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- Rule 609. Impeachment by Evidence of Conviction of Crime
- (a) General rule.
- For the purpose of attacking the character for truthfulness of a witness,
- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to [Rule 403](#), if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.
- (b) Time limit.
- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

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- (c) Effect of pardon, annulment, or certificate of rehabilitation.
- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- (d) Juvenile adjudications.
- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
- (e) Pendency of appeal.
- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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- Summary FRE 609 Impeachment by evidence of prior criminal convictions
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- Not admissible against crim. def. unless:
 - defendant elects to testify, then credibility is impeachable. But,

- Court must weigh probative vs. prejudicial impact. Note, equal weighting, not *substantially outweighed*, as in 403 balancing.

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- As to other witnesses, evid of conviction inadmissible only if judge determines under FRE 403 that unfair prejudicial impact substantially outweighs probative value.

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- As to all testifying witnesses, including criminal defendants, if crime involved dishonesty or false statement, admissible regardless of punishment .
 - Applies to felonies and misdemeanors
 - Majority rule, no 403 applicability

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- As to all other crimes (and as to both criminal defendants and all other witnesses), to be an admissible conviction:

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- Crime must have been punishable by death or more than one year imprisonment (basically a felony only); and

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- Must be less than ten years since later of conviction or release. But,
 - Caution here, as court can admit conviction greater than ten years old if court determines that probative value substantially outweighs prejudicial impact – a reverse 403 balancing; and
 - Proponent must give advance notice of intent to offer conviction older than 10 years.

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- Cannot have been convicted as a juvenile. But,
 - In a criminal case, with regard to a witness other than the criminal defendant, court can admit juvenile conviction if it would be admissible if committed as an adult; and
 - Court determines admission is necessary for fair determination on the issue of guilt or innocence.

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- Conviction admissible even if on appeal, and fact that appeal pending admissible by def.
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- If pardoned, annulled, or cert. of rehab. obtained, not admissible.

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- In Texas, conviction must be for any felony or any crime involving moral turpitude. Similar to FRE otherwise, but if probation successfully completed, inadmissible.

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- What crimes automatically relate to veracity for purposes of FRE 609(a)(2)?
 - “Core” crimes, such as perjury, fraud, embezzlement, forgery, counterfeiting, and false statement or false pretenses. Why?
 - Crimes of pure violence generally do not qualify, such as murder, forcible rape, assault.
 - Crimes of simple moral turpitude generally do not qualify, such as prostitution, drunkenness, DWI, or drug trafficking.
 - Others depend on the circumstances, and the court should hold an in camera hearing to determine whether they apply, such as theft, robbery, failure to file a tax return, etc.

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- Prob. 8-B. Dennet robs a bank. Elmo called by prosecution, to testify that Dennet confessed to him in prison. Dennet elects to testify and asserts alibi. Dennet then calls friend, Farr, to confirm alibi. Dennet, Elmo, and Farr each have a prior conviction for bank robbery, less than 5 years old. Is Dennet's conviction admissible?
- Probably not. Why?
 - Robbery is not closely related to veracity-related crimes, but close enough for further analysis.
 - Dennet is the criminal defendant. Accordingly, the court must decide that the probative value outweighs the unfair prejudicial effect (simple, unweighted scale). Since the prior conviction is the same crime as the one in trial, risk is high that the jury would convict Dennet on the basis of two similar charges. Combining these two factors, 609 militates strongly against admission as to Dennet.
- Is Elmo's conviction admissible? Probably. Why?
 - Prosecution witness, so prosecutor would object to admissibility.
 - Elmo is not the defendant. Accordingly, simple FRE 403 weighing test. Here, the risk of unfair prejudice to the prosecution by admission of Elmo's conviction is extremely low. Accordingly, probably admissible.
- Is Farr's conviction admissible?
 - Defense witness, so defense would object to admissibility.
 - Same issues as to Elmo. However, much more substantial risk of unfair prejudice to the defense if Farr's conviction is admitted. Close call by the court.

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- Prob. 8-C. Dewald charged with embezzlement of union funds (kickbacks from lawyers). Pickett testifies she saw law firm couriers bring envelopes with apparent cash to Dewald, Dewald says were just legal papers and Pickett has vendetta due to failed romantic relationship. To impeach Pickett, defense counsel wants to question about 3 prior convictions. Which are admissible:
 - Misd. Conviction 9 years earlier for displaying false handicap symbol in car, fine \$500?
 - Yes. Necessary element of dishonesty or false statement, fits 609(a)(2).
 - 8 year old felony conviction for obstructing justice, for persuading a witness to leave town rather than honor a grand jury subpoena, by lying to witness that her testimony no longer needed. Served 3 years in prison.
 - Not core crime under 609(a)(2), but felony conviction with more than 1 year punishment, admissible under 609(a)(1), unless excluded by 403.
 - 6 year old misd. for petit theft (shoplifting, after telling clerk she had "put the scarves back")?
 - Inadmissible. Not a "core" dishonesty crime and not punishable by more than 1 year or death.

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- Prob. 8-C (cont.) Same case, Dewald elected to testify. Prosecutor wants to question him about the following. Admissible?
- 8 year old felony conviction for forgery (signed name of another official on travel authorization documents, served 1 year).
 - Yes. Necessary element of dishonesty or false statement, fits 609(a)(2).
- 4 year old felony conviction for obstructing justice, using physical force or threat of physical force to prevent testimony to a grand jury, served 2 years in prison.
 - Perhaps. Not a core crime under 609(a)(2). (Different from Pickett's obstruction conviction because Dewald threatened violence, but did not attempt to deceive the witness.) Does fit 609(a)(1), because punishable by more than 1 year. However, because it is the criminal defendant, court would conduct reverse 403 weighing, i.e., will exclude unless court finds probative value outweighs prejudicial effect.
- 1 year old misdemeanor conviction for petit theft, altered electric meter at his house, paid fine of \$500.
 - Not punishable by more than 1 year, so does not fit 609(a)(1). Not a core crime under 609(a)(2). However, charging instrument may require proof of deceit and, if so, can fit under 609(a)(2).

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- Prob. 8-D. Allen charged with burglary of habitation. Elects to testify at trial. Allen previously convicted of felony tax fraud, imprisoned 1 ½ years. Prosecutor wants to inquire of Allen about specific false entries in tax returns pursuant to FRE 608(b), but does not intend to offer the convictions under FRE 609.
- If the conviction alone is admitted, can prosecutor inquire into the details of the charges?
 - No, only the date and conviction itself are admissible. Thus, good reasons for the prosecutor to desire to admit under 608.
- Can the prosecutor choose whether to inquire under FRE 608 or 609?
 - Probably not, although not completely resolved as yet.
 - Generally, though, when in conflict statutes are construed so as to give effect to both statutes. And generally a specific statute controls over a general statute. Do those rules impact the decision?
 - Yes. Here, if prosecutor is allowed to present under 608, makes irrelevant protective provisions of 609 as to not going into details of the bad act. Also, essentially would make 609 completely unnecessary.
 - Since 609 specifically refers to convictions and 608 does not require conviction, most courts would hold 609 controlling if the defendant was convicted of the crime.

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- Luce v. U.S. U.S. S.Ct. 1984. Luce charged with conspiracy and poss. Cocaine with intent to distribute. Files motion in limine to prevent prosecution from cross-examining defendant on prior conviction for possession of controlled substance if he chose to testify. Did not commit to testify if the trial court granted the motion. Court rules that it will exclude the conviction if defendant testifies and only explains attempts to flee from cops, however, if he denies prior involvement with drugs, court would admit prior conviction. Defendant does not testify, convicted, appeals.
- No error to deny the defendant's motion in limine. Why not?
 - Because speculative as to whether defendant would have testified and what court would have done with conviction had he done so. This was only an advisory ruling, which the trial court was free to change once the defendant testified.
 - Speculative as to whether prosecution would even have offered the conviction if defendant testified.

- Entirely speculative as to whether this was reversible error.
- Motions in limine not authorized under FRE or FRCP, but commonly employed. Why would the courts be reluctant to allow error to be based on a ruling in limine?
 - Because inevitably would require interlocutory appeals.
- Is this result fair to the defendant?

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- Generally, courts do not allow testimony of experts as to credibility of other witnesses. Why?
 - Serious question as to reliability of such expert testimony (to be covered later under FRE 702).
 - "Invades the province of the jury."
- If defendant calls a witness to testify to the reputation of the plaintiff for being untrustworthy, the defense attorney cannot ask the witness about specific instances of misconduct supporting the opinion, since that can only be done on cross-examination. Plaintiff's counsel could cross-examine by asking whether witness is aware of specific good acts contrary to opinion as to untrustworthiness of the plaintiff. Why would counsel be reluctant to do so?
 - Because it would open the door to allow defense counsel to ask about specific incidents supporting opinion of lack of trustworthiness.

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- Rule 613. Prior Statements of Witnesses
- (a) Examining witness concerning prior statement.
- In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
- (b) Extrinsic evidence of prior inconsistent statement of witness.
- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in [rule 801\(d\)\(2\)](#).
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- Rule 613 is about prior inconsistent statements. When a witness says one thing out of the courtroom and then says something else on the witness stand, the opposing party can use their inconsistency to attack their credibility.
- Rule 613(a) allows a lawyer to "ambush" their opponent's witnesses with a prior inconsistent statement: Rule 613(b) forces the lawyer to ambush the witness on cross-examination, not later when they are unable to respond.
- Prior inconsistent statements *given under oath* are also admissible as substantive evidence under [Rule 801\(d\)\(1\)\(A\)](#) (*Prior statement by witness substantive admissibility as non-hearsay under 801(d)(1)(A)*). Requires declarant to testify at trial and be subject to cross-ex, and the prior statement: (1) was inconsistent with trial testimony and given under oath at a trial, hearing, deposition, or other proceeding; or (2) consistent with trial testimony and offered to rebut claim of recent fabrication or improper influence or motive; or (3) one of identification of a person made after perceiving the person.)
- The key difference between the two rules is that 613 statements are only useful for impeaching a witness, while 801 statements can be used for any relevant purpose.

801(d)(1)(A) statements can be thought of as a subset of 613 statements; all prior inconsistent statements are admissible to impeach, but only some are admissible for their truth. 801(d)(1)(A) admissibility also overcomes the 613(b) restriction on extrinsic evidence.

- Although Rule 613(a) does not specifically apply to "inconsistent" statements, prior *consistent* statements are irrelevant for the purposes of impeachment: they can, however, be admitted as substantive evidence under [Rule 801\(d\)\(1\)\(B\)](#).

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- Impeachment with prior inconsistent statement (contrast with substantive admissibility [non-hearsay] of prior consistent or inconsistent statement under FRE 801(d)(1)).
- Can do, so long as not collateral matter.
- Non-hearsay because not offered for TOMA.
- Done pursuant to FRE 613(a). Keep in mind procedure:
 - When examining a witness with a prior inconsistent statement, need not show the statement to the witness, but on request must show to opposing counsel.

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- FRE 613(b) Extrinsic evidence of the prior inconsistent statement (e.g., the written statement itself), is admissible if:
 - Witness is allowed opportunity to explain it; and
 - Opponent is allowed to interrogate witness on circumstances of prior statement.
- Compare TRE 613(a). If witness unequivocally admits the prior statement, cannot offer extrinsic proof of same.

17 

- Prob. 8-F. Dirk sues Plimpton for hitting him with a shovel. At trial, Plimpton's counsel calls Welch, who testifies that Dirk struck the first blow without provocation. No cross by Dirk, and Welch leaves the court. Dirk's lawyer then calls Officer Murphy, who wants to testify that Welch told him a different story. Plimpton's lawyer objects that he is being "sandbagged" by the plaintiff because Welch could have been given opportunity to explain if Dirk had cross-examined him on the statement while on the stand. Can Dirk do this?
 - Yes in general. Nothing in FRE 613 requires that witness be allowed opportunity to explain at that time. However, what if Welch is no longer available?
 - Discretion of the court, but generally Dirk would bear the risk if Welch cannot be compelled to return to testify at trial. Reason most courts ask of all counsel, at the conclusion of testimony, "May this witness be excused?"

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- U.S. v. Webster, 7th Cir. 1984. Webster convicted of aiding and abetting robbery. The actual robber, King, confessed and was sentenced. At Webster's trial, prosecution asks permission to call King and question him outside presence of jury. Defense objects. Prosecution calls King and he testifies that Webster had nothing to do with the crime. Prosecution then impeaches King with a prior inconsistent statement in which he implicated Webster. Court instructed jury it could not consider Webster's prior statement for anything other than impeachment. Webster convicted and appeals. FRE 607 says anyone can impeach a witness, even your own witness. However, can a lawyer call a witness solely for the purpose of impeaching with a prior inconsistent statement? Why is the practice troubling?
 - This is considered an "abuse" of FRE 607, unless the calling party has a legitimate reason to call the witness beyond the impeachment value.

- There is often significant risk the jury will not heed the instruction and will convict based on impeachment evidence. Thus, the court might exclude under FRE 403.

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- In Texas, this is considered “bootstrapping.” Can a party call a witness solely for the purpose of impeaching with a prior inconsistent statement?
 - *Pruitt v. State*, Tex. App. Ft. Worth 1989. Party cannot call a witness to the stand, when the lawyer knows the witness will testify unfavorably, solely to get a prior inconsistent statement into evidence (otherwise hearsay).
 - *Hughes v. State*, Tex. Ct. Crim. App. 1999. TRE 607 expressly allows impeachment of own witness, and matter should be addressed under TRE 403. If no legitimate reason to call the witness except to get in otherwise inadmissible prior inconsistent statement, TRE 403 compels exclusion.

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- *Harris v. NY*, U.S. SCt. 1971. Harris charged with cocaine, testifies at trial and denies selling cocaine to undercover officer. On cross-ex, prosecutor ask defendant about statements made at time of arrest, before Miranda warnings. Conceded the statements were substantively inadmissible due to Miranda problems. Question whether prosecution can use such prior inconsistent statements to impeach if not substantively admissible.
 - Yes. Defendant was under no compulsion to testify, but chose to do so. Once he did, had duty to testify truthfully, and can be impeached with any prior inconsistent statement without violating right against self-incrimination.

21

- But recall the *Doyle* Doctrine (Week 4), from U.S. S.Ct. 1976. If a criminal defendant does not speak up to deny an admission after being arrested and Mirandized, his failure to do so cannot be construed as an admission by adoption pursuant to FRE 801(d)(2)(B). However, what of this language: “It would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial....”

22

- *Jenkins v. Anderson*, U.S.S.Ct. 1980. Defendant stabbed Redding and claimed self-defense. Turned himself in 2 weeks later. At trial, prosecution questions witness as to the fact that he did not tell anyone his story for 2 weeks after the stabbing occurred. What is the distinction from *Doyle*?
 - Defendant’s silence was before he received Miranda warnings. Is this a satisfactory distinction? Why not?
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- Prob. 8-F. Oswald charged with robbery in Seattle on 7-14. Witness Ardiss testifies that Oswald was at Ardiss’ restaurant in Portland that entire day, and every day for weeks prior to 7-14. Prosecution in rebuttal calls: (a) Officer Kinney, who testifies he saw Oswald in Seattle on 6-27, and Oswald said he had been in Seattle for a couple of days; and (b) a waiter at the restaurant in Portland who says he never laid eyes on Oswald. Is Officer Kinney’s testimony collateral?
 - Yes, because Ardiss should not be impeachable on an immaterial detail as to how many days prior to 7-14 Oswald was in Portland.

- Is the waiter's testimony collateral?
 - No, although the same argument could be made. The waiter's testimony directly contradicts Ardis's testimony as to how often Oswald was in the restaurant. However, it is arguably collateral to the extent it covers any days other than 7-14.

24 

- U.S. v. Havens, U.S. S.Ct. 1980. Two lawyers, Havens & McLeroth, go to Peru. At airport, McLeroth is arrested with cocaine sewed in makeshift pockets on his t-shirt. Havens had already cleared customs. McLeroth implicated Havens and he was brought back and searched, with no cocaine found. His bag was searched, without a warrant, and a t-shirt with cut-outs that corresponded with McLeroth's makeshift t-shirt pockets was found in the bag. Contents of search of bag excluded under 4th Amendment. At trial, Havens testified that he had never engaged in that type of activity on direct. On cross-ex, prosecutor asks whether Havens was saying he had not sewn the pockets into McLeroth's t-shirt to transport cocaine, and Havens denies. Prosecutor then later calls customs agent and admits the t-shirt from Havens' bag. Can the prosecutor admit evidence illegally seized to impeach a testifying defendant?
 - Yes, this is controlled by Harris v. NY, see slide 20. Once defendant elects to testify he must be truthful and can be impeached with what would otherwise be constitutionally deficient evidence.
 - If the defendant does not in direct testify contrary to the illegally seized evidence, does that change the calculus?
 - Perhaps, if his direct testimony did not reasonably suggest a conclusion disproved by the illegally seized evidence.
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25 

- Prob. 8-G. Young is charged with selling narcotics and testifies he did not do so at trial. Prosecutor wants to impeach by asking Young if he has ever sold narcotics before. Can she do so?
 - No. By simply denying commission of this offense, Young has not put his credibility in issue. Therefore, the prosecution is not allowed to bring up prior bad acts in cross-examination. This is pure character evidence, excludable.
 - What if Young testified on direct that he had never engaged in selling narcotics?
 - Then door would have been opened for prosecutor to ask these questions.
 - If Young testifies on direct that he had never engaged in selling narcotics, prosecutor asks him on cross-examination whether it is true he had sold narcotics on three prior occasions and he denies, can prosecutor put on extrinsic evidence of that fact?
 - Yes.
 - What about the requirement of FRE 608(b) that extrinsic proof of prior bad acts is not allowed?
 - 608(b) applies only to impeachment of character for truthfulness. This is considered direct contradiction impeachment. No specific rule available, but generally the courts will allow extrinsic evidence to contradict something a witness said on the stand, so long as it does not involve only the character for truthfulness of the witness.

26 

- Repairing credibility. Although not specifically covered under the rules, generally if a witness is impeached, most courts will allow a limited amount of evidence to support the credibility of the witness, such as prior good acts that show a propensity contrary to the bad acts used to impeach the witness. This is under a general "opened the door"

theory.

- However, courts do not allow witnesses to testify that they believe another witness is being truthful.
- Exception: Sometimes, if a defendant has claimed a plaintiff is malingering or faking injuries, "secondary gain syndrome," "functional overlay," etc. (extremely common), then the courts will allow the plaintiff's lawyer to question a treating or expert physician as to whether it appeared to her that the plaintiff's complaints were faked or not genuine.

27 

- Prior consistent statements. Prob. 8-H. Arla and Clair sell cocaine to undercover officer. Clair pleads guilty. At Arla's trial, officer testifies that Arla actually handed him the cocaine. Arla's lawyer cross-examines officer, strongly suggesting the officer is lying to make sure both women serve time for the sale. Can the prosecutor offer a tape-recorded statement by the officer, made shortly after the arrest, in which he said Clair delivered the cocaine?
 - Yes.
 - If so, what of the limitation of 801(d)(2)(B) (prior consistent statement is non-hearsay if offered to rebut claim of recent fabrication or improper motive).
 - Only governs substantive, non-hearsay admissibility.

28  **FRE 701**

- ▶ Lay opinion rule. Opinions from non-expert witnesses are limited to those opinions or inferences which are:
 - Rationally based on the perception of the witness; and
 - Helpful to a clear understanding of the testimony or the determination of a fact in issue; and
 - Opinions cannot be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
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29  **FRE 701**

- ▶ The "Collective Facts Rule," a/k/a in Texas as the "Short-Hand Rendition of Facts Rule."
- ▶ Allows witness to testify to impressions, based on variety of circumstances and appearances, to shorten testimony and make it clearer. Examples:
 - "He appeared drunk," as opposed to having to explain everything the witness observed that led to that conclusion.
 - "The grape looked like it had been there a long time," rather than the witness explaining in detail the color, squishiness, *etc.*
 - "He appeared well," rather than a description of skin color, weight, alertness, *etc.*
 - "It weighed around 2 pounds," rather than trying to get a witness to testify how he determined the approximate weight.
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- Prob. 9-A. Cox tried for firebombing. Former girlfriend Carter testifies that Cox twice said he knew someone who would blow up cars for \$50, and showed her a newspaper article about the bombing giving rise to charges. It was her "impression" and "understanding" from what Cox said and did that "he was involved" in the deed. Is this testimony admissible under FRE 701?
 - ▶ No. This is just a subjective interpretation of Cox's statements. Does not fit under

FRE 701.

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- Prob. 9-B. Hanson witnesses collision between Davis and Pinkston. At trial, Hanson testifies as follows. Which work under FRE 701?
 - ▶ Estimated speed of Davis' vehicle?
 - Yes.
 - ▶ That Davis was breaking the law?
 - No, because this is a question of law.
 - ▶ That Davis was smoking marijuana?
 - Maybe, depending on his subject knowledge of smell of marijuana.
 - ▶ That Davis had a guilty look?
 - No, this is speculation.
 - ▶ That Pinkston looked like she was in a hurry?
 - Yes, if he observed her backing up.
 - ▶ That the damage to Pinkston's vehicle was around \$5k?
 - No, but owner can testify to value of own property.
 - ▶ That Amy had a broken back and Pinkston a dislocated shoulder?
 - No, would require expert testimony.
 - ▶ That Davis did all he could to avoid the collision?
 - Yes, lay observation.
 - ▶ That the "hypothetical perfect driver" could not have avoided Pinkston?
 - No, too vague and would not assist the jury (but many judges would let in anyway).

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