

Please assume the Federal Rules of Evidence:

On February 15, 2011 Harbor Patrol Officer Samuels observed a scuba diver's bubbles emerging from the depths of Federal Harbor. Twenty minutes later, diver Draper emerged at the surface near the dock. Samuels asked why Draper was diving in the harbor. Draper said he worked for A & G Salvage and Repair, an industrial diving company, and he was directed to extract a 300-foot industrial copper cable from the harbor floor. Samuels informed Draper that he was not aware of such a contract with A & G. Samuels followed Draper to his truck where he found two fifty-foot coils of industrial copper cable in the truck's bed. In the cab of the truck was Draper's friend Johnson, whom Samuels knew owned a small commercial fishing boat that was routinely docked in the harbor. Samuels called the owner of A & G, who said his company had not instructed Draper to extract anything from the harbor and that Draper had been fired from A & G two weeks ago after the company discovered Draper had a felony record for domestic violence and a misdemeanor record for bicycle theft. Samuels asked Johnson where the cable came from and Johnson said, "This was a stupid idea." Samuels called police who arrested Johnson and Draper for Grand Theft.

Johnson pled guilty to being an accessory to grand theft. Draper exercised his right to a jury trial.

At trial, Draper testified that in August 2010 he had worked for A & G on a project where the company laid and connected a new underwater power cable that provided electricity to Federal Harbor. The old cable was left on the harbor floor, and after six months, he (Draper) presumed it was abandoned. Draper testified that the method of extraction involved cutting the cable into fifty-foot sections, hoisting the sections from the bottom with an industrial winch that was affixed to Johnson's commercial fishing boat.

On cross-examination Draper was asked if he had been convicted of a felony in 2009. Draper's lawyer objected and the objection was overruled. Draper answered that he had been convicted of felony domestic violence against his former spouse. Over objection, Draper was then asked if he had been convicted of stealing a bicycle from the UCSB campus in January 2008. Draper stated that his public defender forced him to plead guilty to petty theft, but that it was "a really crappy bike that nobody wanted" and it had been left to rust beside a dumpster on campus. Draper's lawyer made a motion to strike his client's testimony concerning the conduct which led to the conviction for the bicycle theft. The court overruled this objection.

Over objection, Samuel's testified that the owner of A & G told him that Draper had not been instructed to extract anything from the harbor. Also over objection, Samuels testified that Draper, upon hearing Johnson's comment about the "stupid idea," hung his head and shook it from side to side in disgust. Draper's lawyer objected and moved to strike Samuel's testimony in this regard.

Draper was convicted of grand theft and he appealed on evidentiary grounds.

1. Discuss Draper's motion to strike Samuel's testimony regarding the statement by A & G.
2. Discuss Samuel's testimony about Johnson's out of court declaration. Also, discuss Draper's response to Johnson's out of court statement.
3. Discuss the trial court's admission of Draper's conviction for domestic violence.
4. Discuss the trial court's ruling on the fact of Draper's conviction for the bicycle theft and the ruling on Draper's explanation for his conduct.

Answers:

1. A & G Statement re. “not directed to extract from harbor”: Hearsay, AG's statement offered to show that D was not directed to extract. Not a prior inconsistent statement b/c it was not made by Draper. (Arguably Testimonial Hearsay even though over phone -- coming from law enforcement in effort to elicit information concerning prosecution; counter argument is statement in course of investigation to verify D's statements, thus not testimonial.
2. Johnson's Statement:
  - a. Not Hearsay, offered to show state of mind/consciousness of guilty
    - i. “in disgust” lacks personal knowledge/speculative
  - b. Draper's response (silence) as adoptive admission
    - i. Ambiguity of meaning and/or context of remaining silent in criminal case.
3. Felony Conviction: generally admissible to impeach
  - a. Not *crimen falsi* as does not suggest character for untruthfulness
  - b. 609(a)(1)(B) objection should have been sustained as probative value does not outweigh prejudicial effect. (Special balancing test)
4. Misdemeanor Conviction: *Crimen Falsi* and thus probative of character for untruthfulness, admissible to impeach, no balancing if *crimen falsi*. Note: Students can successfully argue not *crimine falsi* under Ninth Circuit robbery case, not really involving deception or false statements.
  - a. Fact of conviction is relevant to impeachment and probative of veracity, not too remote thus admissible.
  - b. Must be admitted under 609(a)(2) unless successful argument that petty theft is not *crimen falsi*, as in ninth Circuit robbery case.
  - c. Did D open the door to character evidence? Only reputation and opinion evidence under FRE in this regard.
  - d. Draper's lawyer makes motion to strike form of question and explanation per 404(a).
    - i. D's testimony is admissible under 404(b) to show knowledge and absence of mistake (note that D is claiming the bike was abandoned, just like the copper cable.)

## Reported Facts of Alleged Criminal Offense

### M. Hanely

According to Santa Barbara Sheriff's Department reports, in September 2009, Sheriff's deputies responded to a "gang fight" in progress with three subjects assaulting one victim. A witness to the fight pointed to a departing vehicle that was subsequently stopped. Deputies detained three young adults, MZ, OC, and RM. Deputies contacted the 16 year-old victim who reported that he had been skateboarding home when a subject, later identified as OC asked him "what's up" and punched him in the face, knocking him off his skateboard. The victim stated that MZ and RM also attacked him while he was on the ground. The victim stated he tried to fight back, but was overwhelmed. After suffering the attack, he asked his assailants if he could just have his skateboard. The victim reported that OC responded, "No. This is my fucking skateboard. What you going to do about it?" The victim reported that the three men then stomped on his head. After the assailants fled, the victim made a positive identification of RJ, whom the victim said was a fourth subject involved in the altercation, but did not hit him.

When questioned, RJ told deputies he had been outside his girlfriend's residence when MZ, OC and RM drove up. OC said, "Hey fool, come over here." RJ said that RM was trying to "check [him]," meaning check his willingness to do something on behalf of the street gang to which MZ, OC and RM affiliate. The three men wanted RJ to participate with them, to "bust a mission," meaning to commit a crime in the name of the gang. RJ stated, "I don't bang," meaning he does not participate in crimes on behalf of the gang or associate with gang members or affiliates. RJ told deputies that he witnessed OC punch the victim as he was riding his skateboard and that RM also joined the attack and punched the victim. He stated the MZ had not been involved in the attack. According to RJ, MZ, OC, RM and RJ fled, fearing the police would arrive on scene. RJ said he then re-entered his girlfriend's residence, and that RM followed him into the residence while in possession of the victim's skateboard. According to RJ, RM hid the skateboard under the bed in RJ's girlfriend's bedroom. RM was told by occupants of the residence that he was not welcome and then left the residence.

When MZ was questioned he told deputies that RJ, OC and RM had attacked the victim. MZ also reported the RJ had taken the skateboard and hidden it inside the residence. MZ also stated that he was not a gang member, but that RJ, RM and OC were members of a local street gang.