Turner
EVIDENCE
Fall 1996

PROBLEM ONE

Did you ever wonder what some enterprising crooks might do with those credit cards that banks send you through the mail, if they could get their hands on them? The defendants in this problem had a good scheme about what they wanted to do.

Madeleine L'Engle, Thomas Hardy and Allen Drury are charged with "wire fraud" and money laundering. Wire fraud is the intentional use of electronic means, like telephones or other electronic communications, to defraud victims. In this case, the defendants allegedly set up phony companies and then used the companies to process hundreds of fraudulent charges on stolen credit cards.

The typical scenario was that a thief, who had stolen a credit card, came to one of the defendants' phony businesses. He would ostensibly purchase some product or service and pay with the stolen credit card. Of course, no goods or services were exchanged. The defendants would put through the charge (electronically) to the bank which had issued the credit card and that bank would credit the defendants' company's business account. The defendants would withdraw the transferred sum in cash and give one third of the money to the person who had presented the stolen credit card. After a month or so, the phony company would be go out of business and a new one would be established in another location and the laundering operation would continue.

Part of the evidence introduced at trial were the records from five banks showing the payment of over $500,000 on 270 credit cards to businesses operated by the

defendants. In addition to recording the payments to the defendants' companies and the charges against the allegedly stolen credit cards, the records included customer affidavits from the cardholders stating that their credit cards had been lost, stolen, or not received, and that their account bills contained unauthorized charges. The printout of the banks' records also contained reports of phone calls made by cardholders to bank personnel in which the cardholders informed the bank their credit cards were lost, stolen, or had never been received. The banks' records indicated the missing credit cards were used in transactions with the defendants' businesses. The records were authenticated by a senior vice president from each bank. They each testified the records were generated, maintained and kept in the ordinary course of business.

Counsel for the defendants objected to the introduction of the records, but was overruled. The defendants were convicted and are appealing. The grounds urged on appeal are that the records were inadmissible hearsay and that their introduction violated the Confrontation Clause of the Constitution. (I know this is unusual for me to tell you up front what is the basis for the objection, but it may have something to do with my having been recently visited by the ghost of Christmas past.)

How should the Court of Appeals rule? Explain.

PROBLEM TWO

George Lester died on August 22, 1992, from a respiratory failure. He was 40 years old. His widow, Mary, brought a claim against the Matrix Mining Co. in the West Virginia Superior Court on her own behalf, and on behalf of their three minor children. Mary claimed that they were

entitled to George's full pension because he had died of pneumoconiosis or "black lung" disease. Under state law, a miner's family was entitled to the pension if it could be established by a preponderance of the evidence that the miner had died as a result of contracting black lung disease. There is also a state statute which states: "If a deceased miner was employed for ten years or more in one or more coal mines and died of a respiratory disease, there shall be a rebuttable presumption that his death was due to pneumoconiosis." The legislature did not indicate how West Virginia courts were to apply the presumption. The West Virginia Supreme Court, however, had previously rejected the "Morgan" approach, i.e shifting the burden of persuasion for dealing with presumptions.

Mary's case-in-chief consisted of her testimony that George had been employed by Matrix since 1984, and that he periodically worked in Sam Cook's small private mine for five years prior to being hired by Matrix. Since George was given a cash payment at the end of each working day when working at the Cook mine, there are no records available which indicate how many days George worked in the Cook mine. Mary testified that he worked about 100 days each of the five years he was employed by Cook. Matrix's counsel stipulated that George had worked eight years with Matrix.

At the close of Mary's case-in-chief, Matrix moved for a directed verdict. How should the court rule. Explain.

Just for fun, assume Matrix's motion was denied.

Matrix's case-in-chief consisted primarily of the testimony of several witnesses who said that from 1980 to 1984, George worked at various odd jobs around the town, but was known for peddling the best moonshine in the state. These same witnesses testified that George was a three pack a day smoker. They never saw him without a cigarette in his

mouth.

At the close of all the evidence, Matrix renewed its motion for a directed verdict. How should the court rule? Explain.

Just for more fun, assume this motion was denied, and the case was submitted to the jury. What if any instruction should the judge give to the jury? Explain.

PROBLEM THREE

Jack Cox has brought a claim against the Louisville Police Department and officers Treadway and Burgan for assault and battery. The claim arose out of an incident on June 15, 1995, approximately 8:00p.m., in which the police, with the help of a police informer, John Sprigg, tried to set up an undercover buy of marijuana from Cox. The "buy" failed when Cox, who smelled a rat, took off running for the nearby woods. The officers pursued Cox and the group of them tumbled down a ravine. Cox claims he had ceased to resist and that the officers kicked him several times in the head and hit him with the butt of a gun. The police maintain Cox was not kicked or hit with a gun but that he was only pinned to the ground and hand-cuffed.

Sprigg was called to testify for the plaintiff, Cox. Sprigg testified he had observed the officers kick the plaintiff and strike him with a gun. On cross-examination by defense counsel, Sprigg was asked about his unhappiness with the Louisville Police Department because the department had not been paying him enough to act as an informer for the three years he worked with them. Sprigg had told the Department in December 1995, he would no longer act as an informer. Defense counsel also asked about Sprigg's anger with the police for the arrest of his good friend, Jeff Elder, for domestic violence in January 1996. Finally,

defense counsel asked Sprigg about wanting to get back at Officer Treadway because Sprigg thought Treadway had stolen Sprigg's sunglasses on the night of June 15, 1995.

During the rebuttal phase of the trial, plaintiff calls Alma Spencer to the stand. Alma is the girlfriend of Sprigg and the sister of Jack Cox. She will testify that at about midnight on June 15, 1995, Sprigg came to her apartment and he was angry. He said that "The police had beat the hell out of Jack. They kicked him and hit him with a gun butt." Jack did not tell Alma at that time that he had been the one to set up the buy.

Defense counsel objects to Alma's testimony. How should the judge rule?

Explain.

PROBLEM FOUR

Patrick Tracy is charged with robbery of a supermarket. He has pled "not guilty" by reason of insanity. At trial the defense included testimony from an expert that Tracy was suffering from Post-Traumatic Stress Disorder brought on by his experience in Vietnam during the war.

Prior to Tracy taking the stand during the defense case-in-chief, the defense entered a stipulation with the prosecution, which was announced to the jury, that prior to the date of the robbery, May 18, 1996, Tracy had been convicted of three felony offenses.

Tracy testified that ever since the war he could not hold a steady job. He suffered from nightmares and hallucinations. On the day of the robbery he said he had been contemplating suicide during a walk, and when he saw a man in front of the supermarket selling poppies to celebrate

the end of the Persian Gulf War, he felt horrible. Then the thought came to him to "rob something," distribute the money to the families of friends who were killed in Vietnam and then kill himself in front of the Vietnam War Memorial in Washington D.C. As to what he was thinking when he robbed the store, he said:

> "With everything that had been caving in on me, thoughts about Vietnam this, that, and the other thing, all the things to do with it, friends of mine and stuff like that, my feelings towards it and stuff like that, I thought is was the right thing to do."

During the prosecution's cross-examination of Tracy, the prosecutor wants to elicit the following information about the felony convictions:

1. On September 24, 1989, Tracy was convicted of having a false prescription filled at a pharmacy;

2. On December 18, 1991, Tracy was convicted of armed assault with intent to rob;

3. On December 11, 1992, Tracy was convicted of buying and receiving a stolen firearm.

Defense counsel moves to prohibit the prosecutor from asking Tracy about the above incidents. If you were the judge, how would you rule? Explain.

PROBLEM FIVE

Trong Li is charged with kidnapping Von Tru under the U.

S. Kidnapping Statute. The Statute reads in part as follows: "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for any reason any person, when:

> 1. the person is willfully transported in interstate or foreign commerce;
>
> ...
>
> shall be punished by imprisonment for any term of years or for life."

With respect to this statute, the U.S. Supreme Court has held that the kidnapper's motivation is not an element of the offense.

Von Tru testified at trial that she and Trong were naturalized citizens from Laos and that according to Laotian custom a marriage is arranged between the man and the woman's parents. It is required that the man pay the woman's parents a sum of money. Von said her parents had agreed on the sum of $7,000, for her marriage to Trong. Trong had paid her parents $2,000 as a kind of down-payment. Von, however, refused to marry Trong. She was already romantically involved with Nala Chanta.

Von then told the story of how on March 6, 1996, Trong came to Chanta's house while Von was visiting there and forced her, by use of a gun, to leave Chanta's house and get in his car. Trong drove the car south from Detroit. Von said she pleaded with Trong to return her to her home. Trong told Von it was Von's family who had encouraged him to take her away for awhile so she would forget about her boyfriend. Trong also told Von it was Von's sister who had loaned him the gun.

Von further testified that Trong drove to a cousin's house in Scranton, Pennsylvania. She said she repeatedly asked to be returned home, but she also admitted she did not tell anyone along the way she was being held against her will. She believed Trong would eventually return her to Detroit once he realized she was not going to change her mind.

At this point in the trial a recess was called and defense counsel moved to limit Von's testimony as to what happened at the house in Scranton. The prosecutor told the judge that Von would testify that once in Scranton Trong became much more sexually aggressive towards her and on the evening of March 8, 1996, he raped her. Von would give a detailed description of that rape and describe how she later was able to sneak out of the house and telephone the police from a neighbor's house.

Defense counsel responded by pointing out that the defendant was not charged with rape, and could not be charged with rape under Federal law because there is no Federal statute prohibiting rape.

If you were the judge, how would you rule on the motion? Explain thoroughly your rationale for your decision because the Court of Appeals is looking over your shoulder.

ANSWERS

QUESTION ONE:

This question presents two issues, each with two areas of inquiry. First, should the records indicating payments to defendants' companies and the ones indicating the missing credit cards were used have been admitted? Second, should the customer affidavits and the reports of phone calls have

been admitted? The areas of inquiry are hearsay and confrontation rights. The Court of Appeals should rule the payment and transactions records were properly admitted, but the affidavits and reports of phone calls were not.

As a whole, the banks' business records constitute hearsay, but fall within Rule 803 Business Records exception. The records are out-of-court statements, by out-of-court declarants, intended to assert information and facts, and offered by the prosecution to prove the facts asserted. 803 allows an exception for Business Records to be admitted, though they are hearsay. After being authenticated as required by Rule 901, the records must be shown to have been (1) made in the regular course of the business, (2) a type of record made in a routine practice of record-keeping by the business, (3) original source of the information must have personal knowledge of the information, (4) was reduced to written form, and (5) the persons creating the record had a business duty to do so. The regularity , routine, and business duty are the indicia of reliability of the hearsay records because they reflect the likelihood the records are sincere and accurate. They must also have been made contemporaneous to the business' activity, and the record process must be explained.

Overall, the business records were authenticated by the banks' officers. (It is unclear from the record whether the complete foundation was laid for the exception, as broken down above. The Court will assume that this was properly done.)

The true inquiry begins now because hearsay exists within hearsay for these records. This raises the first issue regarding whether the records indicating payment from the banks to the businesses and the records indicating the credit cards used in the transactions are admissible hearsay.

Both items are out-of-court statements , entered into the computer that generates the records by out-of-court declarants, and offered for the truth of the factual matters they assert. However, these items may qualify for admission under the business record exception. The authentication of them is covered by the banks' officers' testimony. They are routine records of bank personnel who have a duty to report them accurately. They are statements by bank personnel about events and facts of business activity of which they have personal knowledge. Assuming procedures were described for the records' making, these fall within the business record exception, regardless of availability of the declarants.

Hearsay matters that fall within well-settled exceptions are presumed not to violate a defendant's confrontation rights. Inadi; CA v. Green. Under the Sixth Amendment, a crime defendant is guaranteed the right to be present when witnesses testify against him and the right to an opportunity to question these witnesses. This is to guarantee the defendant a chance to examine through confrontation the evidence against him. Given the presumption, these parts of the records do NOT violate the defendants' confrontation rights. Since they fall within the well-established business record exception, these particular items are guaranteed by their sincerity and likely accuracy due to routine business practice. Cross-examination of these out-of-court statements against the defendants is not necessary to guarantee their reliability as evidence (which is the purpose of cross-exam) . Thus, the records indicating the bank payments and credit card transactions are hearsay exceptions and do NOT violate the defendant's confrontation rights. They were properly admitted.

The second issue is whether the records of the customers' affidavits and reports of phone calls from cardholders were properly admitted. This is another hearsay within hearsay issue (these items within the business

records as a whole). The customer affidavits are hearsay because they were made out of court, by out of court declarants, asserting information, and they are offered to prove that information. The phone call reports are likewise hearsay. Neither fall within the business record exception, though they are contained within business records . First, the bank personnel had no personal knowledge of what the affidavits or phone calls asserted. Second, no business duty exists on the customers to be accurate and sincere in what they reported to the banks. There exists no indicia of reliability to outweigh the risks of insincerity and misperception.

Further, the bank personnel cannot authenticate the affidavits or the phone calls. They have no basis for familiarity (most likely) for the customers' handwriting and voices.

Because they meet no exception, the affidavits and phone reports are inadmissible hearsay. Because they do not fall within a well-established exception, they can be said to violate the defendants confrontation rights too. The defendants are not given the opportunity to cross-examine the customers' out-of-court statements that the credit cards were stolen and used for unauthorized transactions. This is a critical issue in the case because of the wire fraud charges especially.

Thus, the affidavits and reports of phone calls are inadmissible hearsay and should have been excluded.

Whether the Court of Appeals will reverse depends upon whether reversible or harmless error occurred. Reversible error affects the substantial rights of a party such that the outcome was likely affected. Other evidence may have shown the cards were stolen, used without permission and no time exchange took place. If so, the outcome would have

still been convictions. If the only evidence were the records of payment and transactions, this would not prove each element of wire fraud and money laundering beyond reasonable doubt, and the court should reverse and remand.

PROBLEM TWO:

(1) The court should deny Matrix' s first motion for a directed verdict because it has not presented sufficient counterproof to rebut the presumption. A presumption is not evidence; it is a way of dealing with or looking at evidence, to help a proponent carry a heavy burden of proof in some instances. Often, like here, they are in place for policy reasons. Because this is a rebuttable presumption, it is intended to shift the burden of production onto the opponent; once the proponent offers evidence of preliminary facts, the opponent is allowed to offer counterproof of the preliminary and presumed facts to prevent the presumption from working against it.

In this case, the plaintiff put on evidence by virtue of the stipulated fact of 8 years and Mary's testimony that George worked in at least two coal mines for somewhere around 10 years. It is reasonable to take the 100 days per year for 5 years at Cook's mine as totalling 2 years, since the statute does not require daily work to constitute a year, nor define how to calculate the years. Mary established that George died of respiratory failure, the presumption's other preliminary fact assuming "failure" counts as "disease" as used in statute. These two preliminary facts give rise to the presumption.

Matrix offered no direct counterproof to the 10 years requirement, but relies on the lack of employment record verification and Mary's testimony of only 100 days/year as counterproof. This is not strong counterproof to the preliminary fact. It may be common for Cook's mine to pay

cash and common for mineworkers to only work 100 days per year (for health reasons!) Moreover, Matrix has offered no counterproof to the other preliminary fact of respiratory failure, nor any to the presumed fact of black lung disease. Therefore, it has not rebutted the presumption. The motion for directed verdict should be denied.

(2) Now Matrix has offered much stronger counterproof on the preliminary fact of George's working at coal mines for 10 years. If he worked odd jobs and peddled moonshine it is reasonable to believe (the jury to) that he did not work at Cook's mine. Then the 10 year requirement has not been sufficiently demonstrated to trigger the presumption.

Additionally, the evidence of George's smoking is counterproof regarding the presumed fact of black lung disease. Though relevant, because it suggests another cause for respiratory failure besides black lung, the sole fact George smoked is weak counterproof. Matrix did not introduce evidence of other disease, such as lung cancer or emphysema. Some people, like George Burns, smoke and never contract lung disease.

Thus, the counterproof still has not fully rebutted each of the preliminary facts and presumed fact. Matrix's motion for directed verdict should again be denied. An additional reason warrants the denial. The presumption is not the method of proof the wife must use to prove her case. It is one way for the evidence to be examined. The jury should be allowed to weigh and determine which proof is stronger here.

(3) Submitting the case to the jury requires an instruction regarding the presumption, even if the court follows the Thayer approach. Under it, the presumption disappears when counterproof is offered to the presumed fact. Since the defendant offered no true counterproof on the presumed fact though, the presumption has not

disappeared; and the strength of the inference need not be examined as the Thayer approach requires.

The judge may instruct the jury as to the presumption in one of two ways:

a. As a presumption: Under WVA state law, if you based on prepond of evidence both: 1) find George worked at one or more coal mines for 10 or more years AND 2) find George died of a respiratory disease, you, the jury, may presume he died as a result of black lung disease.

OR

b. As an inference: same as above but change "presume" to "infer"

Since the presumption is a state statute, the court should instruct the jury as (a) above, as a presumption. The statute's existence reflects the legislature's belief that this should be actively used in these statutory claims.

PROBLEM THREE:

The defense counsel objects to Alma's testimony because it is hearsay. The issue for the court is whether this falls into the exemption for prior consistent statements or the excited utterance exception to be admitted.

Alma's testimony about Sprigg's statement to her is hearsay: Sprigg made it out of court, was an out-of-court declarant, and asserted the information that the police had kicked and hit Cox. This is offered by the prosecution to show the truth of the matter, defense will argue.

At this point, the plaintiff may argue it is not offered for its substantive truth, but to rebut the charge of bias

the defense has created. However, since the statement directly concerns the issue in dispute (whether the officers assaulted Cox), the use of the statement as pure rehabilitation evidence is impossible. The plaintiff wants the jury to infer Sprigg is not only telling the truth which would be the rehabilitation purpose, but that the truth is Cox was assaulted. Thus, it is offered for the truth of the matter asserted, making it hearsay.

As mentioned, defense has attempted to impeach Sprigg's credibility by bias . It has suggested that Sprigg' s has an improper motive, due to his personal feelings of anger and resentment against the police, to testify in favor in Cox. In response, a proponent of the witness may offer prior consistent statements to rebut the charge of improper motive. If a witness is testifying, subject to cross-examination, she may testify regarding prior consistent statements that rebut improper motive, influence, or recent fabrication. These statements are exempted from the definition of hearsay.

Here, Alma would testify and be subject to cross, fulfilling the first requirement. To be a relevant prior consistent statement, it must be one made prior to the alleged motive. If it is made after the motive, it is self-serving for the declarant who is operating out of motive and not sincerity, and therefore has little probative value.

The statement was made by Sprigg to Alma on the night of the alleged assault. This was before Sprigg told the police he no longer wanted to be an informant and before his friend Elder was arrested. It is consistent with what Sprigg asserts at trial. Yet, it was made on the same night Sprigg believed his sunglasses were stolen by Treadway.

The court must then decide if this is the alleged motive and when it occurred for Sprigg. If he made his statement

before he believed the sunglasses were stolen by Treadway, it is a relevant consistent statement. Defense will argue he made the statement after deciding Treadway took his glasses, making it weakly probative.

The court may well wonder if this is a strong implication that Sprigg is a liar, which is required to use prior consistent statements for rehabilitation. It seems the cumulative weight of defense's accusations of improper motives and bias indicate he is being called a liar. In that case, the statement would fit the 801(b) exemption.

Even if it does not come in as a prior consistent statement, the statement may fit excited utterance exception. For this, several items are required: 1) a startling event occurs , 2) declarant perceives it, 3) declarant is upset by the event (shown by circumstances, demeanor) 4) the declarant describes or comments on the event 5) shortly after it happens. The plaintiff may try to argue that Spriggs statement to Alma fits this exception. Police kicking and hitting a suspect is startling, despite any number of videos we see about it. It was especially startling for Sprigg who seemed to expect this set-up to go smoothly since he agreed to be a part of it. Being the boyfriend of Cox's sister had to make it more startling for Sprigg, because he likely knew Cox. Setting Cox up is one thing Sprigg intended, but not seeing Cox physically assaulted. Second, Sprigg was still upset when he made the statement. The shock of such a startling event would be enough to sustain Sprigg's emotional reaction for 4 hours. He probably spent the intervening hours at the station with the alleged offenders, being constantly reminded of the whole mess.

Third, Sprigg's anger was apparent to Alma by his language and appearance probably. He described what happened to upset him. Leaving out that he was setting up Cox was

probably out of shock and fear of Alma's reaction too. Defense will argue this shows he had time to calm down and think about what to tell Alma though. This is the weak link for plaintiff's to argue the excited utterance exception. If Sprigg had less time between the incident and telling Alma, his statement could be considered excited. However the excited utterance depends on immediacy, shock, and stress for its reliability of being sincere. Sprigg had too much time to calm down, alleviate stress and sort out what to tell Alma, defense will argue.

This is persuasive. Had Sprigg still been in shock, he'd have perhaps told Alma he was there as informant and felt bad it went awry. Four hours is too long, given even the shock of seeing the police assault, for Sprigg's statement to be sincere as an excited utterance. He obviously thought clearly enough to leave out his involvement. Thus, this should not be admitted as an excited utterance.

Overall then, the court should allow the statement as a consistent statement under the hearsay exemption for such, to rebut the charge of improper motives.

QUESTION FOUR:

The first issue deals with Tracy's plea of "insanity." Character evidence is not allowed to be used to show that the defendant acted in conformity with that character on a particular occasion. However, if character is a claim, crime or defense there, character evidence is allowed. Tracy is claiming insanity as a defense, thus putting his character into issue. In this capacity, character evidence may be shown by opinion or reputation and by extrinsic evidence of specific instances of conduct. However, the 403 balancing test is still used to determine if the prejudicial effects of each piece of evidence outweighs the probative value.

Tracy testified about his condition, thus making character evidence to refute his "insanity" probative.

The second issue deals with the stipulation announced to the jury concerning the three felonies. The defense, prosecutor and judge agreed that it would be a lot less burdensome to stipulate to the three felony offenses rather than enter witnesses and evidence pertaining to them. It is important to note that the stipulation took effect before Tracy took the stand.

The third issue deals with what the Prosecutor wants to enter the felonies for. It seems that the information (available through a public record or from Tracy to avoid a hearsay problem) may be used for two reasons, even with the stipulation.

One may be to impeach him (609). All three crimes are less than ten years old, as all that must be done is to have the Prosecutor show that the probative value outweighs the prejudicial effects.

The false prescription felony may go to impeach Tracy because of its untruthfulness. This evidence can be used to show that Tracy has lied before he may lie again. Because this involves honesty, no balancing test is done. This would probably be allowed in.

The second felony (armed assault with intent to rob) may be allowed only if the probative value outweighs the waste of time, undue delay and other prejudicial effects. Here, under impeachment, this would not be beneficial because the parties already stipulated that he committed a felony, therefore it would be prejudicial. The probative value is low for impeachment because it does not go to honesty. Under this theory this would not get in.

The third felony of buying and receiving a stolen firearm can be made into an honesty question. Buying and receiving stolen property convictions usually involve knowing it was stolen. However, it could also be argued that this is more like theft. Under this approach, the probative value of stealing for impeachment is very low and once again could be classified as a waste of time because the party's have stipulated to the felonies. Therefore, unless significant proof was advanced that this crime involved honesty it would not get in.

The second manner which to get these convictions in may be to show that they relate to characteristics that Tracy testified to. Under the prior crimes theory, character evidence may be used to show motive, identity, absence of mistake, intent, common plan or scheme, opportunity and preparation. Here, these felonies could go to show Tracy's story does not work.

The false prescription would not be admissible under this theory because it does not go to an element of the charged crime.

The second conviction of armed assault with intent to rob does go to this crime. Tracy testified that the "thought" just came to him. However, this felony can be used to show intent and knowledge about what he was doing. Further, it is strong evidence to show that he knew what he was doing was wrong, thus absence of mistake. Tracy had been convicted of a similar crime only five years ago. This directly conflicts that he thought it was "the right thing to do". Therefore, in this capacity if relevance could be shown (probative value not outweighed by prejudicial effects) this tends to support an element that Tracy had the criminal intent to do this crime and knew how to do it (opportunity and preparation) This evidence would be admissible in this capacity.

If robbery involves the use of a firearm or other such weapon, the third felony should be admitted as to show opportunity (knew how to get firearm) and preparation (inquire about why he would need firearm) This is less likely to survive the 403 balancing test unless Tracy used a stolen gun in this robbery. It is probative to show opportunity, but the prejudicial effects may outweigh the probative aspects. The parties stipulated to the felonies so it might confuse the jury and be a waste of time.

If the Court feels as though his PTS disorder took place after these crimes, it may not let them in.

PROBLEM FIVE:

The issue is whether the prosecution may use the evidence of this uncharged crime, prior bad act of the accused. This involves a two-step analysis: First, whether this is being offered as impermissible character evidence; Second, whether its probative value substantially outweighs its prejudicial effects under Rule 403.

In general prior bad acts are not admissible because they are used as character evidence for the fact-finder to infer the person acted in conformity therewith. Only when a witness is being attacked on cross re: his own credibility or when a witness has testified as to another witness' truthfulness may specific instances of prior bad acts be admissible. Further, if character is not an issue, then evidence about an accused's character may not be offered unless the prior bad acts relate somehow to an element, charge, or defense.

Trong is charged with unlawfully kidnapping and willfully transporting Von. Implicit in this is the charge it was done against her will. His defense seems to be she consented, evidencing by eliciting testimony Von did not

tell anyone she was being held against her will. Trong's general character is not in issue. It is not an element of the crime nor has he placed it into issue. To offer the prior bad act of the rape, the prosecution must link it to something else. It is not an element of the crime.

It does relate to Von being held against her will, but not directly. It does not make it more likely necessarily that she was first kidnapped because she was later raped. However, Von' s credibility has been attacked. Defense had her admit she did not tell anyone in Scranton of her plight.

Yet prior bad acts may only be admitted if they show circumstances of the crime. Though this explains why Von was quiet, it does not make the unlawful or willful part any more likely, nor affect his defense directly.

Moreover, this prior bad act is highly prejudicial. Though not charged, rape is a crime. It would unduly prejudice the jury against Trong because they would assume the rape meant he was a criminal and must have kidnapped her. It would also divert the trial to proving whether it was a rape, a collateral issue wasting the court's time, as well as presenting impermissible character evidence.

Von could be allowed to rehabilitate her credibility by saying she was afraid of Trong, and thus kept quiet. The defendant's motion to limit the testimony and exclude the rape should be granted. She should be allowed to testify about sneaking out and phoning police, though, because it does not relate to the prior bad act.