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DEERING'S CALIFORNIA CODES ANNOTATED
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7, AND 8, AND URGENCY LEGISLATION THROUGH CH 713 OF THE 2010 REGULAR SESSION

EVIDENCE CODE
Division 10. Hearsay Evidence
Chapter 2. Exceptions to the Hearsay Rule
Article 3. Prior Statements of Witnesses

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Cal Evid Code § 1235 (2010)

§ 1235. Inconsistent statement

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

HISTORY:

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:

Historical Derivation:

Former CCP §§ 2049, 2052, as enacted 1872.

Law Revision Commission Comments:

1965

Under existing law, when a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial. *Albert v. McKay &*

Co., 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

Because a witness' inconsistent statement is not substantive evidence, the courts do not permit a party--even when surprised by the testimony--to impeach his own witness with inconsistent statements if the witness' testimony at the trial has not damaged the party's case in any way. Evidence tending only to discredit the witness is irrelevant and immaterial when the witness has not given damaging testimony. *People v. Crespi, 115 Cal. 50, 46 Pac. 863 (1896); People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892); People v. Brown, 81 Cal. App. 226, 253 Pac. 735 (1927).*

Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770--which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement. Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant (and, hence, inadmissible).

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Cross References:

"Evidence": *Ev C § 140.*

"Hearing": *Ev C § 145.*

"Statement": *Ev C § 225.*

Examination of witness regarding inconsistent statement: *Ev C § 769.*

Admissibility of extrinsic evidence of inconsistent statement: *Ev C § 770.*

Credibility of witnesses: *Ev C §§ 780 et seq.*

Hearsay rule: *Ev C § 1200.*

Collateral References:

Cal. Ins. Law & Practice (Matthew Bender(R)), ch 12, Claims Processing and Investigation § 12.10.

Matthew Bender (R) Practice Guide: Cal. Trial and Post Trial Civil Procedure §§ 11.101, 11.104[13].

Cal. Employment Law (Matthew Bender(R)), § 62.05.

Cal. Employment Law (Matthew Bender(R)), § 80.40.

California Trial Guide, Unit 20, "Procedural Rules for Presentation of Evidence", § 20.30 (Matthew Bender).

California Trial Guide, Unit 40, "Hearsay", § 40.36 (Matthew Bender).

Cotchett, California Courtroom Evidence, § 21.24 (Matthew Bender).

1 Witkin Cal. Evidence (4th ed) Hearsay §§ 6, 145, 155-158, 160, 163.

3 Witkin Cal. Evidence (4th ed) Presentation at Trial §§ 106, 153, 185, 338, 359.

Witkin & Epstein, Criminal Law § 2670.

Cal Jur 3d (Rev) Criminal Law §§ 2126, 3145, 3255.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), *CALCRIM No. 318*, Prior Statements as Evidence.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), *CALCRIM No. 319*, Prior Statements of Unavailable Witness.

Jefferson's California Evidence Benchbook, 3rd Edition (CEB, 2003) §§ 1.12, 10.2, 10.11, 27.65.

Laying a foundation to introduce evidence. (Summer 1989) CEB Action Guide.

Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial). CEB Action Guide, Summer 1991.

Unavailable witnesses and out-of-state records and documents. 10 CEB Civ Lit Rep No. 3 p 93.

Forms:

Suggested form is set out below, following notes of decisions.

Law Review Articles:

A guide to the new Federal Rules of Evidence for the California lawyer; A practical comparison with the Evidence Code. 9 Bev Hills BJ No. 4, p. 10.

Foundation rule for impeachment by inconsistent statements. 3 *Cal LR* 330.

Confrontation test for hearsay exceptions. 59 *CLR* 580.

Prior inconsistent statements. 26 *Hast LJ* 361.

First Contact: Critical Evidence Can Often Best Be Uncovered Through the Appropriate Use of Informal Discovery. 27 *Los Angeles Lawyer* 30.

Prior inconsistent statements as exception to hearsay rule; analysis of *People v. Johnson*. 6 San Diego LR 92.

Necessity for laying foundation for impeachment by proof of inconsistent statements. 20 *SCLR* 103.

The new confrontation--hearsay dilemma. 45 *SCLR* 1.

People v. Aranda is alive and well and living in California. 49 St BJ 264.

The rulemaking power of the Supreme Court: A contemporary crisis. 27 *Stan LR* 673.

Due process and the sufficiency of prior inconsistent statements as evidence for criminal convictions. 15 *UCD LR* 1093.

Impeaching the credibility of a hearsay declarant: The foundation prerequisite. 22 *UCLA LR* 452.

California Evidence Code - Federal Rules of Evidence: I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules. 37 *USF LR* 351.

Understanding and Applying Hearsay Rule. LA Law Vol. 14 No. 11 p 27.

Annotations:

Use in civil case of testimony of witness in criminal case. 70 *ALR2d* 1179.

Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility--state cases. 14 *ALR4th* 676.

Use or inadmissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case--modern state cases. 30 *ALR4th* 414.

What is "other proceeding" under *Rule 801(d)(1)(A) of Federal Rules of Evidence*, excepting from hearsay rule prior inconsistent statement given "at a trial, hearing, or other proceeding". 37 *ALR Fed* 855.

Hierarchy Notes:

Div. 10, Ch. 2, Art. 3 Note

NOTES OF DECISIONS 1. In General 2. Constitutionality 3. Application 4. Construction 5. Substantive Evidence 6. Limiting Instruction 7. Leading Questions

1. In General

No oath to the answers to interrogatories is required for their admissibility as evidence of prior inconsistent or consistent statements under *Ev C* §§ 1235, 1236, though answers to interrogatories must be under oath to be admissible as such. *Le Grand v. Yellow Cab Co.* (1970, Cal App 2d Dist) 8 Cal App 3d 125, 87 Cal Rptr 292, 1970 Cal App LEXIS 2027.

Disbelief of a witness does not establish that the contrary is true, only that the witness is not credible. *People v.*

Woodberry (1970, Cal App 2d Dist) 10 Cal App 3d 695, 89 Cal Rptr 330, 1970 Cal App LEXIS 1881.

Normally, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event; but the forgetful witness is subject to the general test for admitting a witness' prior statement, namely, inconsistency in effect rather than contradiction in express terms. *People v. Green (1971) 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, 1971 Cal LEXIS 387, cert. dismissed (1971) 404 US 801, 92 S Ct 20, 30 L Ed 2d 34, 1971 US LEXIS 1466.*

The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute. Thus, *Pen C § 1111* (conviction cannot be based on uncorroborated accomplice testimony), prohibits convictions based upon uncorroborated out-of-court accomplice statements admitted under *Ev C § 1235* (hearsay exception for prior inconsistent statements), even though those statements are not within the traditional definition of "testimony" in that they are not given under oath. The legislative intent in enacting *Pen C § 1111*, was to prevent convictions based solely upon the self-serving and inherently suspect statements of accomplices. *People v. Belton (1979) 23 Cal 3d 516, 153 Cal Rptr 195, 591 P2d 485, 1979 Cal LEXIS 213.*

Prior inconsistent statements that meet the requirements of *Ev C § 1235*, are admissible to prove their substance as well as to impeach the declarant. *People v. Hawthorne (1992) 4 Cal 4th 43, 14 Cal Rptr 2d 133, 841 P2d 118, 1992 Cal LEXIS 5778, rehearing denied (1993, Cal) 1993 Cal LEXIS 417, cert den (1993) 510 US 1013, 114 S Ct 605, 126 L Ed 2d 570, 1993 US LEXIS 7678.*

In a capital homicide prosecution, defendant was not deprived of his due process right to present a defense when the trial court refused to permit him to introduce, for impeachment purposes, the preliminary hearing testimony of an eyewitness who, on cross-examination, could not recall certain statements by the police during a photographic lineup. While defendant sought admission under *Ev C § 1235* (prior inconsistent statements), the trial court found that the witness had genuine memory loss, so that there was no "inconsistency." Although defendant also relied on *Ev C § 1291* (prior recorded testimony), the trial court found the witness was not unavailable, as required by that provision. The foundational prerequisites of both statutes were reasonably and rationally related to the hearsay exceptions concerned, and did not operate unfairly against defendant, since the exculpatory value of the excluded evidence was tangential, and the prosecution had presented other eyewitness testimony and strong physical evidence connecting defendant to the crimes. *People v. Hawthorne (1992) 4 Cal 4th 43, 14 Cal Rptr 2d 133, 841 P2d 118, 1992 Cal LEXIS 5778, rehearing denied (1993, Cal) 1993 Cal LEXIS 417, cert den (1993) 510 US 1013, 114 S Ct 605, 126 L Ed 2d 570, 1993 US LEXIS 7678.*

The reason that the prior inconsistent statement of a witness may be received into evidence (*Ev C § 1235*) is that the declarant is present in court and subject to cross-examination. The witness who has told one story aforesaid and another at trial has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the witness's change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. Evidence of a prior inconsistent statement, when the declarant is on the stand to explain it if he or she can, has in high degree the safeguards of examined testimony. *People v. Zapfen (1993) 4 Cal 4th 929, 17 Cal Rptr 2d 122, 846 P2d 704, 1993 Cal LEXIS 756, rehearing denied (1993, Cal) 1993 Cal LEXIS 2443, cert den (1993) 510 US 919, 114 S Ct 315, 126 L Ed 2d 262, 1993 US LEXIS 6422.*

2. Constitutionality

The admissibility of earlier statements made by a witness presently on the stand is not constitutionally limited to impeachment; such statements may be considered for their own truth, if permitted under state rules of evidence such as are embodied in *Ev C § 1235*. *People v. Woodberry (1970, Cal App 2d Dist) 10 Cal App 3d 695, 89 Cal Rptr 330, 1970 Cal App LEXIS 1881.*

The admission of a witness' prior inconsistent statement to establish the truth of the matters asserted therein does not violate the confrontation clause of the Sixth Amendment provided that the statement was made by the declarant in testifying as a witness at the preliminary hearing, or that the declarant testifies as a witness at the trial, regardless of the circumstances in which the prior statement was made. *People v. Green* (1971) 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, 1971 Cal LEXIS 387, cert. dismissed (1971) 404 US 801, 92 S Ct 20, 30 L Ed 2d 34, 1971 US LEXIS 1466.

In a nonjury trial for furnishing marijuana to a minor, in which the minor's extrajudicial statement to a police officer was specifically admitted to prove the truth of the incriminating matters asserted therein and which, in conjunction with another statement of the minor at the preliminary hearing, constituted a substantial proportion of the people's evidence against defendant, the admission of the statement to the officer did not violate defendant's right of confrontation under the Sixth Amendment, where, testifying under oath at the trial, the minor grudgingly conceded having made the factual assertions to the officer, where defense counsel had the opportunity to cross-examine the minor at trial but in effect declined to do so when the minor gave testimony that was exculpatory in effect and inconsistent with his prior statement, and where the minor's demeanor as a witness was closely observed and carefully weighed by the trial court as trier of fact. *People v. Green* (1971) 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, 1971 Cal LEXIS 387, cert. dismissed (1971) 404 US 801, 92 S Ct 20, 30 L Ed 2d 34, 1971 US LEXIS 1466.

Ev C §§ 770, 1235, relating to admissibility of a witness' extrajudicial statement, amply preserve the right to confrontation guaranteed by the Sixth Amendment. *People v. Strickland* (1974) 11 Cal 3d 946, 114 Cal Rptr 632, 523 P2d 672, 1974 Cal LEXIS 343.

Ev C § 1235, providing that evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing, does not deny a defendant his right under the Sixth Amendment to be confronted with the witnesses against him. *People v. Browning* (1975, Cal App 2d Dist) 45 Cal App 3d 125, 119 Cal Rptr 420, 1975 Cal App LEXIS 1672, overruled *People v. Williams* (1976) 16 Cal 3d 663, 128 Cal Rptr 888, 547 P2d 1000, 1976 Cal LEXIS 247.

The right of a defendant to confront a witness as guaranteed by the federal Constitution and by *Cal Const Art I, § 15*, does not require that a witness be available for cross-examination at the time extrinsic evidence of a witness' prior inconsistent statement is introduced. The right to confront the witness and inquire about the making of the prior statements before extrinsic evidence of such statements is introduced satisfies the confrontation requirement. Thus, in a prosecution for robbery, the trial court's admission into evidence of extrinsic evidence of an excused witness' out-of-court tape-recorded statements to prove their truth pursuant to *Ev C* § 1235, the prior inconsistent statement exception to the hearsay rule, did not violate defendant's state and federal constitutional right of witness confrontation, where the witness was before the trier of fact when she was questioned about her prior statements. *People v. Morgan* (1978, Cal App 2d Dist) 87 Cal App 3d 59, 150 Cal Rptr 712, 1978 Cal App LEXIS 2158, overruled *People v. Kimble* (1988) 44 Cal 3d 480, 244 Cal Rptr 148, 749 P2d 803, 1988 Cal LEXIS 34, overruled *People v. Kane* (1984, Cal App 2d Dist) 150 Cal App 3d 523, 198 Cal Rptr 73, 1984 Cal App LEXIS 1477.

In a rape prosecution, defendant's right under *Cal Const Art I, § 15*, to be confronted with the witnesses against him, was not violated by the admission in evidence of testimony of police officers regarding an extrajudicial confession by defendant's brother, who testified as a defense witness, where the officers testified as witnesses against defendant at trial and in so doing were subjected to full cross-examination concerning the brother's prior extrajudicial statements. The testimony was admissible under *Ev C* § 1235, as evidence of the brother's prior inconsistent statements; corroboration of such testimony is not necessary. *People v. Jones* (1980, Cal App 2d Dist) 105 Cal App 3d 572, 164 Cal Rptr 605, 1980 Cal App LEXIS 1808.

In a prosecution for arson, the trial court correctly found that extrajudicial hearsay statements of a witness who had made the statement to the police, who reduced it to writing and had him sign it, and who subsequently received a serious head injury causing amnesia, were inadmissible as prior inconsistent statements under *Ev C* § 1235, where there had been no prior opportunity for confrontation and where the witness' testimony was to the effect that he did not

remember any of the events referred to in his statements which incriminated defendant, or making the statements, or the circumstances surrounding their preparation. *People v. Simmons* (1981, Cal App 4th Dist) 123 Cal App 3d 677, 177 Cal Rptr 17, 1981 Cal App LEXIS 2149.

Read together, *Ev C § 1235* (exception to hearsay rule for witness's prior inconsistent statement), and *Ev C § 1201* (admissibility of multiple hearsay if each level of evidence meets requirements of exception to hearsay rule), permit admission of multiple hearsay where each level constitutes a prior inconsistent statement. *People v. Zapien* (1993) 4 Cal 4th 929, 17 Cal Rptr 2d 122, 846 P2d 704, 1993 Cal LEXIS 756, rehearing denied (1993, Cal) 1993 Cal LEXIS 2443, cert den (1993) 510 US 919, 114 S Ct 315, 126 L Ed 2d 262, 1993 US LEXIS 6422.

Ev C § 1235, does not violate a defendant's constitutional witness-confrontation rights by permitting the admission of prior inconsistent statements as substantive evidence. *People v. Brown* (1995, Cal App 4th Dist) 35 Cal App 4th 1585, 42 Cal Rptr 2d 155, 1995 Cal App LEXIS 567, review denied (1995, Cal) 1995 Cal LEXIS 6112.

The receipt in evidence of a prior inconsistent statement does not violate the confrontation clauses of the federal and state Constitutions where the declarant testifies at trial and is subject to cross-examination. *People v. Williams* (1997) 16 Cal 4th 153, 66 Cal Rptr 2d 123, 940 P2d 710, 1997 Cal LEXIS 4410, modified (1997) 16 Cal 4th 990b, 1997 Cal LEXIS 5885, cert den (1998) 522 US 1150, 118 S Ct 1169, 140 L Ed 2d 179, 1998 US LEXIS 1530.

3. Application

A litigant does not misuse *Ev C § 1235*, relating to admissibility of a witness' prior inconsistent statements by intentionally bringing in the declarant for the purpose of eliciting a predictably false version of the facts; rather he is utilizing the statute for the very purpose it is designed to fulfill, that of opening the door to a second witness with a conceivably reliable indicator of the actual events. *People v. Freeman* (1971, Cal App 3d Dist) 20 Cal App 3d 488, 97 Cal Rptr 717, 1971 Cal App LEXIS 1193.

In a prosecution for murder, the trial court did not err in admitting the testimony of a police officer concerning a statement defendant had made to him which tended to contradict defendant's testimony at trial, over defendant's contention that admission of the statement violated *Ev C § 770*, barring extrinsic evidence of inconsistent statements unless the witness was so examined as to give him an opportunity to explain or deny the statement, where, on cross-examination, defendant had professed no discussion with the officer concerning the matter to which the latter had testified. *People v. Aeschlimann* (1972, Cal App 2d Dist) 28 Cal App 3d 460, 104 Cal Rptr 689, 1972 Cal App LEXIS 772.

In a prosecution for robbery, defendant satisfied the foundation requirements of *Ev C § 770(a)* (providing that extrinsic evidence of a statement by a witness that is inconsistent with any part of his testimony shall be excluded unless the witness was so examined while testifying as to give him an opportunity to explain or deny the statement) so as to make admissible under *Ev C § 1235*, the prior inconsistent statement exception to the hearsay rule, a tape-recorded conversation between a witness and the police. The record indicated the witness testified on direction examination by the prosecutor concerning a conversation that she had had in the prosecutor's office prior to the tape recording of her conversation with the police. The prosecutor questioned her in detail about the first conversation, and the witness admitted that the tape-recorded conversation was essentially the same as the prior conversation in the prosecutor's office, giving her the opportunity to explain or deny making the tape-recorded statements. *People v. Morgan* (1978, Cal App 2d Dist) 87 Cal App 3d 59, 150 Cal Rptr 712, 1978 Cal App LEXIS 2158, overruled *People v. Kimble* (1988) 44 Cal 3d 480, 244 Cal Rptr 148, 749 P2d 803, 1988 Cal LEXIS 34, overruled *People v. Kane* (1984, Cal App 2d Dist) 150 Cal App 3d 523, 198 Cal Rptr 73, 1984 Cal App LEXIS 1477.

The hearsay exception set forth in *Ev C § 1235*, admitting into evidence prior inconsistent statements of a witness, does not make admissible any prior statements of a witness that are not inconsistent with the witness' testimony, even though such noninconsistent statements are made at the same time and as a part of the same conversation in which the

inconsistent statements are made. *People v. Morgan* (1978, Cal App 2d Dist) 87 Cal App 3d 59, 150 Cal Rptr 712, 1978 Cal App LEXIS 2158, overruled *People v. Kimble* (1988) 44 Cal 3d 480, 244 Cal Rptr 148, 749 P2d 803, 1988 Cal LEXIS 34, overruled *People v. Kane* (1984, Cal App 2d Dist) 150 Cal App 3d 523, 198 Cal Rptr 73, 1984 Cal App LEXIS 1477.

Witness's prior statement indicating that an obstruction at an intersection was more problematic in his car that sat low to the ground was properly admitted at a trial to determine the private property owners' negligence where the witness's testimony at trial was inconsistent with the prior statement. *Carson v. Facilities Development Co.* (1984) 36 Cal 3d 830, 206 Cal Rptr 136, 686 P2d 656, 1984 Cal LEXIS 216.

A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in that statement under the conditions set forth in *Ev C § 1235* (hearsay exception), and *Ev C § 770* (admissibility of inconsistent statements). The fundamental requirement of *Ev C § 1235*, is that the statement be inconsistent with the witness's trial testimony. Normally, testimony that a witness does not remember an event is not inconsistent with that witness's prior statement describing the event. However, courts do not apply this rule mechanically. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement, and the same principle governs the case of the forgetful witness. When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. *People v. Johnson* (1992) 3 Cal 4th 1183, 14 Cal Rptr 2d 702, 842 P2d 1, 1992 Cal LEXIS 5693, rehearing denied (1993, Cal) 1993 Cal LEXIS 221, cert den (1993) 510 US 836, 114 S Ct 114, 126 L Ed 2d 80, 1993 US LEXIS 5261.

In a capital murder prosecution, the trial court did not err when it admitted testimony by witnesses that provided the foundation for admission of evidence that defendant had, from jail, arranged for an associate to shoot 45 to 50 bullets into the house of a major prosecution witness. The shooter denied his involvement when he testified at defendant's trial, but a member of defendant's gang testified that the shooter had previously told him that defendant had directed the shooter to "take care of" the witness. Hence, the shooter's out-of-court statements to the gang member were properly admitted as prior inconsistent statements (*Ev C § 1235*). Likewise, the shooter's prior testimony in a juvenile adjudication that he had visited defendant at the county jail was properly admitted as a prior inconsistent statement to his testimony at defendant's trial denying that his previous testimony was correct. In light of the evidence showing that defendant authorized the shooting, the trial court properly admitted evidence of the shooting on the theory that evidence of attempts to suppress evidence are relevant to show consciousness of guilt. *People v. Williams* (1997) 16 Cal 4th 153, 66 Cal Rptr 2d 123, 940 P2d 710, 1997 Cal LEXIS 4410, modified (1997) 16 Cal 4th 990b, 1997 Cal LEXIS 5885, cert den (1998) 522 US 1150, 118 S Ct 1169, 140 L Ed 2d 179, 1998 US LEXIS 1530.

In a capital homicide prosecution, the trial court, in refusing to permit defendant to cross-examine a prosecution witness regarding whether, in criminal proceedings unrelated to defendant's case, the witness had bribed judges, lacked an adequate basis for excluding the evidence under *Ev C § 352* (probative value substantially outweighed by undue time consumption). The witness had previously freely admitted under oath in other judicial proceedings to two acts of judicial bribery, even stating that he was "not ashamed to admit it." Thus, it was unlikely that he would have denied the bribes under cross-examination in this case; had he done so, defendant could have introduced the witness's prior testimony admitting the bribes under the hearsay exception for prior inconsistent statements (*Ev C § 1235*). Neither course would have consumed a significant amount of time. *People v. Quartermain* (1997) 16 Cal 4th 600, 66 Cal Rptr 2d 609, 941 P2d 788, 1997 Cal LEXIS 4974, modified (1997) 16 Cal 4th 990b, 1997 Cal LEXIS 5885.

In a prosecution for a gang-related drive-by murder in which one of the witnesses answered "I don't remember" to virtually all questions, the witness's deliberately evasive forgetfulness was an implied denial of prior statements which created an inconsistency in effect and authorized the admission of her prior statements under *Ev C § 1235*. A witness's prior statements are admissible so long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" responses are evasive and untruthful. *People v. Perez* (2000, Cal App 2d Dist) 82 Cal App 4th 760, 98

Cal Rptr 2d 522, 2000 Cal App LEXIS 600, review denied (2000, Cal) 2000 Cal LEXIS 8746.

Trial court erred in granting summary judgment against an employee in her wrongful discharge in violation of public policy claim without considering relevant evidence that one of the employer's supervisors remarked that she desired to seek revenge on plaintiff and the others that participated in a sexual harassment investigation of the supervisor; the evidence was admissible as a prior inconsistent statement since it conflicted with her deposition testimony. *Colarossi v. Coty US Inc. (2002, Cal App 4th Dist) 97 Cal App 4th 1142, 119 Cal Rptr 2d 131, 2002 Cal App LEXIS 4016.*

In a murder case, inconsistency was implied when a witness' claim of lack of memory amounted to deliberate evasion; hence, prior statements made by the witness were admissible. *People v. Sapp (2003) 31 Cal 4th 240, 2 Cal Rptr 3d 554, 73 P3d 433, 2003 Cal LEXIS 5370, cert den Sapp v. California (2004) 541 U.S. 1011, 124 S. Ct. 2067, 158 L. Ed. 2d 622, 2004 U.S. LEXIS 3095, 72 U.S.L.W. 3672.*

In a murder case, the trial court erred, although it was harmless error, by permitting the jury to hear a recording of a nontestifying accomplice's statement to the police after the accomplice's preliminary hearing testimony was admitted into evidence; under *Ev C § 1235*, a prior inconsistent statement was not admissible unless, pursuant to *Ev C § 770*, the witness testified and was given an opportunity to explain or deny the statement or was not excused from giving further testimony; *Ev C § 1238* required that a witness testify at trial before a statement of prior identification could be admitted; and the recording did not fall within the hearsay exception of *Ev C § 1294* for a statement previously introduced at a hearing or trial as a prior inconsistent statement. *People v. Martinez (2003, Cal App 4th Dist) 113 Cal App 4th 400, 7 Cal Rptr 3d 49, 2003 Cal App LEXIS 1701, review denied (2004, Cal) 2004 Cal LEXIS 1264.*

Petitioner was entitled to habeas relief on his claim that trial counsel at his murder trial was ineffective for failing to adequately present an alibi defense, namely that petitioner had been at a theme park seeking freelance photography work when a prosecution witness stated he was at the beach with the murder victim. Counsel presented four theme park employees who established only that petitioner had visited their office on some afternoon, and failed to present the one employee who saw the inmate at the office at the same time he was supposed to be at the beach. Fact that the employee later told police that she may have seen petitioner earlier in the day did not change the result, as her prior statement would have been admissible under *Ev C § 1235*. *Alcala v. Woodford (2003, 9th Cir Cal) 334 F3d 862, 2003 US App LEXIS 13039.*

Defendant was retried for murder after his first appeal reversed the conviction. Defendant contended that the supreme court's analysis of whether defendant should have been given Miranda warnings affected the detectives' testimony in the second trial, but the proper remedy was effective cross-examination and impeachment, if defendant believed the detectives had changed their testimony. *People v. Holloway (2004) 33 Cal 4th 96, 14 Cal Rptr 3d 212, 91 P3d 164, 2004 Cal LEXIS 5504, rehearing denied People v. Holloway (2004) 2004 Cal. LEXIS 8369, transferred People v. Holloway (Duane) (2004, Cal) 2004 Cal LEXIS 8616, cert den Holloway v. California (2005) 543 U.S. 1156, 125 S. Ct. 1302, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1597, 73 U.S.L.W. 3495.*

Statements and gestures that defendant made during a polygraph exam were properly received by the jury where defendant himself referred to the "lie detector test" in what the court termed a classic example of blurted-out testimony. The trial court reasonably concluded that the prosecution could use the polygraph to impeach defendant's testimony that the confession was coerced and that the detective prompted him to use a hand gesture indicating how far his penis had penetrated the child-sexual-assault victim. *People v. Vonner (2004, Cal App 2d Dist) 121 Cal App 4th 801, 17 Cal Rptr 3d 460, 2004 Cal App LEXIS 1334, dismissed (2005) 34 Cal. Rptr. 3d 191, 119 P.3d 956, 2005 Cal. LEXIS 9983, 2005 D.A.R. 11141.*

Trial court did not err in permitting the prosecution to impeach a witness with her former testimony. Although the testimony of a witness that he or she does not remember an event is normally not inconsistent with that witness's prior statement describing the event, the trial court had the opportunity to view the witness's demeanor and therefore was in

the best position to assess the credibility of her claimed nonrecollection; moreover, no medical evidence was presented to the trial court to support defendant's claim that short-term memory loss was a known side effect of a medication the witness was taking for depression. *People v. Coffman and Marlow* (2004) 34 Cal 4th 1, 17 Cal Rptr 3d 710, 96 P3d 30, 2004 Cal LEXIS 7590, rehearing denied (2004, Cal) 2004 Cal LEXIS 10274, cert den *Coffman v. California* (2005) 544 U.S. 1063, 125 S. Ct. 2517, 161 L. Ed. 2d 1114, 2005 U.S. LEXIS 4406, 73 U.S.L.W. 3693, cert den *Marlow v. California* (2005) 544 U.S. 1063, 125 S. Ct. 2517, 161 L. Ed. 2d 1114, 2005 U.S. LEXIS 4407, 73 U.S.L.W. 3693.

At trial for injury to a spouse under *Pen C* § 273.5(a), defendant's wife's admission that she made a false report to the police placed her credibility in issue and was improperly excluded; the wife's words remained as her "statement" to which *Ev C* § 1202 applied and the statement was thus admissible under § 1202; the record showed that the trial court excluded the statement because it had been stricken from the preliminary hearing, not under the standard of *Ev C* § 352, there was no basis for excluding the statement because it was untrustworthy; the error required reversal of defendant's conviction of corporal injury to a spouse under *Pen C* § 273.5(a) because it resulted in the jury hearing only half of the critical evidence. *People v. Corella* (2004, Cal App 2d Dist) 122 Cal App 4th 461, 18 Cal Rptr 3d 770, 2004 Cal App LEXIS 1552.

Petition for habeas corpus relief was denied, where the refusal of a child witness to testify at trial and petitioner's absence from the courtroom during an unremarkable supplemental instructing of the jury did not violate petitioner's Sixth Amendment rights or constitute other than harmless error. The child witness' incriminating testimony from a preliminary hearing (at which she had been cross-examined) was admitted without objection, and would have been admissible as a prior inconsistent statement and the witness appeared and recanted her prior testimony under *Ev C* § 1235; thus any error was harmless. *Anaya v. Huskey* (2005, ND Cal) 2005 US Dist LEXIS 6104.

In a capital murder case, the trial court did not abuse its discretion by admitting a prosecution witness's prior inconsistent statement to a police detective. The witness's prior statement that he saw defendant put a gun to a woman's head while she was being raped was inconsistent with his trial testimony that he did not see defendant there. *People v. Avila* (2006) 38 Cal 4th 491, 43 Cal Rptr 3d 1, 133 P3d 1076, 2006 Cal LEXIS 5867, cert den *Avila v. California* (2007) 2007 U.S. LEXIS 3605, 75 U.S.L.W. 3511.

Photograph of a murder scene was properly admitted, where the investigating officer testified that in the photograph he was standing where two witnesses had told him the gunman was standing, no matter the witnesses' lack of memory at trial nor that their testimony contradicted the officer's testimony. *People v. Gonzalez* (2006) 38 Cal 4th 932, 44 Cal Rptr 3d 237, 135 P3d 649, 2006 Cal LEXIS 6676, rehearing denied *People v. Gonzalez (Jose)* (2006) 2006 Cal. LEXIS 10117, 2006 D.A.R. 11228, cert den *Gonzalez v. California* (2007) 127 S. Ct. 996, 166 L. Ed. 2d 752, 2007 U.S. LEXIS 445, 75 U.S.L.W. 3352.

Prior inconsistent statement was admissible under *Ev C* §§ 1235, 770, even though the trial court failed to make a factual finding that the testimony was inconsistent with a prior statement because under *Ev C* § 402(c), a ruling on the admissibility of evidence implied whatever finding of fact was prerequisite. Furthermore, the witness's insistence that he never told anyone that defendant had admitted being involved in a robbery was plainly inconsistent with his prior statements to an officer. *People v. Ledesma* (2006) 39 Cal 4th 641, 47 Cal Rptr 3d 326, 140 P3d 657, 2006 Cal LEXIS 9521, rehearing denied *People v. Ledesma (Fermin R.)* (2006) 2006 Cal. LEXIS 13100, 2006 D.A.R. 14245, cert den *Ledesma v. California* (2007) 2007 U.S. LEXIS 3834.

Although a witness consistently denied at trial being able to remember her prior statements, the record provided a reasonable basis to conclude she was being evasive. Therefore, her prior statements were properly admitted under *Ev C* §§ 1235, 770. *People v. Ledesma* (2006) 39 Cal 4th 641, 47 Cal Rptr 3d 326, 140 P3d 657, 2006 Cal LEXIS 9521, rehearing denied *People v. Ledesma (Fermin R.)* (2006) 2006 Cal. LEXIS 13100, 2006 D.A.R. 14245, cert den *Ledesma v. California* (2007) 2007 U.S. LEXIS 3834.

In the penalty phase of a capital murder trial, the trial court erred in excluding evidence that a witness who claimed

to have been attacked by defendant told her son that she did not recognize her attacker; the son's testimony was admissible as a prior inconsistent statement under *Ev C § 1235* because the witness's testimony at trial identifying defendant as her attacker was inconsistent with the proffered testimony. The error in excluding the evidence was harmless, however, because the witness was impeached on cross-examination. *People v. Guerra* (2006) 37 Cal 4th 1067, 40 Cal Rptr 3d 118, 129 P3d 321, 2006 Cal LEXIS 2872, rehearing denied *People v. Guerra (Jose F.)* (2006) 2006 Cal. LEXIS 6325, 2006 D.A.R. 6385, cert den *Guerra v. California* (2007) 127 S. Ct. 1149, 166 L. Ed. 2d 998, 2007 U.S. LEXIS 1210, 75 U.S.L.W. 3384.

Counsel was not rendered ineffective by failing to object to the admission of the prior extrajudicial statement of a forgetful witness because the record supported an implicit finding that the witness's forgetfulness was feigned. The witness, who had been a friend of the defendant for decades, could not recall the defendant's self-inflicted shooting injury from dropping a gun in close proximity to the witness. *People v. Gunder* (2007, Cal App 3d Dist) 151 Cal App 4th 412, 59 Cal Rptr 3d 817, 2007 Cal App LEXIS 846, review denied *People v. Gunder (Darrin Eric)* (2007, Cal) 2007 Cal LEXIS 8812.

In a case in which a prisoner sought habeas relief after being convicted of two counts of first-degree murder and of conspiracy to commit murder to collect life insurance proceeds, with special circumstances, a coconspirator's comment, warning another individual that he should forget a conversation he had heard relating to the two murders, was admissible under the coconspirator exception to the hearsay rule because it was an attempt to shield the conspiracy from discovery. The coconspirator's other comments, overheard by the individual, that the prisoner had not shown up for something he was supposed to do, that the coconspirator went in his place, that the prisoner "was too chicken shit to go along," and that the coconspirator "needed his part of the money to get the drugs that he wanted and needed" required a different analysis because they did not appear to have been uttered in furtherance of the conspiracy; rather, they were admissible because they recounted the coconspirator's prior inconsistent statements. *In re Hardy* (2007) 41 Cal 4th 977, 63 Cal Rptr 3d 845, 163 P3d 853, 2007 Cal LEXIS 7881.

Material favorable to defendant that was undisclosed in the penalty phase of a capital murder trial would have been admissible at trial under *Ev C § 1200* and *Ev C § 1235* because the material was prior inconsistent statements of the state's star witness, who would have had the opportunity to explain or deny the prior inconsistent statements, as required by *Ev C § 770*. *In re Miranda* (2008, Cal) 43 Cal 4th 541, 76 Cal Rptr 3d 172, 2008 Cal LEXIS 4819.

Inmate did not receive ineffective assistance of counsel because the victim's statements were properly admitted under *Ev C § 1235* where the victim testified at the preliminary hearing and had the opportunity to explain or deny the testimony from other witnesses about her prior inconsistent statements. Trial counsel's decision to allow witnesses to testify to the victim's prior inconsistent statements on the stand, in lieu of having the statements admitted in the form of the preliminary hearing transcript, was not an objectively unreasonable trial strategy. *Delgadillo v. Woodford* (2008, CA9 Cal) 2008 US App LEXIS 11765.

Trial court did violate defendant's rights to a fair jury trial and to due process by giving two instructions on witness credibility because, as to *CALJIC No. 2.13*, the instruction in no way directed the jury to accept prior statements as the truth, but merely covered the hearsay exceptions provided in *Ev C § 1235* and *Ev C § 1236* in a neutral fashion; as to *CALJIC No. 2.24*, defense counsel had specifically requested the instruction, and in any event defendant underestimated the common sense of jurors by faulting the instruction for not referring to a witness's character for dishonesty or untruthfulness. *People v. Harris* (2008, Cal) 43 Cal 4th 1269, 78 Cal Rptr 3d 295, 185 P 3d 727, 2008 Cal LEXIS 7331, rehearing denied *People v. Harris Lanell (Craig)* (2008, Cal.) 2008 Cal. LEXIS 9411, cert den *Harris v. California* (2009, U.S.) 129 S. Ct. 922, 173 L. Ed. 2d 130, 2009 U.S. LEXIS 1.

In a capital murder case, defendant's theory at trial was that a particular individual was involved in the victim's murder. Although defendant argued that the trial court erred in admitting as a prior inconsistent statement this individual's statement that he spent the night of the murder as his parents' house, any error was harmless given the powerful evidence of defendant's guilt. *People v. Curl* (2009, Cal) 46 Cal 4th 339, 93 Cal Rptr 3d 537, 207 P 3d 2,

2009 Cal LEXIS 4364, rehearing denied *People v. Curl (Robert Zane)* (2009, Cal.) 2009 Cal. LEXIS 7266.

There was no merit to defendant's claim that a trial court erred by permitting the prosecutor to enhance the credibility of a prosecution witness through the admission of the witness's prior consistent statements because even if the witness's out-of-court statements were not admissible because they were not made before the bias, motive for fabrication, or other improper motive was alleged to have arisen, as required by *Ev C § 791(b)*, if defendant had interposed hearsay objections to the introduction of the prior statements, the prosecutor might have been able to demonstrate that at least the first two statements were admissible as examples of prior identification pursuant to *Ev C § 1238*. Moreover, the prosecutor also might have been able to secure the admission of all three of the statements on the ground that the witness had been forgetful and evasive during his testimony, rendering prior statements admissible for their truth as prior recorded recollections pursuant to *Ev C §§ 1235 and 770*. *People v. Dykes* (2009, Cal) 2009 Cal LEXIS 5195.

Trial court did not abuse its discretion during the penalty phase of defendant's capital murder trial in admitting a child witness's statement to a police officer where a reasonable inference arising from the child witness's testimony was that defendant did not mistreat the children, but his statement to the officer tended to contradict or disprove that broad assertion by showing that defendant had mistreated one of the children on at least one occasion. Moreover, because the child witness could have been recalled and cross-examined about his statement to the officer, the admission of the hearsay statement did not violate defendant's Sixth Amendment right to confront and cross-examine witnesses. *People v. Cowan* (2010, Cal) 2010 Cal LEXIS 7545.

Although defendant argued that the statement of his former girlfriend's mother to a police officer was inadmissible hearsay because it was not inconsistent with her trial testimony, and that its admission into evidence violated state hearsay rules, there was no abuse of discretion because the trial court properly found that the statement was inconsistent with the mother's trial testimony in two ways: (1) it was inconsistent regarding to whom defendant purportedly spoke about killing an elderly couple; and (2) it was inconsistent as to what defendant purportedly said. The trial court reasonably could have concluded that the mother was being deliberately evasive when she twice answered questions about what defendant had purportedly said about "murdering anybody" or harming an elderly couple in a nonresponsive manner, and, under the circumstances, her nonresponsive answers could be deemed an implied denial that defendant had admitted killing an elderly couple. *People v. Cowan* (2010, Cal) 2010 Cal LEXIS 7545.

4. Construction

In a criminal case in which a witness had an apparent lapse of memory as to incriminating statements that, according to what other witnesses claimed he had told them, defendant had made to him before the trial, the witness' extrajudicial statements to the other witnesses were admissible under the "inconsistent statement" exception to the hearsay rule (*Ev C § 1235*), where his testimony was so evasive and equivocal that the trial court was justified in doubting the genuineness of his lapse of memory and in deeming his testimony to amount to an implied denial that defendant had ever made the incriminating statements to him. *People v. Petersen* (1972, Cal App 1st Dist) 23 Cal App 3d 883, 100 Cal Rptr 590, 1972 Cal App LEXIS 1262.

In a criminal prosecution, testimony of the prosecution's chief witness at the preliminary hearing and a former trial was not admissible under *Ev C § 1235*, providing prior testimony is admissible if "the statement is inconsistent with his testimony at the hearing," where the witness refused to testify at all out of fear for his life and the safety of his family, and thus the witness did not testify at the "hearing," that is, the trial, at which the question of admissibility of testimony arose. *People v. Rojas* (1975) 15 Cal 3d 540, 125 Cal Rptr 357, 542 P2d 229, 1975 Cal LEXIS 251, 92 ALR3d 1127.

Where a witness recalls part, but not all, of a given event or statement, the proponent of the prior inconsistent statement must be given an opportunity to test the witness' memory so that the trial judge can determine whether the statement is, in fact, inconsistent with his testimony; in making this determination, the trial judge must base his determination on the credibility of the witness, the tenor of his testimony, and the likelihood that he does, in fact, recall

the nature of his earlier statement; in a criminal case, this type of foundation ensures that the statement is admissible under *Ev C § 1235* and affords the defendant an adequate opportunity to explore the difference between the witness' current testimony and his prior statement. *People v. Loyd* (1977, *Cal App Dep't Super Ct*) 71 *Cal App 3d Supp 1*, 139 *Cal Rptr 693*, 1977 *Cal App LEXIS 1680*.

The rule that a witness' deliberately evasive "I don't remember" response constitutes an implied denial of a fact asserted by him in a prior statement, thus rendering the prior statement admissible under *Ev C § 1235*, is not limited to cases in which the witness either admits or denies making the statement or suffers selective forgetfulness at the trial or hearing, testifying as to at least some of the events surrounding a crime, while forgetting others. A witness' prior statements are admissible so long as there is a reasonable basis in the record for concluding that his "I don't remember" responses are evasive and untruthful. *People v. O'Quinn* (1980, *Cal App 2d Dist*) 109 *Cal App 3d 219*, 167 *Cal Rptr 141*, 1980 *Cal App LEXIS 2155*, cert den *Henderson v. California* (1981) 450 *US 928*, 101 *S Ct 1384*, 67 *L Ed 2d 359*, 1981 *US LEXIS 956*.

Ev C § 1235, by its express terms, requires a witness to give testimony from which an inconsistency, express or implied, may be determined, and where a witness gives no testimony, there is no evidence to support a finding of inconsistency and § 1235 does not apply. Thus, in a murder prosecution, where two witnesses gave damaging testimony to an investigating police officer before trial but refused to answer any questions during trial, the trial court improperly admitted the prior statements made by them, since there were no statements in the trial record from which to infer or deduce implied inconsistency for purposes of § 1235. *People v. Rios* (1985, *Cal App 4th Dist*) 163 *Cal App 3d 852*, 210 *Cal Rptr 271*, 1985 *Cal App LEXIS 1542*.

In an action against an automobile manufacturer, arising from injuries allegedly due to the defective design of the back of an automobile's front seat, the trial court did not err in refusing to admit in their entirety several papers coauthored by defendant's expert as to various safety aspects of seat back designs. The papers were not admissible as prior inconsistent statements, since *Ev C § 1235* (evidence of statement made by witness is not made inadmissible by hearsay rule if statement is inconsistent with witness's testimony), does not permit the wholesale admission into evidence of entire works in which a statement appears. The hearsay exception set forth in 1235 does not make admissible any prior statements of a witness that are not inconsistent with the witness' testimony, even though the statements that are not inconsistent were made at the same time and as a part of the same conversation in which the inconsistent statements were made. *Benson v. Honda Motor Co.* (1994, *Cal App 2d Dist*) 26 *Cal App 4th 1337*, 32 *Cal Rptr 2d 322*, 1994 *Cal App LEXIS 757*.

The language of *Ev C § 1236* (prior consistent statement), is virtually identical to *Ev C § 1235* (prior inconsistent statement). In fact, the provisions were enacted as part of the same legislative bill in 1965, and both became effective on Jan. 1, 1967. Thus, under ordinary rules of statutory construction, *Ev C § 1236*, should be interpreted consistently with *Ev C § 1235*. *People v. Hitchings* (1997, *Cal App 1st Dist*) 59 *Cal App 4th 915*, 69 *Cal Rptr 2d 484*, 1997 *Cal App LEXIS 991*, rehearing denied (1997, *Cal App 1st Dist*) 60 *Cal App 4th 792*, 1997 *Cal App LEXIS 1107*, review denied (1998, *Cal*) 1998 *Cal LEXIS 1702*.

5. Substantive Evidence

Ev C § 1235, provides in effect that a prior inconsistent statement of a witness is admissible not only to impeach his credibility but also to prove the truth of the matters asserted therein. *People v. Green* (1971) 3 *Cal 3d 981*, 92 *Cal Rptr 494*, 479 *P2d 998*, 1971 *Cal LEXIS 387*, cert. dismissed (1971) 404 *US 801*, 92 *S Ct 20*, 30 *L Ed 2d 34*, 1971 *US LEXIS 1466*.

In a prosecution for furnishing marijuana to a minor, in which prior extrajudicial statements of the minor were specifically admitted to prove the truth of the matters asserted therein and constituted a substantial proportion of the people's evidence against defendant, such statements were properly admitted for that purpose under *Ev C § 1235*, where their inconsistency with the minor's trial testimony appeared from the fact that, whereas both prior statements indicated

that defendant had supplied him with the contraband, his deliberately evasive and inherently incredible trial testimony only two months later implied that defendant had not done so. *People v. Green* (1971) 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, 1971 Cal LEXIS 387, cert. dismissed (1971) 404 US 801, 92 S Ct 20, 30 L Ed 2d 34, 1971 US LEXIS 1466.

A police officer's testimony as to allegedly prior inconsistent statements, concerning identification of defendant, made by certain witnesses, was admissible for the truth of its contents, pursuant to *Ev C § 1235*, relating to hearsay evidence, where all of such witnesses were present in court and available for cross-examination. *People v. Williams* (1973) 9 Cal 3d 24, 106 Cal Rptr 622, 506 P2d 998, 1973 Cal LEXIS 173, overruled in part *People v. Cromer* (2001) 24 Cal 4th 889, 103 Cal Rptr 2d 23, 15 P3d 243, 2001 Cal LEXIS 26.

Ev C §§ 770, 1235, relating to admissibility of a witness' extrajudicial statement, in effect, permit a prior inconsistent statement of a witness to be admitted not only to impeach his credibility, but also to prove the truth of the matters therein asserted. *People v. Strickland* (1974) 11 Cal 3d 946, 114 Cal Rptr 632, 523 P2d 672, 1974 Cal LEXIS 343.

Prior inconsistent statements of a witness are admissible as substantive evidence if the requirements of *Ev C § 770*, providing that such testimony shall be excluded unless the witness was examined while testifying as to give him an opportunity to explain or deny the statement or unless the witness has not been excused from giving further testimony in the action, are met. Thus, in a prosecution for murder the inconsistent testimony of a witness from a previous case was properly admitted into evidence and the requirements of § 770 were satisfied, where the witness was examined by the prosecution about the prior inconsistent statement during direct examination, where the witness was not excused but remained available under court order for recall if desired, and where the witness was legally available for cross-examination by defendant and was in fact fully cross-examined by defendant during the guilt phase of the trial to the extent that he then desired. *People v. Manson* (1977, Cal App 2d Dist) 71 Cal App 3d 1, 139 Cal Rptr 275, 1977 Cal App LEXIS 1587, cert den (1978) 435 US 953, 98 S Ct 1582, 55 L Ed 2d 803, 1978 US LEXIS 1378.

In a prosecution for robbery and assault by means of force likely to produce great bodily injury, the trial court properly admitted in evidence a statement made by an accomplice of defendant to the police after the accomplice had been arrested, which statement had been reduced to writing, signed by the accomplice, and witnessed by two officers, where the accomplice testified at the trial that defendant had not participated in and did not know of the robbery and assault but the statement was that defendant had participated. The statement, as a prior inconsistent statement, fell within the exception to the hearsay rule of *Ev C § 1235*, making admissible a statement by a witness that is inconsistent with his testimony at the hearing in which the statement is introduced. Substantial evidence supported the trial court's finding that the accomplice had been advised of and waived his constitutional rights, and, in any event, defendant had no standing to invoke the accomplice's rights. *People v. Brown* (1980, Cal App 2d Dist) 110 Cal App 3d 24, 167 Cal Rptr 557, 1980 Cal App LEXIS 2224.

In a prosecution for second degree murder of a human fetus (*Pen C § 187(a)*), the trial court did not err in admitting the testimony of witnesses to whom the fetus's mother had described defendant's attack on her, even though the mother maintained at trial that, although she had made the previous statements, they were lies, and that the fetus died when she hit her stomach on some boxes during an attack by her on defendant. *Ev C § 1235*, permits inconsistent statements to be used as substantive evidence, so long as, pursuant to *Ev C § 770*, either the declarant is provided an opportunity to explain or deny the statements or he or she is kept available for further testimony, and both of these procedures were followed. The mother's prior statements were clearly "inconsistent" with her trial testimony, and that character did not change simply because she admitted making them. Similarly, the trial court did not abuse its discretion in overruling defendant's objection that the testimony of the multiple witnesses was cumulative (*Ev C § 352*). Whether the mother's prior statements to her mother, friends, doctors, and police were true governed the outcome of the case, and evidence that she had repeated these statements to several persons was a relevant factor for the jury to consider in determining their credibility. *People v. Brown* (1995, Cal App 4th Dist) 35 Cal App 4th 1585, 42 Cal Rptr 2d 155, 1995 Cal App LEXIS 567, review denied (1995, Cal) 1995 Cal LEXIS 6112.

Defendant was convicted by a jury of first degree murder with use of a firearm (*Pen C §§ 187, 12022.5*), attempted premeditated murder (*Pen C §§ 187, 664*) with a firearm and infliction of great bodily injury (*Pen C § 12022.7*), and possession of a firearm by a felon (*Pen C § 12021*). The trial court did not err in admitting recorded testimony of the murder victim's girlfriend made at the preliminary hearing since she was unavailable at trial. The witness did not adopt and reaffirm the substance of her previous statements to police, but rather disavowed most all of them at the preliminary hearing. Therefore, the statements were not admissible for their truth under *Ev C § 1291*. However, the statements were admissible for their truth under recently-enacted *Ev C § 1294*, providing, inter alia, for the admission of transcripts containing the statements of the preliminary hearing or prior proceedings concerning the same criminal matter. This witness' statements were prior inconsistent statements properly admitted at the preliminary hearing under *Ev C § 1235* for their truth, and the transcript of the hearing "contained" those statements. *People v. Haynes* (1999, Cal App 1st Dist) 72 Cal App 4th 337, 85 Cal Rptr 2d 340, 1999 Cal App LEXIS 496, rehearing denied (1999, Cal App 1st Dist) 73 Cal App 4th 41h, 1999 Cal App LEXIS 595, review gr, depublished *Supreme Court Minute 09-01-1999* (1999) 88 Cal Rptr 2d 775, 983 P2d 727, 1999 Cal LEXIS 6101, review dismissed (2001, Cal) 104 Cal Rptr 2d 738, 18 P3d 660, 2001 Cal LEXIS 1310.

Defendant's argument that there was insufficient evidence that, at the time of a victim's shooting, the victim was in possession of any property, or that defendant took any property from him, ignored the substantial evidence from which a reasonable jury could find that the victim's killing occurred during the commission of a robbery where the testimony of defendant's accomplice provided direct evidence that defendant took personal items from the victim before killing him because the accomplice testified that before the shooting defendant told the victim to take off his clothes, which he did, and that after the shooting defendant returned to a truck and threw some things into the back of it, including the victim's clothing and some small items that might have been the victim's wallet or some change. Moreover, the victim's body was found with no shirt or jacket, which further supported the inference that personal items were taken from him, and even if the accomplice's grand jury testimony was inconsistent, because it was admitted for its truth, whether the jury accepted the accomplice's trial testimony exclusively, his grand jury testimony exclusively, or a combination of both, the testimony provided substantial evidence that a robbery took place. *People v. Thompson* (2010, Cal) 2010 Cal LEXIS 4884.

6. Limiting Instruction

The trial court in a criminal prosecution need not instruct the jury sua sponte that a witness' prior inconsistent statements should be viewed with caution. Under *Ev C § 1235*, a cautionary instruction is applicable only when the purpose of the testimony is to introduce a party's oral admission. *People v. Sims* (1976, Cal App 2d Dist) 64 Cal App 3d 544, 134 Cal Rptr 566, 1976 Cal App LEXIS 2097.

In a medical malpractice action arising out of defendant physicians' alleged failure to timely diagnose spinal meningitis in an eight-week old infant, a nurse who was a friend of the family was properly permitted to testify to statements made by the father in a telephone conversation with her over the critical weekend before the infant was hospitalized, during which she asked whether the child had specified symptoms such as abdominal pain and the father stated the symptoms were cold-like. The father's statements to the nurse constituted an admission of a party (*Ev C § 1220*), and were also admissible against him as a statement of a declarant whose liability or breach of duty, by way of alleged contributory negligence, was in issue (*Ev C § 1224*), and as the prior inconsistent statements of a witness (*Ev C § 1235*). Further, such statements by the father in an endeavor to obtain help and advice constituted authorized statements with respect to helping the sick child and were thus admissible against the mother as authorized admissions (*Ev C § 1222*). Even assuming the father's statements were not authorized admissions as to the child, their admissibility as prior inconsistent statements rendered them admissible for all purposes, and no request for a limiting instruction was made. *Dincau v. Tamayose* (1982, Cal App 2d Dist) 131 Cal App 3d 780, 182 Cal Rptr 855, 1982 Cal App LEXIS 1459.

7. Leading Questions

Leading questions asked by the prosecutor in a death penalty case were permissible under *Ev C §§ 764, 767*, subd.

(a)(1), as to prior statements and inconsistencies. Some statements referenced by the prosecutor qualified as prior inconsistent statements under *Ev C* §§ 770, 1235. Others were admissible as prior consistent statements under *Ev C* §§ 791, 1236. *People v. Collins* (2010, Cal) 2010 Cal LEXIS 5032.

SUGGESTED FORMS

Instruction Concerning Inadmissibility of Statements to Establish Truth