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OFFICE OF THE DISTRICT ATTORNEY

Concord Judicial Circuit

Sonnerville, Columbia

MEMORANDUM

TO: Andrew Solmark, Assistant District Attorney

FROM: Applicant

DATE: July 30, 2019

RE: *State v. Martin* - Bernice Martin Identity Theft Case - Evidence Use

This memo is in response to instructions from Andrew Solmark regarding the admissibility of evidence from three prior instances involving Ms. Martin for possible use under CRE 404 and CRE 608 in *State v. Martin*.

Subject Matter & Current Projected Testimony From Subpoenaed Witnesses

Bernice Martin has been charged with two counts of identity theft for using the name "Bernecia Martinez" and SS# 989-22-0094 at both Blake's Department Stores and Chiclet's Clothing. At Blake's Department Store, Martin charged nearly \$5,000 worth of goods. At Chiclet's, no account was opened because an account already existed in that name. Each representative, Constance Gainer from Blake's and Henry Frank's from Chiclet's will testify to that effect.

Martin's supervisor, Joan Timmons, will testify that Martin was in the accounts department at FastCom, where Martin had access to records, including the name Bernecia Martinez. Timmons can also testify that Martin's SS# is 989-21-0994. Only two numbers different from Ms. Martinez's SS# of 989-22-0094.

Three Specific Incidents Involving Ms. Martin

In order to more clearly discuss the three incidents as they relate to substantive and impeachable evidence. Each incident is paraphrased below and given a descriptor.

The first incident: involves a police stop of Ms. Martin for a broken tail light where Ms. Martin gave the officer a different name and driver's license. The name given was to Ms. Martin's sister, Beverly Martin. (**"False Info" or "incident one"**)

The second incident: involves Ms. Martin intoxicated outside the Blue Moon Bar two months ago where she could hardly stand and was shouting at the officer before she walked off and hailed a cab. (**"Drunk Shouter" or "incident two"**)

The third incident: involves a call to Ms. Martinez from Ms. Martin's FastCom phone number wherein the caller identified herself as Bernice and threatened that if Ms. Martinez testified, she would "regret it." Further, the caller stated that if Ms. Martinez testified she should testify that she gave "Bernice" permission to open the accounts. (**"False Testimony" or "incident three"**)

I. Substantive Evidence - Columbia Rule of Evidence 404 ("CRE 404")

CRE 404(b)(1) prohibits admission of prior bad acts to establish an individual's character or propensity to commit a crime. CRE 404(b)(2) permits the admission of prior bad acts to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The court will look to the degree of similarity to the charged crime and the temporal relevance of the other acts.

As explained below, given the three incidents above it is likely that only incident one and three are admissible substantively.

A. Incident One and Three Likely Admissible Under CRE 404(b)(2)

The Court in *Landreau* found that an incident where the defendant provided a bank a false name, fabricated SS#, and false date of birth for a loan was admissible under CRE 404. Even when the bank found out about the false identity through a credit check. Ms. Martin, in incident one, gave a different name and driver's license to an officer. Further, the officer found out about the falsity just as the bank had. This situation surrounding giving false information to a police officer is similar to giving false information to a bank. Thus, incident one is likely admissible under CRE 404.

Further, just as the court found the actions could show "intent or absence of mistake." *Landreau*. The actions of Ms. Martin in incident one likewise show "intent or absence of mistake." Both cases and both incidents involved falsifying information for financial gain.

Incident three, where Ms. Martin calls the victim to threaten and tell her to perjure herself can be used to show "plan or knowledge." Since Ms. Martin tells her to use the name "Bernice" to falsely testify consent was given for the identity theft, the prosecution can show that not only did Ms. Martin have knowledge of the charged crimes, but Ms. Martin had a "plan" because of the similarity between their names and social security numbers. Thus, incident three may be admissible under CRE 404(b)(2) to show "plan or knowledge."

Ms. Martin's attorney will likely argue that there is no basis to know who was on the phone call in incident three. However, Timmons is willing to testify to the effect that Ms. Martin had access to the phones at FastCom and the phone call came from Ms. Martin's phone.

The prior acts are also sufficiently close in time to the charges in this case to satisfy use under CRE 404. Incident one was three months ago.

B. Incident Two Likely NOT Admissible Under CRE 404

The Court in *Landreau* also found that an arrest from a bar fight was inadmissible under CRE 404 because acts of violence or intoxication were not similar to the crime at issue, passing bad checks. Here, it is likely that incident two is not admissible under CRE 404 because intoxication is not similar to the crime of identify theft. Further, incident three, threatening a witness over the phone is similar to the violence prong above and might not be considered similar to the identity theft crime as well.

II. Impeachment Evidence - Columbia Rule of Evidence 608 ("CRE 608")

A. Incident One and Three Likely Admissible For Impeachment of Ms. Martin

Under CRE 608, a witness may be asked about specific instances of conduct that are probative of a witness's character for truthfulness or untruthfulness. "[P]roviding false information to a police officer" has been held as conduct probative of the witness's truthfulness. *Proctor*. Incident one included Martin giving false information to a police officer. Since this untruthful conduct is expressly recognized in *Proctor*, it is very likely that incident one will be allowed for impeachment purposed under CRE 608.

Although no conviction came from giving the police officer false information in incident one, a conviction is not needed for impeachment evidence. In fact, the Court in *Proctor* found that impeachment evidence was proper where the impeachment questioning involved shoplifting but no conviction for the shoplifting existed. Martin's defense counsel may argue that there was no conviction because the shoplifting involved a 13-year old child, however, the purpose of the impeachment evidence was to show untruthfulness, a conviction based on the purported untruthfulness is not required.

In *Proctor*, the Court allowed questioning "that indicates a willingness to gain a personal advantage by dishonest means." Here, both the first incident ("False Info") and third incident ("False Testimony") could arguably fall under this umbrella. In the first incident, Martin attempted to use her sister information to escape getting a ticket. Lying to the police in this manner surely indicates Martin's willingness to gain personal advantage by dishonest means. Incident three, also shows that Martin wanted to gain advantage by dishonest means by calling the victim and telling her to commit perjury. Thus both, incidents one and three should be viable for impeachment of Ms. Martin at trial.

Further evidence of incident three's admissibility under CRE 608 is evidenced by the Columbia Court of Appeals in *State v. Voorhees*. In *Voorhees*, the court held that persuading a witness to lie on the stand constituted a proper focus of questioning. Thus, under CRE 608(b), incident three can most likely be used at trial to impeach Martin.

B. Incident Two Likely NOT Admissible For Impeachment of Ms. Martin

Courts have prohibited questioning about some acts because they are not probative. This includes "acts of violence; instances of drug use; driving under the influence." *Proctor*. The second incident ("Drunk Shouter"), likely falls under this category of not probative enough to use as impeachment evidence under CRE 608. Martin was drunk outside of a bar. This is similar to drug use or driving under the influence in that a person is impaired. Thus, the second incident will not likely be admitting for impeachment purposes at trial.

The Supreme Court of Columbia, in *Proctor*, stated the case law for CRE 608 is not well-settled. Please keep that in mind for the above objective analysis.

Conclusion

Incident one will likely be admissible substantively under CRE 404(b)(2) to show "intent or absence of mistake" and for impeachment purposes under CRE 608.

Incident two will likely not be admissible substantively under CRE 404 or for impeachment purposes under CRE 608.

Incident three will likely be admissible substantively under CRE 404(b)(2) to show "plan or knowledge" and for impeachment purposes under CRE 608.

Respectfully,

Applicant

Question #6 Final Word Count = 1433

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