

PART II

Darlene Defendant is on trial for the murder of her boss, Sammy Sleese. Sleese, a prominent businessman, was the founder and CEO of "Tweeters," a popular chain of restaurants. Defendant worked at the company as Vice President in charge of marketing. Sleese was shot in his office with a handgun that he kept in his desk drawer. Darlene admits that she shot him, but claims that she killed him in self-defense after months of being sexually harassed by him. She claims that, on the night of the shooting, Sleese tried to rape her and threatened her when she resisted his attempt, and that she then grabbed the gun out of the drawer and shot him.

Following is a list of several items of evidence that are likely to be offered at trial. For each potential piece of evidence, please evaluate the objections that could reasonably be raised, the arguments on both sides, and the likely ruling by the trial court. ***This analysis should be in the form of a legal memorandum; in other words, it should not be in outline form nor contain shorthand, abbreviations, slang, or bullet points.***

1. [40 minutes]. The government wishes to call Theresa Therapist to testify to the content of therapy sessions that she conducted with Defendant in the months leading up to the shooting. In addition, Therapist taped several of these sessions, and had her secretary, Stella Secretary, listen to and transcribe them. The tapes were then re-used (taped over) as per Therapist's usual practice. The government has indicated its intent to call Secretary as a witness to testify to what she heard on the tapes. According to the prosecutor, the government does not seek to introduce the transcripts of the conversations that were made by Secretary.

During the investigation of the shooting, police officers questioned Secretary. She informed them that she had eavesdropped on the final session between Therapist and Defendant because she "got a funny feeling" from Defendant and was "worried that she might do something to Therapist." This session was not one of those that were taped by Therapist. Secretary stated to police that she arrived at the office after the final session was already in progress and the door to Therapist's office was closed, but that she saw a car in the parking lot that she recognized as Defendant's car. She told police she was surprised that Defendant was there, because there was no appointment scheduled for that day. She told police investigators that she put her ear to the door and heard a voice that sounded like Defendant's say, "I'm at the end of my rope. I don't know what I might do if he doesn't leave his wife. It makes me so mad I might just . . . (inaudible)." She did not see anyone come out of the office because Therapist's office has a side door that leads to the parking lot and patients usually exit through that door.

EXAM CONTINUES ON NEXT PAGE

2. **[40 minutes].** Following the shooting there was much media attention, with local newspapers and the evening news carrying numerous stories about the individuals involved and about the upcoming trial. During this period, the local network news carried an interview with a woman named Helga Heffalump. In the interview, Helga said that she had worked one summer in the corporate offices of "Tweeters" as a bookkeeper. In the videotape of the interview, she stated, "When I first got to the company, some of the other women told me to watch out for Sammy, that he had loose hands and liked to get young women alone in his office and lock the door. They said everyone knew that he had a reputation for bothering the pretty women and that he had a terrible temper and could be mean. Once, during that summer, he took me out for drinks after work. He drank several martinis and then propositioned me. Another time I was working late and he came into my office and came around to my side of the desk and said that he'd really like to see me naked. I was scared and told him to get out, and he did. But he was angry and told me that I should make him happy if I knew what was good for me."

After this interview aired, the grand jury investigating the crime called Helga as a witness. She testified before the grand jury to essentially the same thing that she'd said on television.

The defense wishes to introduce the videotape of the television interview as well as the transcript of the grand jury testimony at the trial. The defense has attempted to locate Helga, but she has apparently left the country and left no forwarding address.

EXAM CONTINUES ON NEXT PAGE

3. [40 minutes]. Prior to the start of the trial, Defendant made a motion in limine to exclude certain evidence at trial. In particular, she moved to exclude (i) a two-year-old prior conviction for shoplifting, a misdemeanor, for which she paid a fine and performed community service; (ii) an arrest record that showed that she was arrested in 1993 for stalking a former boyfriend, though she ultimately was never charged with or prosecuted for any crime in connection with the incident; (iii) a seven-year-old conviction for income tax fraud, a misdemeanor; and (iv) a letter contained in Defendant's personnel file at "Tweeters," signed by "Jean M. Archer, Dean of Students" which read in part: "Pursuant to your inquiry, this letter confirms that Ms. Darlene Defendant was enrolled as a student at Middling College from September 1989 through February 1992. She withdrew voluntarily after she was convicted by the honor court of plagiarism."
- a. Analyze the above items of evidence (i) through (iv), noting all non-frivolous objections that might be made, possible counter-arguments, and likely rulings.
 - b. Assume that the trial judge has issued the following ruling on the pre-trial motion: "All of the evidence is inadmissible unless Defendant testifies at trial, in which case all of it is admissible to impeach her." Following this ruling, Defendant chooses not to testify at trial. She is then convicted of murder and she appeals. Evaluate the issues on appeal with respect only to the judge's ruling quoted in this question, taking into account the applicable standard of review. Important: consider the grounds for appeal and likely result *only with respect to the trial court ruling quoted in this question 3(b)*; do not discuss issues on appeal that might be raised by any of the evidence described in questions 1 and 2 of this essay.

GOOD LUCK AND HAVE A GREAT HOLIDAY!!!

END OF EXAM

Fall '04 Part II Answer Key

Exam No. _____

Total Score: _____

Question 1 (total 28 points)

Psychotherapist/patient privilege

_____ Defense will argue that Therapist's testimony as to the therapy sessions is inadmissible due to the privilege. The Supreme Court has held that there exists a federal psychotherapist/patient privilege (Jaffee v. Redmond) under FRE 501. The privilege is held by the patient, and Therapist should not be allowed to testify to their confidential communications made in the course of therapy, in the absence of waiver or exception. **(4 points)**.

_____ In addition, if the court determines that the privilege applies, it would bar introduction of the transcripts and the testimony of Secretary. The fact that Secretary eavesdropped and overheard the communications does not vitiate the privilege. The issue under the FRE's and modern practice is whether the patient took **reasonable steps to keep the communications confidential**. Here, a court would probably find that there was a reasonable expectation of confidentiality. **(3 points)**.

_____ **Dangerous patient exception** (Menendez): Prosecution will argue that the privilege does not apply because Defendant was a danger to a third party and therefore the therapist is permitted to warn that party. Arguably, Defendant posed a danger to Slease or his wife, though Therapist did not in fact warn either of them as far as we know from the facts as given. However, in Menendez the court stated that once the Therapist had a reasonable belief that third parties were in danger and should be warned, the privilege would disappear generally. The defense can argue that there was no reasonable belief of dangerousness because of the ambiguousness of the overheard statement. Further, the defense can argue that the privilege was not waived as to all of the sessions, but only as to the one at which the threatening statement was made. **(6 points)**.

_____ Prosecution can argue that Defendant has placed her mental condition at issue, thereby waiving the privilege. However, she does not appear to be claiming some kind of abuse defense, but rather that he attacked her and she fought back. In that case, the court will likely find that Defendant has not placed her mental condition in issue. **(2 points)**.

Authentication

_____ If the court determines that the privilege does not apply to bar Secretary from testifying as to the final session, then the defense can argue that the voice has not been properly authenticated as Defendant's voice. Authentication is a 104(b) issue for the jury; the proponent must offer sufficient evidence that a reasonable jury could find that the person overheard by Secretary was Defendant. Here, there is probably sufficient

evidence based upon all of the circumstances surrounding the statement: Defendant's car in the lot, the voice recognition by someone who is familiar, etc. **(4 points)**.

Best Evidence Rule

_____ Defendant will argue that both the transcripts and the testimony of Secretary as to what she heard on the tapes are barred by the BER and that FRE 1002 requires the introduction of the original tapes. The first issue is whether the BER applies, i.e. whether the prosecution seeks to prove the content of the tapes. The answer here is yes. The second issue is whether there has been sufficient excuse for nonproduction (the transcripts do not qualify as a "duplicate" under the rule). Here, it does not appear that the tapes were destroyed in bad faith, and therefore secondary evidence (of any sort) is permissible. **(5 points)**.

Hearsay

_____ Defendant's statements are hearsay (the transcripts are double hearsay, but the prosecution does not intend to offer the transcripts). However, assuming that there is sufficient evidence for a reasonable jury to find that Defendant is the person who spoke (104(b)), these are admissible under 801(d)(2)(A) as the admissions of a party opponent. As for Secretary's testimony of what she heard on the tape, there is no additional hearsay issue because recordings are not persons under 801(a) and the issue would be the reliability of the recorder. Were the prosecution to offer the transcript rather than Secretary's testimony, it would be admissible under 803(5) assuming Secretary testified and laid the proper foundation. It might also be admissible under 803(6). **(4 points)**.

Question 2 (total 26 points)

Hearsay

_____ The **statements on the videotape** are hearsay, because they are offered to prove the truth of the matter asserted (that Sleese had a reputation for harassing women and that he had done these specific things to Helga). There is a double hearsay issue, but the tape itself is not hearsay because it is not the statement of a person. Helga's statements on the tape are hearsay and do not appear to be covered by any exception. Defense could argue that they should come in under the residual exception, but there is really no good argument that the circumstances here offer indicia of reliability. **(5 points)**.

_____ The **grand jury testimony** is admissible under the former testimony exception, so long as she is unavailable under FRE 804(a). (The transcript is admissible as a business or public record, or as a PRR if the court reporter lays the required foundation). Here, Helga has left the country without a forwarding address, so the court is likely to hold that she is unavailable under the rule. This testimony was given at a prior proceeding, under oath, and the party against whom it is offered had an opportunity to

develop the testimony. The prosecution can argue that it did not have a similar motive to develop the testimony (Salerno); the Circuits are split on this issue. **(6 points)**.

Character evidence

_____ Helga's statements are character evidence with respect to Slease. They are in the form of reputation and specific acts that tend to show that he is sexually aggressive and threatening to women who work for him. Though FRE 404 generally bars character evidence when used to show propensity (as here – character is not “in issue”), this evidence may be offered under the exception contained in FRE 404(a)(2) as evidence of a pertinent character trait of the victim offered by the accused. Under FRE 405, this character evidence can only be in the form of opinion or reputation evidence, and not of specific acts. By offering this evidence, Defendant “opens the door” to the prosecution to offer evidence of the same trait of character of the accused. **(5 points)**.

_____ **FRE 412:** The defense might argue that the specific instances of conduct are admissible under FRE 412(b)(C) because these instances of sexual behavior by the victim are highly probative and support Defendant's self-defense claim. Though the drafters probably did not contemplate the rule being invoked under these circumstances, against a sexual aggressor whose victim then becomes the criminal defendant, it is possible a court might apply the rule to allow this evidence. **(5 points)**.

_____ **FRE 413:** Similarly, the text of this rule does not cover this situation because the prior sexual assaults are not by the defendant but by the victim. However, the rationale of the rule, that prior acts of sexual misbehavior are highly probative of conduct on a particular occasion, might support an argument for admission. **(3 points)**.

_____ There is no **CC issue** because this evidence is offered by the Defendant. **(2 points)**.

Question 3 (total 26 points)

Part (a)

_____ *the two-year-old conviction for shoplifting:* Defendant can object to this item as inadmissible character evidence and also as irrelevant. If she testifies, it may not be used to impeach her because it does not satisfy FRE 609. If there is something about the specific shoplifting incident that involves dishonesty or false statement, some courts would admit it to impeach her. **(4 points)**.

_____ *1993 arrest record for stalking:* This other act is arguable relevant for the non-character purpose of proving lack of accident. Defendant claims that she killed Slease in self-defense; her prior act of possessiveness/aggression toward a boyfriend arguably negates this through a “law of chances” type of inference. Defendant will argue that it is

pure propensity. Further, defendant may argue that it should be excluded under FRE 403. The question whether the incident occurred is a 104(b) question for the jury. If she testifies, this cannot be used to impeach her under 609 because it is not a conviction, nor can the prosecution ask about it under 608(b) because it is not relevant to truthfulness. **(5 points).**

_____ *7-year-old conviction for income tax fraud:* This is not admissible unless Defendant testifies. There is no non-character relevant purpose. If she testifies, it is admissible under FRE 609(a)(2). There is no discretion to exclude because it is a crime involving dishonesty/false statement. **(4 points).**

_____ *letter from personnel file from Jean M. Archer:* If Defendant does not testify, this is irrelevant and also barred by FRE 404. If she testifies, it is not admissible under 609 because not a criminal conviction, but the judge may allow the prosecutor to ask about the incident on cross examination pursuant to FRE 608(b) (though extrinsic evidence would not be permitted). **(5 points).**

Part (b)

_____ The judge's ruling on the motion is reviewed under an **abuse of discretion** standard. As to the character evidence issues, the judge excluded all the evidence except for impeachment purposes so Defendant does not have any basis to appeal that aspect of the ruling. As to the impeachment issue, because Defendant chose not to testify, she may not challenge the in limine ruling of the trial court (**Luce**). Brief discussion of **policy** issues raised by this rule. **(8 points).**

Subtotal _____

Organization and misc. (possible 10 points) _____

TOTAL: _____

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

1.

The first issue is whether the testimony concerning Darlene's therapy sessions are relevant. Evidence is relevant if it has any tendency to make a fact of consequence in the case more or less probable. Here since Darlene is claiming that she killed Slease in self defense after he had been sexually harassing her for months, it seems that her state of mind, if present in the sessions would be relevant to the issue of self defense.

The next issue is whether the Therapist can testify at all with regard to the statements made by Darlene to her therapist during the therapy sessions. The SC has recognized a patient-psychotherapist privilege in *Jaffe v. Raymond*. The privilege protects confidential communications between the patient and their therapist. The privilege belongs to the patient. Here it seems clear that Darlene contacted Theresa within her professional capacity as a therapist and therefore the contents of the sessions would be privileged. There is also the additional issue of whether the communications were made in confidence with the expectation that they would be kept confidential. One would think that ordinarily when a patient seeks out psychotreatment the patient would expect that the therapist would keep those communications confidential, especially since the therapist is under an ethical duty to do so. A more troubling issue is whether the privilege was destroyed by Stella listening to them. While there is no federal rule that details the psychotherapist privilege, courts are to interpret the rules governed by the principles of the common law in light of reason and experience. While there does not appear to be case law on whether the privilege is waived or vitiated by a secretary of the therapist listening to the conversations, in applying the attorney client privilege, statements of a client are

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

still under the privilege when an agent of the attorney is made aware of the privilege.

Additionally, proposed rule 504 would have allowed communications to remain confidential even if they were disclosed to third persons participating in the diagnosis and treatment under the direction of the psychotherapist. Here it seems that in light of the interpretation of the attorney-client privilege and the proposed rules, the sessions would still be confidential and covered by the privilege even though Stella observed them. Additionally it is unclear whether Darlene was aware that Stella would be listening to the conversations, if Stella was unaware, this would bolster the conclusion that the privilege was not waived.

Since the privilege belongs to the patient, Theresa cannot waive the privilege for Darlene by being willing to testify. While Theresa cannot waive the privilege for Darlene, it is possible that Darlene to waive the privilege. Some courts have held that the psychotherapist privilege can be waived when the patient's mental state is put at issue in the case. As mentioned above, Darlene here is claiming that she killed Slease after he had been sexually harassing her for months. Therefore her state of mind is likely relevant in the case and it could be said that she waived the privilege. In response, the defense should argue that her state of mind has not been put in issue rather the only issue is whether at the time, Slease threatened to rape her and then threatened her. While this case is different than Prink in that in that case it was the plaintiff who was seeking to invoke the privilege, it seems that by defending on a claim of self defense, Darlene has waived the privilege.

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

The judge should though still weigh the evidence under 403 to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. While it is not clear what exactly the contents of the sessions were, the judge should exclude evidence that does not go to her state of mind in this case as that evidence would be unduly prejudicial to her and any other evidence in the sessions that would tend to induce the jury to make a decision of an emotional basis if that evidence is not highly probative.

Assuming that the privilege has been waived we next have to deal with the issue of the best evidence rule. Here the government is seeking to introduce secondary evidence of the conversations between Theresa and Darlene through the tapes. While Theresa can testify to the contents of the conversations without the tapes because she was a party to the conversations and thus the best evidence rule does not apply, Stella was not a party to conversations, her only knowledge of the conversations is through the tapes. However, the best evidence rule does not prohibit secondary evidence to prove the contents of a recording if the party presenting the evidence gives an excuse for nonproduction of the original. Here the tapes were not destroyed in bad faith but were destroyed in the normal course of business after the transcripts were taken-this would be an adequate excuse for nonproduction. While the transcripts might have been the next best evidence of the transcripts, the best evidence rule does not rank secondary evidence of a recording and thus Stella could testify as to this evidence.

Additionally, Darlene's statement on the tapes although hearsay would be admissible as an admission of a party opponent. They are her own statements, and are being offered against her. The statements of the therapist would be more difficult to come in but generally questions are not considered assertions and therefore fall out of the rule against hearsay and would likely be admissible.

Once again it must be determined if the communication by Darlene to the therapist are privileged. Under the common law eavesdroppers were allowed to testify, but under the modern rule courts will allow information to remain privileged as long as reasonable precautions are kept to keep the communications privileged, here since Stella had to press her ear to the door to hear the information, the communications likely remained privileged. Again though we have the issue of whether Stella waived the privilege by putting her ear up to the door. Additionally communications that fall within the dangerous patient exception are vitiated. That is the privilege never attaches to communications that fall under the dangerous patient exceptions. Communications which accuse the doctor to have reasonable belief that the patient is a danger to himself or others and is necessary to disclose is not privileged. Here though the defense should argue that the doctor did not make this determination, the secretary did and thus the dangerous patient exception should not apply, additionally the defense should argue that because the doctor did not feel the need to tell anyone about the statements the exception does not apply and the communications are privileged.

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

If though the court decides on any of the above that the privilege has been waived or was vitiated, we still have to deal with the admissibility of the statements.. The defense will argue that they are hearsay because they are offered to prove the truth of the matter asserted, that she was at the end of her rope etc. The government could offer that the statements are not hearsay but are circumstantial evidence of her state of mind and that even if they are hearsay the statements would be admissible as admissions of a party opponent as they are her own statements. Therefore, Stella could testify to these statements. However, since this is a criminal case and the police were investigating this crime, if the statements were obtained in a police report they would be inadmissible against Darlene under the public records exception to hearsay and would be inadmissible under the business records exception because this would contravene the clear intent of the legislature to exclude these kinds of records against criminal defendants as articulated in Oates.

We still also have the issue of whether the statements are even relevant. If Stella was not talking about Sleese then the statements would have no relevance. However if she was talking about Sleese they might be relevant. This is an issue of conditional relevancy for the jury so the judge should admit the evidence if the prosecution presents sufficient facts for the jury to conclude by a preponderance of the evidence that she was talking about Sleese here there does not seem to be any evidence to indicate that she was talking about Sleese so the judge should probably keep the statement out.. It is also not even clear that it was Darlene that was talking. This again would be a conditional relevancy issue for the jury and here Darlene is saying that she recognized her voice and saw her car so the judge should probably let it in,

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

However, the issue is not over because she does not say what she might do. She might have said I might kill myself or I might break up with him or I might leave him. This then seems unfairly prejudicial to Darlene and should likely be kept out especially given the fact that it is unclear that she was talking about Slease.

Part II.

The best evidence rule applies here but since the defense is seeking to introduce the original of the tape it is satisfied. We still must deal with her statements within the videotape.

First the prosecution should object to the statements on the tape as hearsay.

The videotapes actually contain hearsay within hearsay. The statements of Helga and then within her statements, her statements that other women at the office had made statements to her. The defense will argue that these statements are not hearsay but instead are offered for effect on the hearer. That these statements were offered to show that Helga believed that Slease was a sexual harasser because of what she had been told. However, her state of mind in the case is irrelevant. Additionally no other exceptions appear to apply to her statements, they would not be admissible under the state of mind exception because they are all backward looking. The defense will also argue that the statements are not hearsay because they do not go to show the truth of the reputation but only the fact that such a reputation was out there and that this is therefore not hearsay.

The defense should also argue that this testimony is allowed under 404 a(2). Under 405a(2) the defense is allowed to offer evidence of a pertinent trait of the victim's

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

character. Here the defense will argue that the pertinent trait of Sleese is that he sexually harassed women and is relevant because this is Darlene's defense. However, under 405a this testimony is only allowed in the form of reputation or opinion testimony. Therefore, her statements about the specific instances where he harassed her would not be admissible but her testimony as to his reputation would be admissible under 404a(2). However, the defense could then argue that since this is a self defense case the character of the victim is directly at issue and thus can be proved by specific instances of conduct under 405b. Because her an essential part of Darlene's claim is that he sexually harassed her which caused her to shoot him and this evidence tends to show his character for aggressively harassing other women it seems that these specific instances would be admissible under 405b. The prosecution will argue that this evidence does not show his character and that even if it did it is unfairly prejudicial because the jury is likely to base its testimony of their dislike for him rather than on this instance. However, since it is highly probative it seems this argument would fail.

The defense still must though find some way to get the evidence. The videotape itself is not hearsay because a recording cannot make a statement but the statements contained in it are most likely hearsay and should be excluded-except those being used for reputation testimony as discussed above. However, her testimony could be admissible under the former testimony exception. Here Helga is unavailable and she testified at the grand jury where she testified under oath and the testimony is being admitted by the Darlene so we have no confrontation clause issue. Additionally, the testimony is being offered against the prosecution so the prosecution must have had a similar motive to develop the

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

tstimony at the grand jury hearing. The prosecution will argue that they did not have a similar motive at the grand jury testimony to develop the testimony because there they are only trying to get a charge and might be motivated by concerns of secrecy and might not have known what Dralene's defense was at that time. On the otherhand the defense will argue that the prosecution did have a similar motive to develop the testimony. The SC has not addressed this issue but it seems that here the prosecution did have a similar motive.

The transcript itself is hearsay but is admissible as either a business record or a public record and is self authenticating as transcripts are normally certified documents.

PART 3

i. This evidence would only be admissible if at all if the defendant testified for impeachment purposes. Under Rule 609 evidence of a conviction for a crime that involves dishonesty or false statement is admissible to impeach a witness. The trial court does not have discretion here and must admit evidence of the crime. The defense will argue that a shoplifting conviction does not involve dishonesty or false statement and thus should not be admissible for impeachment and because the conviction was a misdemeanor it is not allowed under 609 b(1) and should thus be kept out. The prosecution should argue that shoplifting is by its very nature dishonest in that involves taking something that is not yours, additionally it should look into the particularities of the conviction to see if anything in the specific conviction involved dishonesty or false

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

statement. While courts differ on this, it is likely that the evidence should be kept out unless this specific instance of shoplifting involved some sort of dishonesty.

ii. Darlene's arrest record for stalking her boyfriend is also likely inadmissible and is not affected by her testifying at trial. Under 608b specific instances of conduct for impeaching a witness are only admissible if probative of truthfulness. Here the defense will argue that Darlene's stalking a former boyfriend does not in any way relate to her truthfulness. This seems like a winning argument. However the prosecution may argue that Darlene's arrest is admissible as character evidence under 404b as tending to show motive. Here the prosecution will argue that her history of stalking a former boyfriend shows that she has a difficulty letting go of relationships and of become too attached to her lover and that they intend to use this to show her motive for killing Sleese- that she became so infatuated with him and killed him because he would not leave his wife. The defense should object that her stalking a boyfriend is not the same as her killing a boyfriend and in no way provide a motive for this murder and that the acts are too dissimilar and should not be admissible under 404b. Additionally the defense will argue that because the arrest happened so long ago and was never charged this cuts against its probative value and should be excluded under 403 as too unfairly prejudicial.

iii. This evidence would be admissible under 609(2). Here the conviction is for misdemeanor tax fraud, a crime that by its very nature involves false statement and dishonesty. Therefore, the court must admit it if the defendant testifies under 609(2). If

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

the defendant does not testify this statement should not be admitted because it does not go at all to any noncharacter purpose.

iv. This is an act of nonconvicted conduct and its admissibility is governed by 608b. While this is an act that goes to her character for truthfulness it cannot be proved by extrinsic evidence. The letter in the personnel file constitutes extrinsic evidence. Therefore if the defendant chose to testify, the prosecution could inquire into this instance on cross examination by asking her if she was ever found guilty of plagiarism by the honor court but if she denied this, the prosecution would be bound by her answer and could not prove this by extrinsic evidence. Whether or not to admit the questioning on cross examination would be in the discretion of the trial court, but since this is highly probative of truthfulness-plagiarism-it seems it should be admissible.

Under Luce, when a defendant chooses not to testify at trial, the defendant cannot challenge on appeal the court's in limine ruling to admit prior convictions under FRE 609a as impeachment evidence even if the trial court was wrong in saying that the items were admissible. Thus if Darelene does not testify she cannot challenge any rulings that were said to be admissible under Rule 609a. Because Luce dealt only with appeal of 609a rulings it is possible that the evidence admitted under 608b-the letter especially since here the judge clearly would be admitting extrinsic evidence(letter) when it is prohibited by the rules and the arrest for the boyfriend for impeachment where it is not probative of truthfulness but the judge admitted it for impeachment purposes would be subject to an appeal. The reasoning in Luce though, that such a review under 609a would be entirely

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

speculative because the defendant had not testified would still apply in this instance and therefore it is likely that Luce will not be able to appeal the ruling because she did not testify and the evidence was not admitted against her. Even if the appeal was allowed which is unlikely, the standard of review on evidentiary rulings is an abuse of discretion. This is very difficult to win on appeal.

Exam ID: 775
Course: Evidence
Professor Name: Seaman
Exam Date: Monday, December 13, 2004

Exam Start Date: 12-13-2004
Exam Start Time: 11:04:58
Exam End Date: 12-13-2004
Exam End Time: 13:00:22

Pages: 6
Words: 2970
Lines: 232

Disk Space : 20398 MB
RAM : 195056 MB
Microsoft Windows : Windows XP
Microsoft Word : Word2000
Application Version : Securexam Student 3.15