JULY 2019

Annotated California Bar Questions

Study edition | Original question pages with added highlights and reading pointers.

Practice first: attempt the clean question, then use the numbered notes and online sample responses to compare your reasoning. The full source packet is preserved, including its instructions and library.

Original, ungraded instructional commentary. Not official selected answers, scored student work, or a claim of attorney review.

Source: State Bar of California | 24 original pages, all retained.

Bar Exam Doctor | Published November 4, 2026

JULY 2019
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 1

In 2015, Priscilla was shopping at Grocery when a very large display of bottled soda products fell on her, bruising her head and entire body. She filed suit in federal district court against Grocery for negligently maintaining the display, and sought damages for medical expenses, pain and suffering, and lost wages. Grocery recognized that jurisdiction was proper and filed an answer denying liability.

1 Accompanying the complaint was a set of 26 interrogatories, which read in part:

25. Please provide the names and addresses of every Grocery employee who worked on construction of the soda display and every soda company employee who did so.

26. Please provide copies of every training manual Grocery has used in training its employees.

Grocery responded: "Objection. These interrogatories are flawed." Upon receiving the reply, Priscilla filed a motion to compel further responses.

Grocery made two discovery requests asking for:

2 a. An order requiring Priscilla to submit to mental and physical examinations.

b. All of Priscilla's tax returns since 1995.

Priscilla opposed both discovery requests and Grocery filed motions to compel.

3 Before Priscilla filed her lawsuit, Grocery hired Xavier, an expert on grocery store displays, to investigate the accident. His findings were unfavorable, and Grocery has not identified Xavier as a witness. Xavier is an independent contractor, but he works exclusively for Grocery.

Included in Priscilla's original set of interrogatories was a question seeking the names and opinions of all experts Grocery had hired for the litigation. In response to that interrogatory, Grocery replied: "Objection. Privileged." No information about Xavier was disclosed by Grocery.

1. How should the court rule on Priscilla's motion to compel further responses to her interrogatories to Grocery? Discuss.

2. How should the court rule on each of Grocery's motions to compel? Discuss.

3. Was Grocery's response to Priscilla's interrogatory about its experts proper? Discuss.

4. Should the court sustain Grocery's assertion of privilege with regard to Xavier? Discuss.

READING POINTERS

1 Count and time the requests

The ordinary limit is 25 including discrete subparts. The complaint-stage service also raises the restriction on discovery before the Rule 26(f) conference.

2 Analyze each condition

Bodily injuries support a tailored physical exam. Ordinary pain and suffering do not automatically put a separate psychiatric condition in controversy.

3 Identify the protection precisely

Employment labels do not decide privilege. Determine litigation purpose, anticipated trial use, and any exceptional need for consulting-expert information.

QUESTION 2

Clear City is home to 50 churches, one of which burned down earlier this year. Fire investigators suspected that the cause was a burning candle.

2 Clear City has enacted an ordinance that prohibits burning candles in any church and authorizes the fire marshal to close down any church in which candle burning occurs. The Mayor told the press that Clear City would vigorously enforce the ordinance and that the fire marshal would randomly visit churches during their Sunday services to close down violators.

The fire marshal visited six churches last Sunday, but did not visit the Clear City Spiritual Church ("SC"). Two of the six churches visited were burning candles, but were only issued warnings, not shut down. Immediately after visiting the last of the six churches, the fire marshal publicly announced that it was likely no further warnings would be issued to churches caught violating the ordinance. The fire marshal also announced that, due to a lack of personnel, these random visits would

1 not resume for "at least eight weeks."

3 The members of SC burn candles during Sunday services to signify spiritual light in the world. The day after the fire marshal's announcements, SC gave notice to Clear City's attorney that it would immediately sue Clear City in federal court seeking: (1) a temporary restraining order and a preliminary injunction to enjoin Clear City from enforcing the ordinance during the pendency of the lawsuit; and (2) a declaration that the ordinance violates the First Amendment.

Clear City's defense is that it has not taken any action and there is no controversy.

1. What is the likelihood of SC's success in obtaining a temporary restraining order? Discuss.

2. What is the likelihood of SC's success in obtaining a preliminary injunction? Discuss.

3. What is the likelihood of SC's success in obtaining declaratory relief in its favor? Discuss.

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READING POINTERS

1 Urgency and controversy differ

The pause weakens a short emergency TRO but does not eliminate a credible future threat or the need for relief during a longer lawsuit.

2 Facial religious classification

Compare church candle use with comparable secular risks. Analyze neutrality, general applicability, and narrow tailoring under the exam's 2019 framework.

3 Read the procedural facts

SC notified the City's attorney. Discuss the distinct notice and timing requirements of temporary and preliminary relief without assuming an ex parte application.

QUESTION 3

3 Delia entered a coin shop, pulled out a toy gun that appeared to be a real gun, and pointed it at the owner, Oscar. Oscar handed her a set of valuable Roman coins and she fled. Neither said a word.

Subsequently, the police received an anonymous email that stated, "Your coin robber is Delia, and she is trying to sell the stolen coins." Detective Fong followed Delia and saw her using a payphone in a public alley. The payphone was not in a
1 phone booth. As he walked past her, he heard her say softly, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight."

2 Detective Fong then bought a "Bird Song Microphone" from a pet store, a parabolic microphone that promised to enable a listener to hear the chirping of birds from a distance of 150 feet. He went to Nell's house, which had a deck that overlooked the alley, and lied to Nell saying that he needed to go on the deck because he was investigating a terrorist plot and "lives are at stake." Nell let him onto the deck at 9:00 p.m. that night. He aimed the microphone at Delia, who was using the same payphone in the alley, and heard her say softly, "Fine, call your buyer and let me know if we have a deal for the hot coins."

The next day, Detective Fong put all of the above information into an affidavit for a search warrant for Delia's house, obtained a signed search warrant from a judge, searched Delia's house, and recovered the coins. Delia was arrested and charged with robbery.

Prior to trial, Delia filed a motion under the Fourth Amendment to the United States Constitution seeking to suppress her statements and the coins.

1. What arguments may Delia reasonably raise in support of her suppression motion, what arguments may the prosecution reasonably raise in response, and how should the court rule with regard to

   a) Delia's statement, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight." Discuss.

   b) Delia's statement, "Fine, call your buyer and let me know if we have a deal for the hot coins." Discuss.

   c) The Roman coins. Discuss.

2. Is Delia guilty of robbery? Discuss

READING POINTERS

1 Natural hearing versus amplification

The first words were audible to a passing officer. Evaluate the second interception separately; an outdoor location does not automatically eliminate conversational privacy.

2 Identify the protected interest

Delia challenges surveillance of her own speech. Nell's deck and the officer's lie do not automatically give Delia a claim based on someone else's property.

3 Intimidation does not require a real firearm

An apparently real gun and the resulting surrender can establish robbery without spoken demands. Distinguish any separate firearm enhancement.

JULY 2019
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, and designed to be answered in 90 minutes.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

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READING POINTERS

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QUESTION 4

Larry is an associate lawyer at the ABC Firm (ABC). Larry has been defending Jones Manufacturing, Inc. (Jones) in a suit brought by Smith Tools, Inc. (Smith) for failure to properly manufacture tools ordered by Smith. XYZ Firm (XYZ) represents Smith. Larry has prepared Jones' responses to Smith's discovery requests.

Peter is the partner supervising Larry at ABC in the Smith v. Jones case. Peter has instructed Larry to file a motion to compel discovery of documents that Smith claimed contains its trade secrets. Larry researched the matter and told Peter that he thought that the motion would be denied and may give rise to sanctions. Peter, who had more experience with trade secrets, told Larry to file the motion.

1

Larry also told Peter about a damaging document that Larry found in the Jones file that would be very helpful to Smith's case. Larry knows that the document has not been produced in discovery. The document falls into a class of papers that have been requested by Smith. Larry knows of no basis to refuse the production of the document. Peter told Larry to interpose hearsay, trade secrets, and overbreadth objections and not to produce the document.

2

Larry recently received an attractive job offer from XYZ.

3

1. May Larry ethically follow Peter's instructions to file the motion? Discuss.

2. What are Larry's obligations in relation to the damaging document? Discuss.

3. What ethical obligations must Larry respect with regard to XYZ's job offer? Discuss.

Answer according to California and ABA authorities.

READING POINTERS

1 Losing is not necessarily frivolous

Determine whether Peter offers a reasonable resolution of an arguable duty. Experience does not excuse a motion lacking any legitimate basis.

2 This instruction is materially different

Larry may not invent objections to suppress a concededly responsive document. Address correction and production through proper channels.

3 Protect the current client first

Substantive employment negotiations can impair independent judgment. Preserve confidences and analyze personal and firm conflicts before any lateral move.

QUESTION 5

Sam owned a classic 1965 Eris automobile. Only 500 such cars were made and they are considered highly valuable.

Sam and Art, a classic car specialist, signed a valid written contract. The contract stated in its entirety:

3

> Art will serve as Sam's exclusive agent in selling his Eris car. Upon successful sale, Art will earn a commission equal to 10% of the sale price.

A few days later, Sam showed his Eris to Bob, who had learned of the car when he saw a "For Sale" sign Sam had decided to place on it while parked in his driveway.

1

Bob, wanting to add the Eris to his personal collection, mailed Sam a signed letter later that day offering to pay $250,000 for the car. When Sam received the letter, he telephoned Bob and said he accepted the offer. They agreed to meet the following week for payment and exchange of title. Sam then called Art and said he was terminating their agreement.

The next day, Charlie saw an advertisement for Sam's Eris in a classic car trade publication. Art had placed the ad prior to Sam terminating their agreement. Charlie drove to Sam's house and offered $300,000 for the car and said he would mail a written contract to Sam that day. Sam said he would "think about it." He did not inform Charlie of his agreement with Bob. When Charlie's contract arrived, Sam signed it, placed it in a stamped envelope addressed to Charlie, and dropped it in the mailbox.

2

Sam died in his sleep that night. His will left all his property to his only relative, a nephew named Ned.

Ned wants to keep the Eris. As a result, Bob and Charlie filed timely claims against Sam's estate seeking title to the car. Art filed a timely claim seeking a 10% sales commission.

What contract rights and remedies, if any, do each of the following parties have against Sam's estate:

1. Bob? Discuss.

2. Charlie? Discuss.

3. Art? Discuss.

READING POINTERS

1 Whose signature is required?

Bob signed the offer, but the estate is the party being charged. Analyze the UCC statute of frauds separately from oral formation.

2 Fix the acceptance time

A properly mailed acceptance ordinarily takes effect on dispatch. Sam's death later that night does not revoke an already completed agreement.

3 Agency is not an unconditional right to sell

Distinguish Sam's independently found buyer from Charlie, who responded to Art's authorized advertisement. Address procuring cause and the successful-sale term.

July 2019

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

STATE v. MARTIN

Instructions……

FILE

Memorandum to Applicant from Andrew Solmark.....

Memorandum to File from Janelle Phinney.....

Transcript of Pretrial Hearing .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

STATE v. MARTIN

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

READING POINTERS

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OFFICE OF THE DISTRICT ATTORNEY

Concord Judicial Circuit

Sonnerville, Columbia

MEMORANDUM

TO: Applicant

FROM: Andrew Solmark, Assistant District Attorney

DATE: July 30, 2019

RE: State v. Martin

I had a hearing yesterday on the Bernice Martin case. We have charged her with identity theft. Martin acquired the name and Social Security number (SSN) of another person from her former job at FastCom, a cell phone company. Using this information, she tried to open charge accounts at several stores, in one case successfully. The person whose name and SSN Ms. Martin used discovered that use and put a fraud alert on her cards. The police eventually arrested Ms. Martin. I include a Memorandum to File that summarizes the expected testimony on these points.

At yesterday's hearing, I gave notice that we intended to introduce evidence of three specific incidents involving Ms. Martin.

We want to use all three of these incidents as similar acts evidence to rebut the defense that we expect Ms. Martin to offer. I would like to admit them as substantive evidence under *Columbia Rule of Evidence* 404. I would also like to use them to impeach Ms. Martin if she takes the stand under *Columbia Rule of Evidence* 608.

1 Before I start briefing, I need an objective appraisal of the arguments for and against admission of this testimony. Please write a memorandum analyzing first, whether we can admit any of these incidents as substantive evidence, and second, whether we can use them in impeaching Ms. Martin if she takes the stand.

READING POINTERS

1 Do not write a prosecution argument only

Address admissibility strengths and weaknesses in the requested order: substantive evidence, then impeachment if Martin testifies.

MEMORANDUM

TO: File

FROM: Janelle Phinney, Deputy District Attorney

DATE: May 16, 2019

RE: State v. Martin – Summary of Expected Testimony

We have charged Bernice Martin with two counts of identity theft, for the use of a name and Social Security number acquired while employed by FastCom, a cell phone company. The following witnesses have been subpoenaed for trial:

CONSTANCE GAINER: Gainer is a customer service representative at Blake's Department Stores. She will testify that she reviewed an application for store credit from a "Bernecia Martinez" whose Social Security number was 989-22-0094. A credit check verified "Bernecia Martinez" met the credit requirements for a charge card. Pursuant to store policy, Gainer called the number listed on the application to confirm a mailing address. The caller answered, "This is Bernice." A later check of that phone number indicated that it belonged to the defendant, Bernice Martin.

Gainer will also testify that Ms. Martin charged nearly $5,000 worth of goods from the store, including appliances, electronics, and some clothing.

HENRY FRANKS: Franks is an accounts manager at Chiclet's Clothing, a women's clothing store. Franks will testify that he received an online application for store credit from "Bernecia Martinez" whose Social Security number was 989-22-0094. Franks noted that the store already had an account in that name with that Social Security number. He called Martinez and reported the effort to open another card in her name. Martinez asked him to put a fraud alert on her account. Franks testified that he notified the police of the incident.

READING POINTERS

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JOAN TIMMONS: Timmons was Martin's immediate supervisor at FastCom. She will testify that Martin had a position in the accounts department. Martin's job responsibilities included reviewing applications for new accounts and ensuring the new customers had provided complete information in their applications, including name and Social Security numbers.

Timmons will testify to the procedures through which FastCom receives, reviews, and stores records of application. She will testify that Martin had access to FastCom records that included the name of Bernecia Martinez, who had the same Social Security number listed above.

Finally, Timmons can testify that she personally reviewed Martin's employment record with FastCom and that Martin listed her Social Security number as 989-21-0994, which contained only two digits that were different from Ms. Martinez's number.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

STATE v. MARTIN

Transcript of Pretrial Hearing

July 29, 2019

COURT: All right, that is all for the witness lists. Mr. Solmark, what's next on the case?

SOLMARK: Your honor, the State provides pretrial notice of its intention to offer similar acts evidence.

COURT: Any objection from the defense, Ms. Dacosta?

DACOSTA: There will be, yes, your honor.

COURT: All right. I'll hear from Mr. Solmark first.

SOLMARK: Your honor, I am referring to three separate incidents. First, we have a good faith belief that, three months ago, a police officer stopped Ms. Martin for a broken tail light. Ms. Martin gave the officer a different name and driver's license than her own, which the officer discovered when he ran the car's registration. It turned out that Ms. Martin's own license had expired. He later learned that the name and license belonged to Ms. Martin's sister, Beverly Martin.

COURT: Has she been charged or convicted of any crimes arising out of the traffic stop?

SOLMARK: No, your honor.

Second, we have a good faith belief that another officer stopped Ms. Martin on the sidewalk outside the Blue Moon Bar about two months ago. Ms. Martin was visibly intoxicated, barely able to stand, with a strong smell of alcohol on her breath. She started to shout at the officer, but after a warning, she walked away and hailed a cab.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Third, your honor, we have information involving Bernecia Martinez, the individual in whose name Ms. Martin tried to open several store accounts. Two weeks ago, Ms. Martinez received a call on her cell phone from a woman who identified herself as Bernice. The caller threatened Ms. Martinez by saying that, if she testified at the trial in this case, she would regret it. She will also testify that the caller said that it would be better if Ms. Martinez would testify that she gave "Bernice" permission to open those accounts. After the call ended, Ms. Martinez wrote down the phone number. We later identified it as belonging to Ms. Martin's FastCom phone account.

COURT: Ms. Dacosta, your objection?

DACOSTA: Your honor, we contend that this entire case is the result of a computer error at the two stores. The stores mixed up the names and social security numbers of Ms. Martinez and Ms. Martin. My client was trying to open accounts in her own name and had entirely innocent intentions.

We object to this evidence. None of those incidents qualify under Rule 404(b). The State just wants to show Ms. Martin up as a bad actor who should be punished for other reasons. It's propensity evidence, pure and simple.

COURT: Mr. Solmark?

SOLMARK: Your honor, all three incidents raise inferences under Rule 404(b)(2). In addition, the defendant will likely take the stand. If she does, we will use these incidents to impeach her.

DACOSTA: Your honor, not one of these incidents goes to truthfulness. First, the traffic stop was just a mistake. Second, being drunk doesn't make you a liar. And finally, that conversation with Ms. Martinez isn't about truthfulness. It's about the prosecution's effort to paint my client as a

READING POINTERS

1 Connect the purpose to the actual defense

Use deliberate identity substitution to rebut mistake. A general showing that Martin behaves badly is not a proper substantive purpose.

violent person. Rule 608(b) requires that the specific conduct go to truthfulness. These do not.

SOLMARK: Your honor, may I respond?

COURT: No. I'm not ruling today. We will set a briefing schedule later. Anything else on this case?

SOLMARK: No. Thank you, your honor.

DACOSTA: Nor from me, your honor.

READING POINTERS

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July 2019

California Bar Examination

Performance Test

LIBRARY

READING POINTERS

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STATE v. MARTIN

LIBRARY

State v. Landreau

Columbia Supreme Court (2011) .....

State v. Proctor

Columbia Supreme Court (2008) .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

State v. Landreau

Supreme Court of Columbia (2011)

Marianne Landreau (Landreau) was convicted of passing a series of bad checks in amounts that totaled over $10,000. On appeal, she claims that the trial court abused its discretion in admitting evidence of certain specific acts under *Columbia Rule of Evidence (CRE)* 404(b). We affirm.

In its case in chief, the prosecution proved that Landreau attempted to open checking accounts with four different banks over a two-week period. In each case, she opened the accounts with checks payable to her and signed by Charles Hickson. Hickson and Landreau had lived together for several months before Landreau attempted to open the bank accounts. About a month before the first attempt, Hickson lost his job as a dishwasher at a restaurant, a fact that Landreau knew. After the fourth attempt was reported to the police, the police arrested Landreau and Hickson.

In his opening statement, Landreau's counsel claimed that his client did not know how much money Hickson had in his checking account and that her opening of the account resulted from an innocent mistake. He argued that, as a result, she lacked the "intent to defraud or deceive" that forms an element of the charged crime.

In response, before opening its case in chief, the prosecution notified the court of its intention to offer evidence of two specific actions of Landreau's. First, it proffered evidence that, two years before the events in this case, during an application to a bank for a mortgage loan, Landreau had provided the bank with a false name, a fabricated Social Security number, and a made-up date of birth. The bank eventually learned Landreau's actual identity during the credit check and denied the loan.

Second, the prosecution proffered evidence that, one year before the events in this case, Landreau had been arrested for physically assaulting another patron of a bar after a heated fight. The other patron chose not to file charges. The prosecution proposed to call both that patron and the arresting officer as witnesses.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Landreau objected to the use of both incidents, arguing that they constituted specific instances of conduct offered "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" under CRE 404(b). The trial court overruled the objection and permitted the prosecution to introduce evidence of the incidents.

We first address the application for a mortgage. CRE 404(b)(1) prohibits the admission of prior bad acts to establish an individual's character or propensity to commit a crime. Rule 404(b)(2) does permit, however, the admission of prior bad acts "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In determining the admissibility of evidence under Rule 404(b), our trial courts must determine whether the evidence has relevance for some purpose other than as proof of propensity. The list of purposes listed in Rule 404(b)(2) provides a

1 starting point for this analysis, but the list is not exhaustive. To determine whether proffered evidence has relevance for one of the other purpose, the court considers 1) the degree of similarity to the charged crime and 2) the temporal relationship of the other acts.

In this case, the trial court admitted the evidence of the mortgage application because it showed "opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident." We believe, more precisely, that the mortgage application is relevant to show intent or absence of mistake because the evidence rebuts an innocent involvement defense.

Specific acts can be the basis for inferring that the defendant had a mental state that is inconsistent with innocence. Our prior cases have often established that similar acts may be admitted to rebut a claim of innocent involvement. *See, State v. Rodgers* (affirming the admission of evidence of prior importation of drugs to rebut the defendant's claim that he was an innocent participant in the charged importation); *State v. Vargas* (no abuse of discretion in admitting evidence of prior fraudulent transactions to rebut the claim that defendant had been duped into joining the charged transactions.)

In this case, Landreau claims that she did not know that Hickson's checks would bounce and that she had no intention to defraud the bank. However, her false statements on the mortgage application indicate an instance of deception to obtain a financial advantage for herself.

READING POINTERS

1 A purpose must explain a real inference

Analyze similarity and timing for the proposed similar acts. For the witness call, distinguish a narrow similarity theory from a case-specific concealment argument.

The prior mortgage application is also sufficiently similar to be relevant. The other bad act need not be identical to the crime charged so long as it is sufficiently similar to permit a reasonable inference of knowledge or intent. Landreau contends that the two incidents are not similar because a mortgage application is different from opening a bank account. But we find this incident probative of her willingness to deceive so as to secure money from a financial institution.

The prior acts are also sufficiently close in time to the charges in this case to satisfy our prior decisions. We find no abuse of discretion in the admission of this evidence.

We do, however, agree with Landreau that the incident of the altercation in the bar does not satisfy the requirements of Rule 404(b). Acts of violence or of intoxication are not sufficiently similar to the crime of passing bad checks to permit any inference of knowledge or intent. In light of the other evidence against Landreau, however, we find that the evidence of the altercation did not have an impact on the verdict. Admission of this evidence thus constituted harmless error.

Affirmed.

READING POINTERS

1 Recency cannot cure irrelevance

The bar incident lacks a connection to deceptive account applications and resembles the unrelated conduct Landreau rejected.

State v. Proctor

Supreme Court of Columbia (2008)

Petitioner, Joseph Proctor (Proctor), is charged with aggravated battery of a 13-year old child. At trial, the prosecution's chief witness was the child victim. Proctor contended that T.L.'s allegations were fabricated and was prepared to offer videotapes and call witnesses to support his theory of the case.

After the child testified, defense counsel cross-examined her. The following exchange occurred:

Q: Now, you have promised the Judge to tell the truth to this jury, haven't you?

A: Yes.

Q: And in order to tell the truth to the jury, that requires you to be honest, correct?

A: Yes.

Q: Okay. But you're not always honest, are you?

A: What do you mean?

Q: Well, last July, you and Josh stole $100 from your mother's store in Danville, didn't you?

A: No.

At this point, the prosecutor objected on the grounds that evidence of specific acts was inadmissible under *Columbia Rule of Evidence (CRE)* 404(b). Defense counsel responded by asserting Rule 608(b) as grounds to allow the question as impeachment of the witness.

The trial court agreed with the prosecution that the evidence of shoplifting was inadmissible under Rule 404(b)(1). As to use of the evidence under Rule 608(b), the trial court ruled that defense counsel could only impeach the witness with the shoplifting incident, for which there was no conviction, if counsel established that the witness "was untruthful about the issue when questioned by someone on that topic." The trial court thus sustained the objection and instructed the jury that it should disregard the question.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

On appeal, the defendant argues that questioning the child witness about the shoplifting incident constituted a permissible form of impeachment under Rule 608(b). This argument requires us to consider for the first time whether an act of shoplifting is proper impeachment evidence under this rule.

If a witness takes the stand and testifies, she puts her credibility in issue. Thus, the opposing party is entitled to impeach the witness's credibility. Under Rule 608(b), a witness may be asked about specific instances of conduct that are probative of a witness's character for truthfulness or untruthfulness. The rule does not explain how to determine if an act is probative of truthfulness.

Our prior decisions have held a wide variety of conduct to be probative of the witness's truthfulness: providing false information to a police officer; intentionally failing to file tax returns; and misrepresenting financial information to obtain a loan. In contrast, our courts have prohibited questioning about some acts because they are not probative of truthfulness: acts of violence; instances of drug use; driving under the influence of drugs; and bigamy.

This court has never considered whether an act of shoplifting is probative of truthfulness or untruthfulness under Rule 608(b). A thorough review of state and federal case law indicates that the law is not well-settled. A majority of federal courts and some state courts have held that acts of theft are not probative of truthfulness or do not involve dishonesty. In contrast, a number of courts have concluded that theft is probative of truthfulness or dishonesty.

These cases can be grouped into three categories, based on their view of the definition of truthfulness or dishonesty: broad, middle, and narrow. The broad approach would allow testimony about instances of weak or bad character as probative of veracity. This approach improperly subjects a witness to questioning about almost any event in her past. Almost no modern decisions adopt this view.

In contrast, the narrow approach requires the act to have an affirmative element of false statement or deception, limiting the inquiry to acts such as perjury, false statement, criminal fraud, embezzlement, or false pretense. A majority of federal courts take this view. We decline to follow these courts, however, because their holdings create an unduly narrow category of acts that reflect on one's character for truthfulness.

We are most persuaded by the middle approach, which incorporates the narrow view but would also permit questioning about conduct that indicates a

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willingness to gain a personal advantage by dishonest means, including by taking from others in violation of their rights or by encouraging dishonest behavior in others. For example, in *State v. Voorhees*, the Columbia Court of Appeals held that persuading a witness to lie on the stand, that is, suborning perjury, constituted a proper focus of questioning on cross-examination under Rule 608(b).

Common experience suggests that a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way. Such behavior reflects on one's truthfulness because a person who stole from another may be more inclined to obtain an advantage for herself by giving false testimony. Therefore, we hold that shoplifting is a specific instance of conduct that is probative of truthfulness pursuant to Rule 608(b).

Because the trial court incorrectly interpreted Rule 608(b), we hold that the trial court abused its discretion in finding defense counsel's question improper.

Reversed.

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1 Apply Columbia's supplied middle rule

The request for false permission testimony bears on credibility even though a threat alone might suggest only violence. Do not replace Proctor with a narrower outside rule.