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The threshold question in any evidence problem is whether the evidence offered is relevant to the proceedings. Under California law, evidence is relevant if its admission tends to prove or disprove a material fact of the situation at hand. This general rule is subject to Cal. Evid. Code 352, which states that the court may nevertheless exercise its discretion to exclude a piece of relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice to the party against whom it is offered. Under 352 relevant evidence can be excluded if it is needlessly cumulative, confusing to the jury, or its admission is designed to shock/upset the trier of fact (such as extremely graphic photos of a crime scene). Each piece of evidence that will be discussed below has been determined to be relevant to the disposition of the State's case against Dan.

1. Court's Denial of Dan's Motion to Suppress the Photograph

Both the prosecution and defense often file pre-trial motions to admit or exclude pieces of evidence prior to the beginning of trial. The difficult decision about whether to admit or exclude a given piece of evidence is the under the trial judge's sole discretion at this point in the proceedings. The trial court judge must determine whether each piece of evidence is (1) relevant and (2) properly admissible. The photograph of Dan is relevant to the disposition of this case because it allows the prosecution to establish that Dan was present at the scene of the crime and responsible for the crime with which he is being charged (in this case robbery). Because Tessa is the teller who was robbed, her recollection about the person who robbed her is also clearly relevant, and the fact that she picked Dan out of six similar-looking men as the person responsible for the robbery is a strong piece of evidence toward the prosecution's case in chief. While a trial court judge is ultimately responsible for determining whether a piece of relevant evidence should be admitted or excluded, there are many guidelines designed to help the trial court judge make the right call. Sometimes, a piece of relevant evidence should be admitted but for a violation of a party's constitutional rights, as Dan is asserting here.

Dan asserts that the photograph shown to Tessa should be suppressed in violation of his 6th Amendment right to counsel because Dan's lawyer was not present when the police officer showed Tessa the set of photographs. For Dan's argument to stand, Dan would have to successfully show that his 6th Amendment right to counsel had already attached and, further, that his 6th Amendment right extends beyond his mere physical presence in a custodial situation. The 6th Amendment guarantees a defendant the right to counsel in custodial situations once a defendant has been charged with violating the law. While a defendant does not have the right to counsel during a pre-arraignment lineup or at an arraignment hearing, the right does officially attach once the defendant has been formally charged. To this end, Dan may have a cognizable argument for some kind of constitutional violation because the police officers presented Tessa with the six similar photographs in April of 2023, after Dan had been charged on January 15, 2023, with the robbery. Unfortunately for Dan, that is probably where the success of his argument ends. In order to suppress the photograph, the trial court judge would essentially have to find that the 6th Amendment prevents the prosecution from continuing to investigate and build their case once formal charges have been brought. The trial court judge would also have to determine that the investigation of any evidence that includes Dan and does not include his attorney as a representative of Dan's interests amount to a constitutional

violation based solely on the fact that Dan has been formally charged. This supposition would basically insulate criminal defendants from further investigation by the police and prosecution once formal charges have been brought, and that is certainly contrary to the interests of our justice system. Based on the foregoing, the trial court properly denied Dan's motion to suppress evidence of the photograph.

2. Did the Court Properly Admit:

(a) Tessa's Testimony re: Statement to Defense Investigator

Please refer to the above discussion regarding relevance. The statement given by Tessa to the defense investigator might constitute hearsay. According to California law, hearsay is an out-of-court statement offered by a declarant for the truth of the matter asserted. Statements that are deemed hearsay are inadmissible unless an enumerated exception applies, such as statements that are made for the purpose of medical diagnosis; spontaneous statements ("excited utterance"), statements made under the belief of imminent death, statements made by a party opponent, and such. Under limited circumstances, statements that may be adjudged as hearsay in one context can function as non-hearsay in another context, such as the statement Tessa made to the defense investigator. This would be considered a prior inconsistent statement, where a declarant's testimony on the stand contradicts something they had previously asserted either in or out of court. A prior inconsistent statement can be used to attack a witness's credibility during cross-examination, but the witness must be or have been available in court to explain or deny having made the inconsistent statement. While Dan's defense team used Tessa's prior inconsistent statement to undermine her credibility, they also gave her the opportunity to explain or deny the inconsistency, which she did. Now because her credibility was attacked on cross-examination, it would be proper for the prosecution to conduct a re-direct and allow Tessa to rehabilitate her credibility. It does not appear that anything is amiss with Tessa's testimony; thus, the trial court properly admitted Tessa's testimony about her statement to the defense investigator.

(b) Photograph with Tessa's Signature

Please refer to the above discussion regarding relevance and hearsay. As stated above, the rule against hearsay makes out-of-court statements (including expressive conduct) inadmissible subject to a number of rules. Because the hearsay rule explicitly applies to statements (and expressive conduct), it clearly does not apply to the admission of photographs because photographs are not statements. The facts indicate that the parties stipulated that the photograph was neither a business record nor an official record, but again for our purposes that should have only mattered if we were facing a hearsay problem, which we are not. Since the trial court denied Dan's motion to suppress the photograph, the only real inquiry would be whether the photo is relevant subject to 352 balancing. As discussed above, the photograph is clearly relevant and is not unduly prejudicial. Tessa witnessed the robbery and, as such, she has personal knowledge regarding the identity of the robber. This would be a sufficient for the prosecution to lay a proper foundation for the admission of the photograph. Not only does Tessa have personal knowledge of the underlying robbery, but also with respect to the photograph itself. The fact that it contains her signature probably helps the prosecution properly authenticate the photograph, which would then allow the prosecution to move for its admission into evidence. If all else fails, California law contains a catch-all provision called Proposition 8 which allows the admission of relevant evidence even if it would otherwise be inadmissible. Therefore, the trial court properly admitted the photograph with Tessa's signature.

(c) The ATM Records

Please refer to the above discussion regarding relevance. The admission of these ATM records is relevant because it tends to prove or disprove the existence of Dan's alibi, that he was allegedly in Alaska prior to, during, and after the robbery. The ATM records, however, produce a potential hearsay problem: while California law is currently split on this issue, a number of courts have ruled that records produced by a machine can constitute hearsay and potentially inadmissible for that purpose. One exception to the rule against hearsay is the business records exception, which allows a party to offer documents or other records kept during a company/entity's regular course of business. It appears that the prosecution attempted to use the business records exception as a way to get the ATM records properly admitted into evidence. They called Chet, who is the custodian of records at Credco, and is the best person to authenticate a business record. Chet properly identified the records from a Credco ATM located near the bank, which allowed the prosecution to lay the foundation for what these ATM records tended to show--that a withdrawal was made from Dan's account one day before the robbery. If Chet is also qualified to testify as to the function/importance of Dan's Personal Identification Number in connecting the money withdrawal to the ATM, then there is ostensibly no reason that these ATM records should be excluded. Therefore, the trial court properly admitted the ATM records.

Question #1 Final Word Count = 1469

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