California Bar Examination

Performance Test and Selected Answers

July 2019

The State Bar of California
Committee of Bar Examiners / Office of Admissions

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PERFORMANCE TEST AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2019 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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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.

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.

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.

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.

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.

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.

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 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.

July 2019

California Bar Examination

Performance Test

LIBRARY

STATE v. MARTIN

LIBRARY

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.

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 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.

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.

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.

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 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.

PT: SELECTED ANSWER 1

MEMORANDUM

TO: Andrew Solmark, Assistant District Attorney

FROM: Applicant

DATE: July 30, 2019

RE: *State v. Martin*, Admissibility of Evidence

I. Introduction

In this case, Bernice Martin was charged with two counts of identity theft, for the use of a name and Social Security number acquired while employed by Fast Com. With the information, she attempted to open several charge accounts, in one case successfully. On that account, she charged almost $5,000 worth of goods. This memorandum addresses whether three incidents of prior misconduct will be admissible either as substantive evidence under Rule CEC Rule 404 and/or for impeachment purposes under CEC Rule 608. In the first incident, Ms. Martin gave false information to a police officer when stopped for a broken tail light. In the second incident, Ms. Martin was publicly intoxicated and shouted at a police officer. And finally, in the third incident, Ms. Martin called the victim of this case and threatened her to persuade her from testifying at trial.

II. Can the evidence be admitted as substantive evidence?

"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." *State v. Landreau* (Columbia S. Ct. 2011). This list of purposes is not exhaustive, but rather provides a starting point. *Id.* The key inquiry is "whether the evidence has relevance for some purpose other than as proof of propensity." *Id.* To make this determination, a court will consider "1) the degree of similarity to charged crime and 2) the temporal relationship of the other acts." *Id.*

Traffic Stop

Three months ago, a police officer stopped Ms. Martin for a broken tail light. Transcript of Pretrial Hearing. Ms. Martin gave the officer a different name and driver's license than her own. *Id.* Ms. Martin's license had expired. *Id.* In this case, Ms. Martin is claiming that "this entire case is the result of a computer error at the two stores," in which "[t]he stores mixed up the names and social security numbers of Ms. Martinez and Ms. Martin. *Id.* She further claims that she "was trying to open accounts in her own name and had entirely innocent intentions." Notably, Bernice Martin, the defendant, and Bernecia Martinez, the victim, do have extremely similar names and their social security numbers are identical with the exception of two numbers. Summary of Expected Testimony. Thus, the theory asserted by the defense does, at first glance, appear plausible.

Thus, our strongest argument is that Ms. Martin's conduct is relevant to show intent or absence of mistake. In *Landreau*, the Columbia Supreme Court explained that "specific acts can be the basis for inferring that the defendant has a mental state that is inconsistent with innocence."

Similarity to the Charged Crime

Our biggest challenge in arguing that Ms. Martin's prior conduct at the police stop is relevant to showing intent or absence of mistake is establishing the similarity between her conduct then and the conduct that she has been presently charged with. While, "[t]he other bad act need not be identical to the crime charged," it must be "sufficiently similar to permit a reasonable inference of knowledge or intent." *Landreau.* In *Landreau*, the defendant was charged with passing a series of bad checks. She claimed that "she did not know that [the] checks would bounce and that she had had no intention to defraud the bank." *Id.* The court ruled that it was permissible to rebut her claims with evidence of false statements on a mortgage application, which the court concluded "indicate[d] an instance of deception to obtain a financial advantage for herself." The defendant argued that the two incidents were not similar because "a mortgage application is different from opening a bank account." *Id.* But, the court found that the prior act was "probative of her willingness to deceive so as to secure money from a financial institution." Similarly, in *State v. Vargas*, the court found that there was "no abuse of discretion in admitting evidence of prior fraudulent transactions to rebut the claim that the defendant has been duped into joining the charged transactions." Likewise, in *State v. Rodgers*, the court found that evidence of prior importation

of drugs was admissible to rebut the defendant's claim that he was an innocent participant in the charged importation.

In our case, Ms. Martin is charged with identity theft. She acquired the name and Social Security number (SSN) of another person, Ms. Martinez, from her former job at FastCom. She used the information to try to, and in one case successfully, open charge accounts at several stores. Memorandum from Andrew Solmark. On one account, she charged nearly $5,000 worth of goods. Summary of Expected Testimony. Previously, she presented false evidence to the police. The defense argued at the pretrial hearing that the "traffic stop was just a mistake." Transcript of Pretrial Hearing. Yet, the purpose of rule 404 is to admit such evidence when a defendant has made multiple "mistakes" that are sufficiently similar, to illustrate that the conduct at issue was not in fact a mistake, but rather is intentional. In both this instance and the prior instance, Ms. Martin presented herself as someone other than herself. However, I am not certain that this will be enough to convince a court that these acts are sufficiently similar. Unlike in *Landreau* and *Vargas*, the prior conduct here does not show a willingness to deceive for the same purpose for which she is charged. She stole someone else's identity to open charge accounts. By contrast, in the previous instance, she offered her sister's name and driver's license because hers had expired, presumably to avoid getting a ticket. Though the prior act does show her willingness to deceive, which a court may find sufficient. However, in all of the cases discussed in *Landreau*, as well as in *Landreau* itself, the prior act and the charged crime had similarly beyond the baseline willingness to deceive. Therefore, I think, on

balance, it is unlikely that a court will find the two acts here sufficiently similar.

Temporal Relationship

If we can establish that this evidence is relevant for a purpose other than as proof of propensity and that it is similar to the charged crime, we should have no difficulty establishing the temporal relationship between this act and the charged crime. In *Landreau*, the court found that a falsified mortgage application from two years before the events in this case was "sufficiently close in time to the charges in [that] case." Here, the conduct occurred only three months ago. Therefore, there is sufficient temporal relationship between the acts.

Conclusion

If the court finds that Ms. Martin's prior conduct is sufficiently similar to that which is charged, then this incident will be admissible as substantive evidence. In the event that it is not admissible as substantive evidence, which I believe is more likely, it will be admissible for impeachment purposes (see below).

Public Intoxication

Two months ago, Ms. Martin was stopped on a sidewalk, where she was "visibly intoxicated, barely able to stand, with a strong smell of alcohol on her breath." Transcript of Pretrial Hearing. "She started to shout at the officer, but after a warning, she walked away and hailed a cab." *Id.*

I think it will particularly difficult for us to establish that this conduct is relevant for some other purposes other than as proof of propensity, or general bad character.

Similarity to the Charged Crime

The charged crime deals with identity theft, misrepresentation, deceit, and lying. By contrast, this prior conduct deals with generally rowdiness and rudeness, but there is no suggestion that during this incident Ms. Martin lied to or deceived anyone. While being drunk to the point that you cannot stand is typically considered bad character, it is not probative of whether Ms. Martin committed identity theft. In fact, in *Landreau*, the court specifically noted that "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." Therefore, I think it is doubtful that this incident will be admissible substantially.

Temporal Relationship

If we can establish that this evidence is relevant for a purpose other than as proof of propensity and that it is similar to the charged crime, we should have no difficulty establishing the temporal relationship between this act and the charged crime. In *Landreau*, the court found that a falsified mortgage application from two years before the events in this case was "sufficiently close in time to the charges in [that] case." Here, the conduct occurred only two months ago. Therefore, there is sufficient temporal relationship between the acts.

Conclusion

Because of the dissimilarity between this incident and the charged crime, it is unlikely that it will be admissible substantively.

Conversation with Bernecia Martinez

Two weeks ago, a woman who identified herself as Bernice called Ms. Martinez, the victim in this case. Transcript of Pretrial Hearing. "The caller threatened Ms. Martinez by saying that, if she testified at the trial in this case, she would regret it." *Id.* Furthermore, the caller said that "it would be better if Ms. Martinez would testify that she gave 'Bernice' permission to open those accounts.

Our strongest argument here would be to assert that this incident is proof of intent or absence of mistake.

Similarity to the Charged Crime

Here, Ms. Martin has been charged with identity theft. The prior bad act is a threatening phone call in which Ms. Martin threatened a witness and encouraged her to testify a certain way. On the surface, these incidents do not appear to be similar. The threatening phone call, unlike the prior acts in *Landreau* and *Vargas* did*,* does not illustrate that Ms. Martin is willing to deceive for pecuniary gain. Rather, it indicates that perhaps she is violent and threatening, which is not a valid reason to admit evidence under Rule 404. *See Landreau* ("acts of violence . . . are not sufficiently similar to the crime of passing bad checks to permit any inference of knowledge or intent"). Our strongest argument is that the telephone conversation illustrates that Ms. Martin is willing to deceive the court by tampering with a witness and encouraging the witness to provide false testimony. However, it is unclear whether a court would find sufficient similarity because although both actions illustrate a willingness to deceive, the deception is for different purposes, which as mentioned above is

dissimilar to all of the cases discussed in *Landreau*, as well as the facts of *Landreau* itself. Alternatively, we could point to the fact that the comment that "it would be better if Ms. Martinez would testify that she gave "Bernice" permission to open those accounts" is directly contrary to the defense's position that there was a computer error that resulted in a mixed up with the names and social security numbers. Thus, this statement does permit a reasonable inference that Ms. Martin did not accidentally use Ms. Martinez's information. Still due to the dissimilarity of the two incidences, I am not confident how the court would rule on this issue. It is, of course, possible that a court would admit the statement suggesting what Ms. Martinez should testify about, while excluding the testimony about the threat against testifying all together.

Temporal Relationship

If we can establish that this evidence is relevant for a purpose other than as proof of propensity and that it is similar to the charged crime, we should have no difficulty establishing the temporal relationship between this act and the charged crime. In *Landreau*, the court found that a falsified mortgage application from two years before the events in this case was "sufficiently close in time to the charges in [that] case." Here, the conduct occurred only two weeks ago. Therefore, there is sufficient temporal relationship between the acts.

Conclusion

Because of the dissimilarity between this incident and the charged crime, it is unlikely that it will be admissible substantively. In the event that it is not admissible as substantive evidence, it will be admissible for impeachment

purposes (see below).

III. Can the evidence be admitted for impeachment purposes?

When "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." *State v. Proctor* (Columbia S. Ct. 2008). In *Proctor*, the Columbia Supreme Court adopted the "middle approach" with regard to what is and is not probative of a witness's character for truthfulness. According to this approach, "acts that have an affirmative element of false statement or deception," as well as "conduct that indicates a willingness to gain a personal advantage by dishonest means" is deemed probative of truthfulness. *Id*.

Traffic Stop

In *Proctor*, the court indicated that in prior decisions, the Columbia Supreme Court has held that providing false information to a police officer is probative of truthfulness. Here, Ms. Martin, when pulled over for a broken head light, gave the officer a different name and driver's license than her own. She providing false information to a police officer.

Thus, this evidence will be admissible under Rule 608(b).

Public Intoxication

In *Proctor*, the court indicated that Columbia courts have prohibited questioning about acts of violence, instances of drug use, and driving under the influence

because they are not probative of truthfulness. Ms. Martin's conduct with regard to public intoxication and shouting at a police officer fairly clearly falls into the categories of drug use and acts of violence.

Thus, this evidence will be inadmissible under Rule 608(b).

Conversation with Bernecia Martinez

The defense will likely argue here that the conversation should not be admitted because the court in *Proctor* specifically indicated that evidence of acts of violence is not probative of truthfulness. And acts of violence and threatening acts are similar. However, the conduct at issue is extremely similar to the conduct that was found to be admissible under CEC 608 in *State v. Voorhees*. In *Voorhees*, the Columbia Court of Appeal found 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). Therefore, we should argue that Ms. Martin's threats to Ms. Martinez were intended to cause Ms. Martinez to lie on the stand. The only potential problem with this argument is that it assumes what we are trying to prove - that Ms. Martinez didn't give Bernice permission to open those accounts. Still, I think this is relatively easy to establish, particularly when combined with the fact that it contradicts the defense’s contention that the mix up was due to computer error and that Ms. Martin was trying to open accounts in her own name.

Thus, this evidence will likely be admissible under Rule 608(b).

IV. Conclusion

Testimony regarding the traffic stop and the conversation with Bernecia Martinez may be admissible substantively, if the court finds that the prior acts are substantially similar to the charged crime. I think it is unlikely that testimony regarding the traffic stop will be admissible, but with regard to the conversation with Ms. Martinez, it is a closer call. Regardless though, both incidents will be admissible for impeachment purposes. Testimony regarding Ms. Martin's public intoxication, by contrast, will not be admissible for any purpose.

PT: SELECTED ANSWER 2

From: Applicant

To: Andrew Solmark, Assistant District Attorney

Date: July 30, 2019

RE: State v. Martin

Question Presented:

You have asked me to prepare a memorandum analyzing whether we can admit any of the following incidents against Bernice Martin as either substantive evidence under *Columbia Rule of Evidence 404* or for impeachment under *Columbia Rules of Evidence 608.* The three incidents are described below:

1) Bernice Martin was pulled over by a police officer three months ago for a broken tail light and gave the officer a different name and driver's license than her own.

2) Two months ago, while visibly intoxicated, Ms. Martin started to shout at an officer

3) Two weeks ago, Bernecia Martinez received a call from someone who identified herself as Bernice and threatened her to not testify at trial.

Discussion:

1. Whether the Incidents Are Admissible as Substantive Evidence Under Columbia Rule of Evidence 404

Prior bad acts are prohibited from being admitted to establish an individual character's propensity to commit a crime in order to show that on a particular occasion the person acted in accordance with the character. *CRE 404(b)(1)*. However, prior bad acts are permitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *CRE 404(b)(2)*. In determining the admissibility of evidence under Rule 404(b), a court must determine whether the evidence has relevance for some purpose other than proof of propensity. *State v. Landreau (Supreme Court of Columbia 2011)*. The prior list is not exhaustive. *Id.* In order to determine whether evidence has some relevance for another purpose, the court considers 1) the degree of similarity to the charged crime, and 2) the temporal relationship of the other acts. *Id.* In order to introduce the incidents as substantive evidence under Rule 404, it must be determined whether they meet these factors.

a. *THE INCIDENT WITH THE DRIVER'S LICENSE CAN BE ADMITTED AS SUBSTANTIVE EVIDENCE*

In the first incident, Bernice gave a police officer who had stopped her for a broken tail light a different name and driver's license other than her own. It turned out that Ms. Martin's own license had expired and she used the license of

her sister Beverly Martin. In *State v. Landreau*, the court determined that specific acts can be the basis for inferring that the defendant had a mental state that is inconsistent with innocence. *State v. Landreau*. In *Landreau*, evidence that a woman had provided a bank with a fake name, social security number, and date of birth was admissible as substantive evidence against a defendant who had opened checking accounts fraudulently under another's name. *Id.* The court determined that both occasions indicated an instance of deception to obtain a financial advantage for herself. *Id.* This is similar to the present case where Bernice used deception by fraudulently stealing Ms. Martinez's social security number and opening charge accounts at several stores. The evidence we are using in the present case is that Ms. Martin attempted to use deception to get out of a traffic ticket by using her sister's identification. Although this prior act does not indicate a financial advantage like in *Landreau*, it does demonstrate that Ms. Martin was willing to use deception to obtain an advantage for herself. In this case, the use of her sister's driver's license can be used to demonstrate an absence of mistake, because the evidence could rebut an innocent involvement defense. Ms. Martin's defense rests on the fact that the stores mixed up the names and that Ms. Martin was trying to open accounts in her own name and had entirely innocent intentions.

In order to see if the evidence is admissible to rebut a defense of innocent involvement, we must see if there is a 1) degree of similarity to the charged crime and 2) the temporal relationship of the other act. The prior 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. *State v. Landreau*. In this case, the acts are sufficiently similar because they both demonstrate a willingness to deceive in order to gain an advantage. In the traffic stop incident, Ms. Martin was willing to steal her sister's identity in order to get out of a traffic ticket. Both Ms. Martin and her sister Beverly Martin had similar names. Seeing the similarity in their names, Ms. Martin took advantage of that information in order to use get out of the ticket. In the present case, Ms. Martin stole the identity of Ms. Martinez in order to open charge accounts and purchase items for herself. In this case, Ms. Martin saw the similarity in both the names (Bernice Martin v. Bernecia Martinez) and social security numbers (989-21-0994 vs. 909-22-0094), and decided to take advantage of that in order to gain an advantage. Therefore, the incidents are sufficiently similar because they both involve identity theft using similar names. Also, the items are related temporally because the traffic stop only occurred three months ago. That is relatively recent, so there is a close temporal relationship. Furthermore, the Supreme Court of Columbia has held in multiple prior decisions that similar acts can be used to rebut innocent involvement. *See State v. Rodgers*; *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).

However, it could be argued that the prior incident was in itself an innocent mistake, which Ms. Dacosta This would negate its probative value as an absence of mistake because if both incidents were a mistake, then the prior incident is in itself irrelevant. Furthermore, it could be argued that the incidents

are incredibly different. Lying in a traffic stop is different than identity theft using credit cards accounts. However, this is unlikely to be a strong argument because both incidents are at their core, identity theft, albeit on different levels and in different manners.

Therefore, because the acts are sufficiently similar and close temporally, the evidence of the traffic stop demonstrates an absence of mistake because it rebuts an innocent involvement defense. This makes it admissible as substantive evidence under Rule 404(b).

b. *THE INCIDENT OUTSIDE BLUE MOON BAR IS NOT ADMISSIBLE AS SUBSTANTIVE EVIDENCE*

In the second incident, Ms. Martin appeared intoxicated and was barely able to stand when she started to shout at an officer. After receiving a warning, she walked away. In *Landreau*, the court did not allow evidence of Landreau being arrested for assault in a bar fight as substantive evidence. *Landreau*. The court found that acts of intoxication and violence are not sufficiently similar to her crime of passing bad checks to permit any inference of knowledge or intent. *Id.* This is similar to the present case, where Ms. Martin's intoxication bears no similarity to her charged crime of identity theft. Although the incident was relatively recent, only two months ago, this does not overcome the fact that it is vastly different than her charged crime. As a result, it is not sufficiently similar and cannot be introduced as substantive evidence under Rule 404(b) and there is no good faith argument to do so.

c. *THE INCIDENT REGARDING THE THREATS TO MS. MARTINEZ ARE NOT ADMISSIBLE AS SUBSTANTIVE EVIDENCE*

In the third incident, Ms. Martin allegedly threatened Ms. Martinez over the phone in an attempt to get her to testify falsely or not testify at all. In order to see if this is admissible as substantive evidence we need to see if it is 1) sufficiently similar and 2) close in temporal relation. It could be argued that they are sufficiently similar because both of them involve dishonesty. In the first case, Ms. Martin used dishonesty in order to open fake accounts in Ms. Martinez's name. In the present incident, Ms. Martin is trying to encourage dishonest behavior. Both of these actions were to gain her own advantage. Furthermore, because the second incident was two weeks ago, the incidents were close in time.

However, there is a strong counter argument to this argument. While both instances demonstrate her willingness to deceive, they are incredibly different. In the first act, Ms. Martin is participating in identity theft. In the prior act, Ms. Martin is using threats to suborn perjury. Furthermore, this incident is not a "prior act" because it occurred after the identity theft had occurred. Therefore, while there is an argument that the acts are sufficiently similar, it is more likely that they are too different to properly be introduced as substantive evidence. As a result, the evidence of the third incident is not admissible under Rule 404(b).

2. Whether the Incidents are Admissible For Impeachment Under Columbia Rule of Evidence 608

If a witness takes the stand and testifies, she puts her credibility in issue entitling

the opposing party to impeach the witness's credibility. *State v. Proctor (Supreme Court of Columbia 2008)*. A witness may be asked about specific instances of conduct that are probative of a witness's character for truthfulness or untruthfulness. *CRE 608.*

a. *THE INCIDENT WITH THE TRAFFIC STOP IS ADMISSIBLE FOR IMPEACHMENT*

Prior Supreme Court of Columbia decisions have established a wide variety of conduct to be probative of a witness's truthfulness. *State v. Proctor* This includes providing false information to a police officer. *Id.* In this incident, Ms. Martin gave the officer a different name and driver's license than her own, because her own license was expired. This incident demonstrates an incident of Ms. Martin providing false information to a police officer. Because the Supreme Court of Columbia has determined this conduct to be probative of a witness's truthfulness, it can be used against Ms. Martin as impeachment evidence.

B. THE INCIDENT OUTSIDE OF BLUE MOON BAR IS INADMISSIBLE FOR IMPEACHMENT

Prior Supreme Court of Columbia decisions have established a variety of conduct to inherently not be probative of a witness's truthfulness. These acts include instances of violence, drug use, and driving under the influence of drugs. The current incident involves Ms. Martin being visibly intoxicated with the strong smell of alcohol while yelling at a police officer. Although this is not the same as drug use, it has the same effect. Being incredibly intoxicated does not speak to a

person's truthfulness or untruthfulness in the same way that drug use does not. Therefore, this incident cannot be used to impeach Ms. Martin.

C. THE INCIDENT REGARDING THE THREATS TO MS. MARTINEZ IS ADMISSIBLE

In *State v. Proctor*, a court determined that a prior act of shoplifting was admissible for impeachment because it demonstrates a 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. *State v. Proctor*. Common experience suggests that a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way. *Id.* This is relevant to the present case because Ms. Martin attempted to gain a personal advantage through dishonest means by threatening Ms. Martinez to not testify. She told Ms. Martinez that if she testified at the trial in this case "she would regret it." She also said that it would be better if Ms. Martinez would testify that she gave "Bernice" permission to open those accounts. This phone number was traced to Ms. Martin's Fast Com phone account. By threatening Ms. Martinez to not testify or alternatively lie that she gave Bernice permission, Ms. Martin tried to gain a personal advantage through dishonest means. In *State v. Voorhees*, the Columbia Court of Appeal held that persuading a witness to lie on the stand constitutes a proper focus of questioning on cross-examination under Rule 608. Similarly, Ms. Martin telling Ms. Martinez to lie that she gave Ms. Martin permission is tantamount to suborning perjury. As a result, it is properly

admissible under Rule 608 for impeachment because it is highly probative of her character for truthfulness and is the proper focus of questioning on cross-examination.

3. Conclusion

In conclusion, the first evidence involving the traffic stop is admissible as substantive evidence under Rule 404(b) because it tends to rebut Ms. Martin's defense of innocent involvement. The other two incidents are inadmissible because they are not sufficiently similar. In regards to impeachment, the incident involving the traffic stop and the threatening phone call to Ms. Martinez are both admissible because they demonstrate her character for truthfulness and willingness to encourage dishonest behavior in others. Finally, the incident outside of the Blue Moon Bar is inadmissible because drunken conduct has no implication on Ms. Martin’s character for truthfulness.