly, an argument that the prior conviction demonstrates a modus operandi would also likely fail. "Modus operandi is generally a means of proving the identity of the perpetrator of the crime charged, by demonstrating that the defendant had committed in the past other crimes sharing with the present offense features sufficiently unique to make it likely that the same person committed the several crimes." *Coleman v. State*, 621 P.2d 869, 874 n.4 (Alaska 1980). Identity is not an issue in Dex's case and the fact that the previous crime was committed in a parking garage is likely not sufficiently unique to establish a modus operandi.

A perceptive examinee may distinguish between the judge's Rule 403 analysis when determining whether to admit evidence under Alaska Criminal Rule 404(b)(3) (prior sexual assaults and attempted sexual assaults) and the judge's Rule 403 analysis when determining whether to admit evidence under 404(b)(1). The judge's assessment of unfair prejudice when determining whether evidence is admissible under Alaska Evidence Rule 404(b)(3) does not include the fact that the evidence tends to prove the defendant's propensity to commit sexual assault. *Wardlow*, 2 P.3d at 1247. Therefore, evidence of Dex's

prior sexual misconduct will be significantly easier to introduce under Rule 404(b)(3) than under Rule 404(b)(1). Deciding whether the evidence is admissible could be a much closer call if the state seeks to introduce the prior conviction solely under Rule 404(b)(1).

3. Discuss whether the judge correctly admitted evidence of the sexual assault of which Dex was acquitted. [20 Points]

Evidence of a defendant's prior acts of attempted or completed sexual assault is admissible under Evidence Rule 404(b)(3) even when the defendant was never prosecuted for those crimes and even when the defendant was tried and acquitted of those crimes. *See e.g., Wardlow*, 2 P.3d at 1246; *Hess v. State*, 20 P.3d 1121, 1123-25 (Alaska 2001). The crime of which Dex was acquitted was therefore likely admissible.

However, if the defendant has been acquitted of a crime, the defendant is entitled to introduce evidence of the acquittal in order to cast doubt on the government's case. *See Hess*, 20 P.3d at 1124 (Alaska 2001). An acquittal does not prove factual innocence of the underlying charge; it only proves that the State did not prove every element of the crime beyond a reasonable doubt. *Hess*, 20 P.3d at 1125. However, evidence is relevant and may be admitted under Alaska Evidence Rule 402 if it has *any* tendency to make the existence of a material fact more or less probable. *See* Alaska Evid. R. 401; Alaska Evid. R. 402; *Hess*, 20 P.3d at 1125. An acquittal is relevant because it may allow the jury to reasonably infer a greater probability of innocence. *Hess*, 20 P.3d at 1125.

A perceptive examinee may discuss how the judge's analysis under Evidence Rule 403 might be different when considering whether to admit evidence of conduct of which a person was acquitted as opposed to conduct for which the person was convicted. The examinee's conclusion on the admissibility of the prior sexual assault is not important, but the examinee should point out that danger of unfair prejudice may be higher in the case of an acquittal and could make it more likely that a judge might conclude that the danger of unfair prejudice outweighs the conduct's probative value.