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### **Did the court properly deny D's motion to suppress the photograph?**

#### **6th Amendment**

The Sixth Amendment protects the right to counsel in a criminal trial. The right is triggered once the defendant has been indicted, arraigned or charged, but must be invoked by the defendant.

Here, D was charged with robbing the bank on Jan 15. Thus his right to counsel was triggered because he was formally charged with the crime. However, there are no facts to show D invoked the right by asking for his or a public defender. Further, because there was no line up, D had no right to have counsel present because the defendant in a photo line up is not present.

Thus, while D's right to counsel was triggered by him being charged, it appears he failed to ask for a lawyer, and he was not present at the photo line up, so this will not be a basis for appeal of the denial of exclusion.

#### **Unduly Suggestive or Coercive Line Up**

Where law enforcement conduct a line up with the defendant, and the defendant requests representation, the police cannot conduct the line up until the def has counsel present. In a line up or where there is no line up but police use a set of pictures instead, the police cannot use tactics to make the choices presented to the witness overly suggestive to influence their selection of the person they think was the perpetrator.

Here, Officer Pat showed Tessa, who was the teller that was robbed, photos of six men, each of who were of the same race, approximate age, and had blond hair and a mustache like D's. This shows the police took care to use pictures of men that had similar appearance to D and were not unduly suggestive or coercive because T's choices all looked similar, and therefore forced her to choose properly. T immediately identified D, saying he was the robber, and signed her name on the picture. This shows that T was not swayed by any tactics used by police to lead her to D's picture because she was the victim of the robbery, and there are no facts to suggest the robber hid his identity, so she recognized him immediately.

Thus, the tactics the police used were not unduly suggestive or improper and D will not prevail in an appeal on this basis.

Thus, the court properly denied D's motion to suppress.

### **Did the court properly admit T's statement to the investigator?**

#### **Relevance**

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## **Logical**

Evidence is logically relevant when it has any tendency to make a fact of consequence more probable than it would have been without the evidence.

## **Legal**

All evidence must be relevant but not all relevant evidence is admissible unless its probative value is not substantially outweighed by the danger of unfair prejudice it presents under FRE 403 and CEC 352.

Here, if T made a statement to the investigator that the robber had black hair, when the picture she chose from the line up had a man with blond hair, this would go to show she was mistaken in her choice and sow doubt on her credibility as a witness. The case against D relies on T's identifying him as the robber, so such a statement goes to the heart of the prosecutor's case. Thus, it made the fact of D's guilt less likely and the probative value very high. There was little to no threat of undue prejudice to D by such a statement, so the statement was legally relevant as well.

Thus, T's alleged statement to the investigator was relevant.

## **Prop 8**

In CA, all relevant evidence is admissible in a criminal trial, subject to the CEC 352 balancing test. There are exceptions for constitutional exclusions, hearsay, and other privileges.

Here, T's statement may have been hearsay, so admissibility under Prop 8 will turn on the finding on that issue.

## **Hearsay**

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is inadmissible as evidence unless an exception applies.

Here, on cross examination defense asked T if she had told the investigator that the robber had black hair and no mustache. The statement was made out of court, in the investigatory process. This shows the out of court element was met. Defense is offering it to show T said the def had black hair and no mustache to the investigator. This shows the defense is arguably offering it to show what T asserted, that someone with black hair instead of blond, and with a mustache instead of none committed the robbery.

Thus, the statement is arguably offered for the truth of the matter asserted and will be inadmissible unless an exception applies.

## **Prior Inconsistent Statement**

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Prior inconsistent statement under FRE is classified as non hearsay because it shows the statement is offered to show the declarant was untruthful or incorrect in her testimony. It requires the declarant make a prior statement conflicting with testimony, and be unavailable as a witness.

Here, T was available as a witness, and in fact was testifying.

Thus, D will not have prior inconsistent statement as a means of admitting the statement.

### **Impeachment**

A witness's credibility is always at issue and impeachment of the witness's credibility can be a basis to admit a statement that would otherwise be excluded as hearsay.

Here, T admitted to making the statement, but testified further that it was incorrect because the robber did have blond hair and a mustache. This shows the statement was inconsistent, and because T stipulated to making it, it can be admitted to impeach her credibility as a witness.

Thus, D could admit the statement for impeachment.

### **Party Opponent Admission**

Party opponent admission requires the declarant be an opposing party and make a contradictory statement.

Here, T is not a party, but a witness.

Thus, POA is not available to D as an exception to hearsay.

Thus, the court properly admitted T's statement to the investigator.

### **Did the court properly admit the photograph with T's signature?**

#### **Relevance**

See the rule above.

Here, the photograph was D's picture. This shows it was a key piece of evidence and goes to show D was the robber. Its probative value was therefore high. The risk of prejudice to D may also be high, but not unfairly so.

Thus, the photo was relevant.

#### **Authentication**

All physical evidence must be authenticated to show it is what the offeror purports it to be. Such evidence can be authenticated by testimony or personal knowledge.

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Here, the parties stipulated that the photo was not admissible as a business or public record, but presumably did testify that it was authentic, and the fact that T signed it is further proof it was what they purported it to be.

### **Hearsay**

See the rule above.

The photo was made out of court. And prosecution is offering it to show D was the robber.

Thus, the photo was hearsay and will be inadmissible unless an exception applies.

### **Prior ID**

Prior identification requires the witness have identified the defendant as the perpetrator in prior testimony.

Here, T ID'd Dan in the photo line up, and in fact was the one she signed at that time. If she swore an oath before doing so, her ID of him then would be testimonial.

Thus, Prosecution would admit the photo under the prior ID exception.

### **Unduly Suggestive**

See the rule above.

Here, the picture T identified D with in the trial bore her signature. This shows she was lead to ID the same picture because she would naturally have recognized her own signature on it. This would in fact make the photo unfairly prejudicial to D.

Thus, the court improperly admitted the photo signed by T.

### **Did the court properly admit the ATM records?**

#### **Relevance**

See the rule above.

Here, the ATM records go to show D was not in Alaska when he said he was. This makes the evidence highly probative and while prejudicial to D, not unfairly so.

Thus the ATM records were relevant.

#### **Hearsay**

The ATM records were made out of court, and while not offered to show all the details of D's transaction, one detail of the records was, the date. This shows the records were offered for the truth of one element of the records.

Thus D may argue the records were inadmissible as hearsay.

### **Business Records Exception**

Business records requires the record was made in the ordinary course of business, at or near the time of the occurrence, by a party with knowledge, and without a show of questionable authenticity by the opposing party.

Here, Chet testified that the records were made as a matter of course in their daily business. More importantly, they were made by the ATM machine. As such, the statement was non-hearsay because machine generated evidence is not hearsay.

Thus, the court properly admitted the ATM records.

Question #1 Final Word Count = 1482

**END OF EXAM**