

HEARSAY

AN INTRODUCTION TO THE MOST MISUNDERSTOOD RULE OF EVIDENCE

NRS Chapter 51 (51.015 – 51.385)

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1. Is it hearsay?
 2. If it is hearsay, does an exception to the hearsay rule apply?



Wallach v. State, 106 Nev. 470 (1990)

Cross Examination of Detective

- Q. Detective, you met the alleged victim at the hospital after she reported being raped, correct?
- A. Yes
- Q. You examined her clothes at the hospital, yes?
- A. Yes.
- Q. And the clothes, they were not torn or ripped, were they?
- A. No.
- Q. You examined the clothes because the alleged victim told you that my client, Mr. Wallach, tore them off of her, isn't that correct?
- Objection Hearsay.
- SUSTAINED.

Wallach v. State, 106 Nev. 470 (1990)

- “The trial judge’s refusal to admit the statement into evidence constituted prejudicial error.”
- Mr. Wallach’s rape conviction was reversed and the case was remanded for a new trial.

Why did the trial court err in Wallach?

- “In Nevada, a statement is hearsay if it is ‘offered in evidence to prove the truth of the matter asserted’ NRS 51.035. As a general rule, hearsay is inadmissible. NRS 51.065. However, the hearsay rule does not apply if the statement is not offered ‘to prove the truth of the matter asserted.’ A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.”
- NOT an exception to the Hearsay Rule.
- Certain out-of-court statements are not, by definition, hearsay.
- Hearsay: An out-of-court statement offered to prove the truth of the matter asserted AND ...

Wallach (continued)

- Did the defense offer the victim's statement to the detective to prove that the defendant tore off the victim's clothes?
- Of course not.
- Why did the defense offer the statement?
- To explain why the detective did what he did during the course of his investigation (and to discredit the victim's story; she made false report)
- The defense did not offer the statement for the truth of the matter asserted (i.e., the defendant tore off the victim's clothes). NOT HEARSAY.

U.S. v. Chipmunk

- Alvin, Simon, and Theodore are believed to be the ring leaders of a drug smuggling operation at the U.S./Mexico border.
- Alvin is arrested first and is being held at a federal detention center.
- Alvin calls Simon from the detention center on a recorded line. Simon informs Alvin that Theodore has been arrested and is now in custody. Alvin thanks Simon for letting him know. Alvin then decides to cut a deal with the prosecution. Simon disappears.
- At Theodore's trial, Theodore claims he knew nothing about the drug ring. The prosecution seeks to introduce Simon's statement to Alvin.
- The defense objects. Hearsay.

HOW DO YOU RULE?

- Is the statement being offered to prove the truth of the matter asserted? (Is it hearsay?)
- Is statement offered to prove that Theodore was arrested or something else?
- The prosecution is not offering it to prove Theodore was arrested but to show the communications between the three drug dealers and impact on Alvin.



U.S. v. Chipmunk taken from:
U.S. v. Mejia, 1998 U.S.App. LEXIS 31891 (9th Cir. 1998)

- The district court did not err when it admitted the conversation that occurred between Ayala and Gonzalez when Gonzalez was in jail. The statements were not inadmissible **hearsay** because the statements were not introduced to prove the truth of the matter asserted. See [Fed. R. Evid. 801\(c\)](#); see also [United States v. Bobo, 586 F.2d 355, 371-72 \(5th Cir. 1978\)](#). The statements were introduced to prove Ayala's and Gonzalez's state of mind. The statements were not introduced to prove that Felix had been arrested or that Mejia had not been arrested. Admitting the conversation into evidence did not *unfairly* prejudice Mejia because the conversation only linked Mejia to the conspiracy.

Woods v. State, 101 Nev. 128 (1985)

- State argues in opening statement that the defendant's confession included information only the murderer could have known.
- Defense seeks to introduce newspaper articles that were published detailing the murder.
- Objection hearsay.



Woods v. State, 101 Nev. 128 (1985)

- “Newspaper articles are not inadmissible under the hearsay rule if they are offered not for the truth of their contents but for the fact of their publication.”
 - Without the double negative: Newspaper articles are admissible if they are not offered to prove the truth of their contents but rather offered to show they were simply published.
 - Defense did not offer to prove the truth of what was reported but simply that facts of the murder were reported.
 - “Since the State argued that information provided by [defendant] could have been known only by the murderer, the newspaper articles could have been properly used to show that the details provided by [defendant] were public knowledge.”

NRS 51.035. “Hearsay” defined.

“Hearsay” means a statement offered in evidence to prove the truth of the matter asserted unless:

1. The statement is one made by a witness while testifying at the trial or hearing;
2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
 - (a) Inconsistent with the declarant’s testimony;
 - (b) Consistent with the declarant’s testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;
 - (c) One of identification of a person made soon after perceiving the person; or
 - (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or
3. The statement is offered against a party and is:
 - (a) The party’s own statement, in either the party’s individual or a representative capacity;
 - (b) A statement of which the party has manifested adoption or belief in its truth;
 - (c) A statement by a person authorized by the party to make a statement concerning the subject;
 - (d) A statement by the party’s agent or servant concerning a matter within the scope of the party’s agency or employment, made before the termination of the relationship; or
 - (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

NRS 51.035. “Hearsay” defined. If not within the definition, the Statement is Not Hearsay.

- Statement not offered to prove the truth of the matter asserted.
- Person testifies at trial and that person’s out-of-court statement is:
 - Inconsistent with testimony
 - Consistent (rebut fabrication)
 - Identification of person
 - Transcript of testimony
- Admission of Party Opponent



Identifying Hearsay

Information gained from someone else.

Witness “B” is testifying to A’s out-of-court statement to prove that D stabbed his wife.

Hearsay Evidence

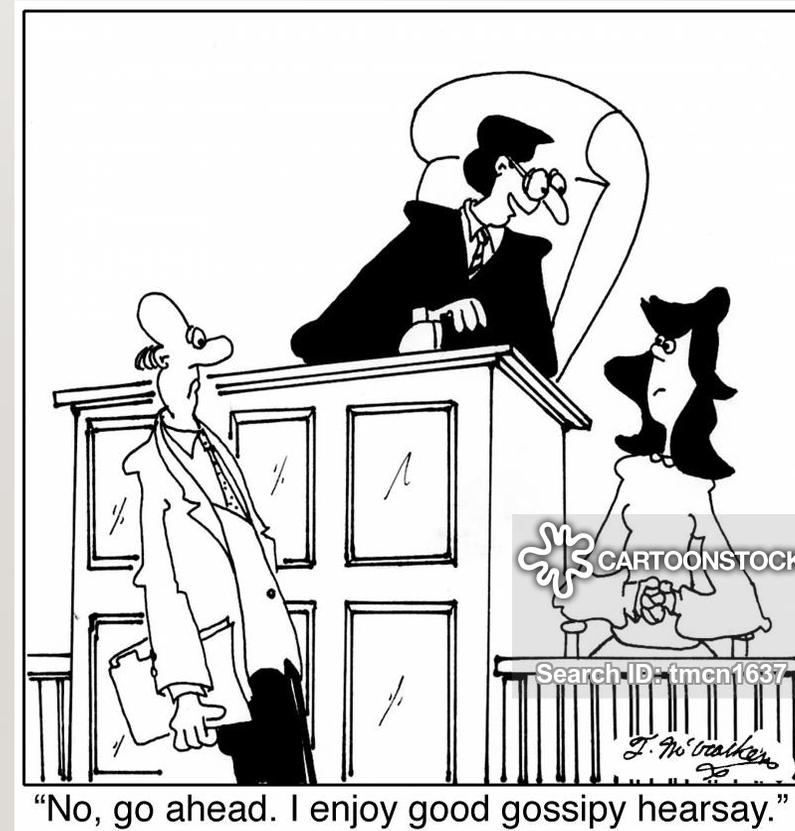
The diagram is split into two panels. The left panel has a light pink background and shows two men, A and B, standing and facing each other. A speech bubble from A says, "I saw 'D' stabbing his wife." The right panel has a teal background and shows man B standing at a white podium, raising his right hand as if testifying. A speech bubble from B says, "'A' told me that he saw 'D' stabbing his wife." A large, semi-transparent watermark "BUZZLE" is visible across the middle of the diagram. At the bottom of the diagram, a dark teal banner contains the text "Evidence based on information received from another." A vertical copyright notice "© Buzzle.com" is on the right side.

Evidence based on information received from another.

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Question calls for hearsay.

- Q. Did you speak to Dave that night?
- A. Yes, when he came home a few hours later.
- Q. What did he tell you?
- A: “Dave told me that he saw James, the defendant, punch his girlfriend.”



Question itself may not call for hearsay.

- Q. Did you see Linda at “Time Out With Friends” on Tuesday, November 19?
- A. No. But, Crystal told me she saw ...
- Q. Did you speak to Linda that night?
- A. Sally did, and Sally told me ...

Well, Lucy's sister,
Sarah, told Lucy and
Lucy told me that...

OBJECTION!
HEARSAY!



HEARSAY RULE: NRS 51.065

- 1. Hearsay is inadmissible except as provide in this Chapter ...
- 2. This section constitutes the hearsay rule.
- Hearsay not admissible unless ... Exception applies

Exceptions to the Hearsay Rule

(Look for Exception if Statement is Hearsay)

DECLARANT'S AVAILABILITY IRRELEVANT

- Present sense impression
- Excited Utterance
- Existing condition
- Recorded recollection
- Reports and Records
- Judgment of previous conviction

DECLARANT UNAVAILABLE

- Former testimony
- Statement against interest

COMMON EXCEPTIONS TO HEARSAY RULE

EXCEPTION

- Present Sense Impression
- Excited Utterance
- Business Record

APPLICATION OF EXCEPTION

- 911 Call – Admissible?
- Statement to Police/Witness – Admissible?
- Police Report – Admissible?