

Kern County College of Law

EVIDENCE II

Final Examination

Spring 2023

Prof. H. Starr

General Instructions:

Answer Two (2) Essay Questions.

Answer 25 MBE Questions

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION 1

Darryl Driver is being charged with hit and run driving resulting in death in the case of People of the State of X vs. Darryl.

On January 2nd at 8:00 a.m. Daryl Driver calls police to report that his vehicle was stolen. He tells police he last saw his black car at 11:00 p.m. when he returned from a New Year's Eve party and went to bed.

On January 2nd at 3:00 p.m. police are dispatched to a 2-vehicle accident. Both vehicles are found in a ravine off the roadway a half mile from Darryl's house. Police locate Victor in the driver's seat of the red car. Victor is badly injured but conscious. The black car is unoccupied. The black car is registered to Darryl Driver.

Victor is taken to the hospital where he tells Nurse Nan, "I am in so much pain and I don't think I am going to make it. I was driving home from my night-shift job at 1:00 a.m. on January 2nd when a black car came flying down the road. The car hit me and we both went down the ravine. I saw a male driver get out of the black car". Victor loses consciousness and dies from the injuries he sustained in the crash shortly later at the hospital.

Due to heavy rain and flooding the morning of January 2nd, the police are unable to determine the cause of the crash based on physical evidence.

On January 15, Officer Owen receives a call from Hillary, Darryl Driver's wife. Hillary tells Owen that Darryl came home at 3:00 a.m. on January 2nd after attending a New Year's Eve party. When Darryl got home he was drunk. Darryl told Hillary that he hit another car and they rolled down a ravine. Darryl said he was able to walk home. The next morning Hillary heard Darryl on the phone falsely reporting his car stolen. Hillary just found out Darryl was cheating on her and wants Darryl to go to prison because he is a lying cheat.

Assume the following occurred in the jury trial of Darryl. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.**

1. In their case in chief, the People call Nurse Nan to testify to Victor's statement.
2. The People call Hillary to testify regarding her observations of Darryl, the statements he made to her and his false report to police.
3. The People call Eugene Einstein, the author of a book on the application of the law of physics to colliding billiard balls and other objects. Einstein would testify that the black car was the cause of the crash based on the application of billiard ball physics to the angles of the vehicles located in the crash. Einstein has a PhD in physics. There are no peer reviewed studies that have applied his theories to vehicle crashes.

QUESTION 2

Officer West responded to a call for service dispatched by dispatcher Carly. According to Carly, the 9-11 caller identified herself as Jewel, the 14-year-old daughter of David and Vicky. Dispatcher Carly informs Officer West through dispatch channels that Jewel was crying hysterically and frantically begging for police to come because “my dad is upstairs killing my mom, I saw him beating and choking her!” Dispatcher Carly noted on the call that she heard what sounded like a male adult screaming in the background and a woman crying. When Officer West arrived at the house where the call originated, he saw David standing on the porch with his shirt off smoking a cigarette. Officer West asked David to sit on the curb while he made contact with Vicky. Vicky had a bloody gash on her forehead, deep red marks around her neck, and was bleeding from her lips and mouth. When Vicky came outside, she was crying and hyperventilating and said, “he tried to kill me! He tried to kill me!” Emergency Medical Technicians (EMTs) were called to the scene to treat Vicky’s injuries. When the EMTs were done treating Vicky, and she had calmed down considerably, Officer West interviewed her. Vicky told Officer West that David had come home and the two were having a nice time watching TV until Vicky got on her phone. David demanded to see who Vicky was texting but she refused to show David. Vicky said David then grabbed the phone and hit her in the head with it, causing the gash. David then punched her in the face and began strangling her. Vicky was rendered unconscious while being choked. Vicky said when she woke up, her daughter Jewel, was yelling at David, “you better get off her, the cops are on their way!” That is when David got off her and went outside to smoke. David was arrested and the District Attorney charged him with felony domestic violence against Vicky under the California Penal Code.

The following proffers were made at trial:

- 1) During the prosecution’s case-in-chief, Vicky testified that she lied to the police about David hurting her, and that she had made the whole thing up because she thought David was cheating on her. In response, while she was on the stand, the prosecutor played two segments of the properly authenticated footage from Officer West’s body-worn camera:
 - a. Footage showing Vicky coming out of the house and yelling that David tried to kill her
 - b. Footage showing Vicky telling Officer West that Vicky was regaining consciousness when Jewel yelled “you better get off her, the cops are on their way!”
- 2) During the prosecution’s case-in-chief, Jewel was called to authenticate her 9-11 call. The prosecution then played her 9-11 call for the jury.
- 3) During the prosecution’s case-in-chief, the prosecutor called Priscilla, David’s former girlfriend, who would testify that David had beaten her in the past, though he had never been charged.

Discuss the potential objections, and responses to objections, to the proffers. Answer according to California Law.

Question 3: Please answer the Multistate Bar Exam (MBE) embedded in Exemplify. Use the 'Next' and 'Previous' buttons to navigate between questions. Read each question carefully and choose the best answer.

**EVIDENCE-ANSWER OUTLINE- SLO-HYB-MCL
FINAL EXAMINATION
SPRING 2023**

QUESTION 1 -OUTLINE- Prof. Lizardo

SUMMARY ANSWER OUTLINE- Alley Op

SUMMARY ANSWER OUTLINE- Alley Op

Please note students may offer different outcomes or rules. This summary is intended to highlight the major issues and rules.

1. Testimony Of Alley -Op (A-O)

As per CEC 350, only relevant evidence is admissible.

Logical Relevance/ CEC 250 Tendency Test- Evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the action.

Negligence claim includes consists of duty, breach of a duty, causation, and damages. Product liability theories include negligence that involve inadequate warnings and manufacturing or design defects.

Here, A-O was using the exercise ball as a foreseeable use because it was while exercising. It does not appear he was misusing the product. His testimony tends to establish the breach of duty by Mighty Ball since a defective product was provided.

Thus, A-O's testimony is logically relevant and admissible.

Legal Relevance/Balancing Test CEC 352- the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

Here, Alley -Op is a percipient witness to his fall and the injuries. Therefore, the probative value of A-O's testimony greatly outweighs any unfair prejudice. It does not seem likely Alley-Op's testimony would confuse, mislead or be a substantial danger of undue prejudice or a waste of time for a jury.

Thus, the trial court will rule the evidence is legally relevant and admissible.

Competency – for a witness to be competent to testify, under CEC it states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the "truth" or cannot communicate. In short, witnesses must have capacity to observe, recollect, communicate and affirm to be truthful.

Here, although Alley -Op sustained a concussion, felt dizzy, had a left-hand fracture, and pain, it does not appear this injury affected his memory or communication skills. His testimony is relevant because he is a percipient witness. Therefore, his competency is not compromised, and he may testify regarding his fall and injuries.

Lay opinion must be based on rationally based perceptions. The fact that Alley -Op was working out when the injury occurred will be admissible.

Writing- Gym Journal: "Left hand hurts and feels dizzy."

Under CEC, the definition of a "writing" is broad and includes, but is not limited to handwriting, typewriting, electronic mail, or other forms of communication.

Here, the gym journal is a writing under CEC because it is a handwriting. The journal may be relevant as to how A-O was feeling right after the fall (dizzy). Since A-O is right handed there is a reasonable inference that he wrote the notes with his right hand. The fact that it was A-O 's left hand was injured should not prevent him from writing with his right hand.

Authentication

This provides that the proponent must provide sufficient information that the item is what it purports to be, Alley-Op's gym journal.

Here, Alley-Op is a witness with personal knowledge since the gym journal are his notes, so this satisfies the sufficiency test. Therefore, he can easily recognize his notes in the journal.

Secondary Evidence Rule

Under the CEC, the Secondary Evidence Rule is applied when the contents of a writing are in issue. Writings may include documents, photos, or recordings. At times, copies may be used if it is a reproduction of the original writing.

Here, the gym journal is the original notes written by A-O and is available. There has been compliance with the rule and is admissible.

Hearsay- "The pain in my left hand is excruciating, it happened when the ball popped, and I fell!"

Defined as an out-of-court statement offered to prove the truth of the matter asserted. This is offered for the truth of the pain and how the fall occurred. It is inadmissible unless there is an exception. Below are some exceptions.

Spontaneous Statement Exception

Defined as a statement by the declarant that describes, explains or narrates an act or event that happened when the declarant was under the stress of excitement of an event.

Here, within minutes of the fall, Alley-Op is in the emergency room telling Dr. Bones that his left-hand pain was excruciating. Since A-O, a basketball player, experienced hand pain due to a fall, this will be deemed a stressful event.

Most likely he realized what an injury would do to his basketball season that caused additional stress.

Defense will argue that too much time has gone by since it took time for A-O to get to the emergency room Therefore, the statement lacks spontaneity. However, Plaintiff will contend that the pain was ongoing and only minutes went by. To fulfill the stress requirement.

The trial court will rule the statement is a spontaneous statement and admissible.

Contemporaneous Statement Exception

Requires a statement to describe or explain an event as it is occurring. It is like the spontaneous statement exception but does not involve a stressful event.

Here, it may be argued by Plaintiff that pain was ongoing so it was during the event, the fall. However, Defense will argue that time went by so the event ended.

The trial court will rule the statement is a contemporaneous statement and is admissible.

State of Mind Exception

Requires the statement by a declarant's (here Alley-Op) then existing state of mind, emotion or physical sensation may be admissible.

Here, A-O is telling Dr. Bones during a medical treatment or diagnosis meeting that he is in excruciating pain only minutes went by from the fall to the ER visit. It does not appear that A-O had time to concoct how the fall happened. The defense will argue that the portion of the statement involves ball popping may be stricken since it does not deal with a medical purpose. However, Plaintiff will counter that how the fall happened, the distance A-O fell and what he was doing is part of diagnosis and treatment.

The trial court will rule this exception applies and the statement of pain is admissible including how the fall happened with the weights and the ball. However, the court may give a limiting instruction regarding how the fall occurred. In short, the jury may not use the how the ball burst to hold the manufacturer liable by itself. Other elements of the civil case must be proven.

2. Dr. Bones Testimony about the injury and the X-rays

Logical Relevancy- defined above.

Dr. Bones' testimony tends to show that A-O's injury was a fractured hand and a concussion. He is a qualified orthopedic surgeon and has expertise in the subject matter of bones. The X-rays are writings and part of the tools Dr. Bones used to diagnose the injuries.

Legal Relevancy- defined above

The trial court has the discretion to weigh the probative value of the letter offer against the unfair prejudicial effect.

Hearsay - rule above. State of Mind exception on pain only (The pain in my left hand ...) See above exceptions under call #1.

Doctor-Patient Privilege

The Dr.- Patient privilege protects confidential communications between a doctor and patient if the communication was for medical diagnosis and treatment.

Here, the patient, A-O is seeking medical assistance due to a fall. Therefore, the privilege would apply unless there is an exception. The X-rays are part of A-O's medical records and likely admissible because they will show the fracture of the hand.

Exception to Privilege: Tort

Alley -Op is seeking damages due to Mighty Ball's defective design of the exercise stability ball. He placed his injuries and damages in issue, so this serves as an exception to the privilege. Dr. Bones may testify to the injuries and show the jury the X-rays.

3. Saul introduces documents.

(a) Similar Happenings/Mighty Ball on Notice - the 752 prior complaints.

In general, similar happenings are when a business has numerous other claims for a similar accident, fall, etc. The fact of other accidents may establish that Mighty Ball has notice or knowledge of a defective product and did nothing to prevent future injuries. Thus, the 752 prior claims could help establish that Mighty Ball has breached a duty of care by providing a defective product, an exercise stability ball, to consumers.

Here, A-O wants to establish that Mighty Ball was on notice and had knowledge that the ball would burst even at a low weight. Further, the ball was defective because it could not hold 600 pounds. This is relevant for product defects. The 752 prior complaints occurred before the present lawsuit. However, the prior complaints are being used to establish knowledge of a defective exercise ball, not fault.

The defense may argue the present injuries resulted due to a misuse of the product by A-O. However, Plaintiff will counter arguing that A-O is a professional basketball player and is aware of how to properly use sports equipment. Also, the fact that other professional athletes suffered injury may help establish there was not a misuse of the ball.

The trial court will rule the prior complaints are admissible for notice or knowledge only. A limiting instruction may be given to limit how the jury may use the evidence.

(b) Special Relevancy- Subsequent Remedial Measures

Logical Relevancy- *defined above.*

In general, evidence of safety measures or repairs after an accident is inadmissible to prove negligence. This is due to public policy concerns as landlords, owners, managers, or manufacturers should fix a problem. Taking action to fix prevent future harm is good public policy. Remedial measures taken before an accident do not implicate policy concerns.

The changed product design tends to establish that Mighty Ball knew of the defect problem and did nothing to fix the problem until after A-O's lawsuit. However, the public policy against using this changed design will be deemed inadmissible to prove negligence.

Legal Relevancy- *defined above.*

The trial court has discretion to weigh the probative value of the prior claims against unfair prejudice. Due to the special relevancy rules, the changed design is too prejudicial and will not be admissible.

Q2 - O'Keefe: SPRING 2023 EVIDENCE EXAM QUESTION AND ANSWER

Darryl Driver is being charged with hit and run driving resulting in death in the case of People of the State of X vs. Darryl.

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On January 2nd at 3:00 p.m. police are dispatched to a 2-vehicle accident. Both vehicles are found in a ravine off the roadway a half mile from Darryl's house. Police locate Victor in the driver's seat of the red car. Victor is badly injured but conscious. The black car is unoccupied. The black car is registered to Darryl Driver.

Victor is taken to the hospital where he tells Nurse Nan, "I am in so much pain and I don't think I am going to make it. I was driving home from my night-shift job at 1:00 a.m. on January 2nd when a black car came flying down the road. The car hit me and we both went down the ravine. I saw a male driver get out of the black car". Victor loses consciousness and dies from the injuries he sustained in the crash shortly later at the hospital.

Due to heavy rain and flooding the morning of January 2nd, the police are unable to determine the cause of the crash based on physical evidence.

On January 15, Officer Owen receives a call from Hillary, Darryl Driver's wife. Hillary tells Owen that Darryl came home at 3:00 a.m. on January 2nd after attending a New Year's Eve party. When Darryl got home he was drunk. Darryl told Hillary that he hit another car and they rolled down a ravine. Darryl said he was able to walk home. The next morning Hillary heard Darryl on the phone falsely reporting his car stolen. Hillary just found out Darryl was cheating on her and wants Darryl to go to prison because he is a lying cheat.

*Assume the following occurred in the jury trial of Darryl. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.***

1. *In their case in chief, the People call Nurse Nan to testify to Victor's statement.*

Relevance: Evidence is relevant if it has some tendency to make the existence of a fact of consequence more or less likely than it would be without the evidence. Nurse Nan's testimony is relevant because Darryl's statement establishes the timeline of and cause of the crash and identifies a male driver leaving the scene.

Hearsay: Hearsay is an out of court statement offered for the truth of the matter asserted.

Dying Declaration: FRE 804(b)(2) allows dying declarations in a prosecution for homicide or in a civil action or proceeding. The declaration needs to be made while the declarant believed his or

her death was imminent, and it needs to concern the cause or circumstances of what he or she believed to be his or her impending death.

Analysis: The statement is not admissible as a dying declaration because a dying declaration requires that the case is either a homicide prosecution or a civil case

1. The case is a prosecution for a homicide or a civil case
2. The declarant is the victim named in the pleading.
3. At the time of the statement, the declarant had a sense of impending death.
4. At the time of trial the declarant is unavailable
5. The statement relates to the event inducing the declarant's dying condition
6. The statement is factual in nature.

Residual Exception: a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in [Rule 803](#) or [804](#):**(1)** the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Note: No other hearsay exception would apply

2. The People call Hillary to testify regarding her observations of Darryl, the statements he made to her and his false report to police.

Relevance: Hillary's testimony would establish Darryl is the driver.

Spousal Immunity- Privilege Not to Testify in Criminal Cases. A defendant's spouse has a privilege to refuse to testify at the trial of his or her spouse. When the privilege of spousal immunity is invoked, a married person whose spouse is the defendant in a criminal case may not be called as a witness by the prosecution and a married person may not be compelled to testify against his spouse in any criminal proceeding. Only the witness-spouse may invoke the privilege against adverse spousal testimony. Thus, one spouse may testify against the other in criminal cases, with or without the consent of the party spouse, but the witness-spouse may not be compelled to testify, nor may she be foreclosed from testifying (except as to confidential communications)

Immunity may be asserted only during the marriage. It terminates upon divorce or annulment. If the marriage exists, the privilege can be asserted even as to matters that took place before the marriage.

Analysis: In the present case, Hillary wants to testify against Darryl because he is cheating on her. They are currently married. Darryl cannot assert this privilege to prevent her from testifying.

Privilege for Confidential Marital Communications. In any civil or criminal case, either spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication made between the spouses while they were married. The rationale is to encourage open communication and trust and confidence between spouses.

Both spouses hold the privilege. Either can refuse to disclose the communication or prevent any other person from disclosing the confidential communication.

Elements of the privilege:

1. **Marital relationship.** The communication must be made during a valid marriage. Divorce will not terminate the privilege retroactively, but communications after divorce are not privileged.
2. **Reliance on intimacy.** Routine exchanges of a business nature, abusive language and misconduct directed to the spouse are not privileged. If the communication was made in the known presence of a stranger, it is not privileged. The confidential communication does not need to be spoken but may be made by conduct intended as a communication.

Analysis: Darryl can assert this privilege. This privilege only protects confidential communications that are made during a valid marriage. Darryl and Hillary were married at the time of the communication. Darryl's statements that he hit another car and rolled down a ravine, and that he was able to hitchhike home would fall within this privilege because they were confidential communications.

Hillary could still testify to other events and conversations. Hillary could testify that she observed Darryl come home at 3:00 a.m. and that she observed he was drunk. These are not confidential communications that fall within the privilege.

Hillary could also testify to what she heard of Darryl's conversation with police. This is not a confidential communication because the statement was made by a third party.

Hearsay: Hearsay is an out of court statement offered for the truth of the matter asserted.

Statement of a Party Opponent: FRE 801(d)(2)(A) authorizes the admission of personal admissions. It permits the proponent to introduce a statement when "the statement is offered against a party and is ... the party's own statement, in either an individual or representative capacity ..." Since the People are offering Darryl's statement through Hillary, it would qualify as a statement of a party opponent.

Prior Bad Acts. The basic rule is that when a person is charged with a crime, extrinsic evidence of his other crimes or misconduct is inadmissible if such evidence is offered by the prosecution solely to establish a criminal disposition. The prosecution may not show the accused's bad character to imply criminal disposition. The reason the rules preclude this use of character evidence is due to the danger that the jury may convict the defendant because of past crimes rather than because of her guilt of the offense charged.

Admissible if Independently Relevant. Although evidence that could lead to a conclusion about someone's character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. FRE 404(b) states that such prior acts or crimes may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, knowledge, identity absence of mistake or lack of accident) whenever those issues are relevant in either a criminal or a civil case. Upon request by the accused, the prosecution in a criminal case must provide reasonable notice prior to trial (or during trial if pretrial notice is excused for good cause shown) of the general nature of any of this type of evidence the prosecution intends to introduce at trial. Thus, if the evidence is logically relevant to a fact in issue other than character, and the probative value of the evidence is not substantially outweighed by its prejudicial effect (FRE 402), the prosecution may introduce evidence of the uncharged act.

Analysis: Darryl false report that his vehicle stolen is relevant as to the identity of the driver. It's probative value on that issue is substantially outweighed by the prejudicial effect. It will be admissible on that issue

3. The People call Eugene Einstein, the author of a book on the application of the law of physics to colliding billiard balls and other objects. Einstein would testify that the black car was the cause of the crash based on the application of billiard ball physics to the angles of the vehicles located in the crash. Einstein has a PhD in physics. There are no peer reviewed studies that have applied his theories to vehicle crashes.

Expert testimony: A person can qualify as an expert witness by a showing of knowledge or experience. An expert's opinion can be based on any data that experts in the field ordinarily use, but it must apply reliable principles to sufficient data related to the case. An expert may state an opinion or conclusion based on the facts the expert believes to be true or may answer a hypothetical question that asks the expert to make assumptions.

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

1. The expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert has reliably applied the principles and methods to the facts of the case.

Daubert: when scientific testimony is offered, the court must first make an assessment of whether the testimony is based on scientifically valid reasoning or methodology, and whether the testimony can be applied properly to the issue at hand. The court provided guidance as to various considerations the trial court may review in determining admissibility, including:

1. Whether a theory or technique can be and has been tested
2. Whether the theory or technique has been subject to both peer review and publication
3. The known or potential error rate of the method
4. The existence and maintenance of standards controlling its operation
5. Whether it has attracted widespread acceptance within the relevant scientific community

Analysis: *Students should apply the Daubert factors to this testimony.*

1)

A. Nurse Nan's testimony

1. Darryl should object to Nurse Nan's testimony regarding Victor's statement under relevance.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

Nurse Nan's testimony has a tendency to implicate Darryl as the driver of the black vehicle which caused collision with Victor. Victor's testimony makes it more probable than not that Darryl, after causing collision with Victor, exited his vehicle, and left Victor stuck in the ravine, describing an essential element of the alleged crime. It has a tendency to show that Darryl, who owned a black car and was out until he arrived home drunk at 3 a.m. on the day of the crash, was the driver, and it tends to show that Darryl caused the serious injury resulting in Victor's death.

Overruled.

2. Darryl should object to Nurse Nan's testimony as inadmissible hearsay evidence.

Hearsay is an out-of-court statement made by a declarant offered to prove the truth of the matter asserted. A declarant is a person. An assertion is a strong belief in a statement's truth. ← *WHERE IS THE ROOM?*

Victor's statement to Nurse Nan was in the hospital, thus out of court. The declarant was Victor. The assertion Victor made was that an individual driving a black vehicle on the night of the crash caused the collision, causing both vehicles to go down the ravine. *BRING OFFERED FOR WHAT PURPOSE*

Subject to any hearsay exceptions, the Court should sustain the objection.

The Prosecution should counter Darryl's objection by arguing Victor's statement was admissible hearsay under hearsay exceptions.

Dying Declaration: A statement made by declarant under the threat of imminent death regarding the cause of his imminent death is admissible hearsay. The defendant must be unavailable.

Victor's statement was made under imminent threat of death, as he stated that he didn't think he was going to make it. Victor continues to tell Nurse Nan about the crash, describing a black vehicle at approximately 1:00 a.m. on January 2nd "flying down the road," hitting Victor's vehicle, causing

both vehicles to go down into the ravine — i.e., Victor is explicitly describing to Nurse Nan the cause of his imminent death. Victor lost consciousness and died from his injuries resulting from the crash after discussing the cause of his death to Nurse Nan.

AVAILABLE
DISCUSS/WRIT?

Original defense objection overruled.

State of Mind: A statement regarding the declarant's then-existing state of mind, physical, sensory, or emotional condition is admissible hearsay.

The prosecution will likely argue that as Victor described that, at that moment, he feared his imminent death because of the crash. He also described his physical condition, stating that he was "in so much pain" and he didn't "think [he was] going to make it." Victor is narrating his then-existing state of mind and physical condition to Nurse Nan, all of which was caused by the resultant injuries.

Original defense objection overruled.

Excited utterance: A statement made during an exciting or stressful event or condition is admissible hearsay when the declarant makes the statement while still under the stress of excitement of the event or condition.

The prosecution will argue that Victor was taken to the hospital after suffering life-ending injuries from a deadly car crash, which is a stressful event or condition. Victor was making the statement while under the stress of excitement of being found alive after over 12 hours of being stuck inside his vehicle with life-ending injuries, likely knowing that his life was about to end. Although Darryl may argue that the period of stress or excitement following the crash had lapsed, as it had been over 12 hours, the prosecution will likely successfully argue that Victor's narration of events was not only made while under the stress of the previous day's car crash, but from being found alive and being taken to the hospital before losing consciousness and dying.

Original defense objection overruled.

Statements made for purpose of medical diagnosis or treatment: statements made to medical providers are admissible hearsay when they are made for the purpose of, and are pertinent to, medical diagnosis or medical treatment. Statements may include the medical history, past or present symptoms, their inception, and their cause.

The prosecution may argue that Victor's statements were made for the purpose of, and were pertinent to, the medical treatment for his injuries. They may argue that he is describing his present symptoms, e.g., that he is "in so much pain" and that he doesn't think he is "going to make it." He also describes the cause of his injuries being the car crash involving the black vehicle operated by a male driver. It is unlikely, however, that this statement was made for the purpose of medical diagnosis or treatment, as Victor shortly thereafter lost consciousness and died as a result of his injuries.

Sustained under these grounds.

Victor's statement made to Nurse Nan will likely come in as admissible hearsay under both 803 and 804 exceptions.

3. Darryl could object to the Victor's statement as a violation of the confrontation clause.

Under the Sixth Amendment, a criminal defendant has the right to confront witnesses.

Darryl may argue that as a criminal defendant, Victor's statement is a violation of the confrontation clause because Darryl was unable to cross examine Victor regarding his statements. He is only able to cross examine Nurse Nan who, based on her personal knowledge, can testify as to the statements Victor made before he died. The prosecution would likely argue in response that Victor's statement was made to Nurse Nan, who may be considered a first responder, is not considered testimonial when it is made to meet an ongoing emergency. Victor was involved in an ongoing emergency as he was facing death.

Overruled.

4. Darryl could object to legal relevance.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, undue delay, confusing the issues, or misleading the jury.

The probative value of Victor's statement to Nurse Nan has high probative value — Victor described the events that took place, causing his serious injuries and ultimate death. He described a black car and a male driver, both of which hold high probative value in the case against Darryl. It has a tendency to show that Darryl, who owned a black car and was out until he arrived home drunk at 3 a.m. on the day of the crash. While there is prejudice in permitting Nurse Nan to testify as to Victor's

statements, it is not unduly prejudicial when balanced against the high probative value of Victor's statements.

Overruled.

B. Hillary's testimony

1. Darryl could object to Hillary's testimony under relevance.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

Hillary's testimony regarding her observations of Darryl, the statements he made to her, and his false report to police have a tendency to show Darryl intended on fabricating his story to avoid punishment. They also have a tendency to show that Darryl was in fact drinking before getting behind the wheel of the black vehicle that crashed into Victor, rolled down the ravine, and fled the scene. Her perception of Darryl and her conversation with him make it more probable than not that he was involved in the subject crash.

Overruled.

2. Darryl could object, invoking ³his spousal testimonial privilege.

A spousal testimonial privilege exists in criminal cases during which a defendant-spouse is charged and tried with a crime. The witness-spouse holds the privilege, and the defendant-spouse cannot invoke the privilege. The spouses must be married at the time of the testimony for the privilege to apply. If this privilege is invoked, the witness-spouse cannot be compelled to testify against their spouse; however, if the privilege is waived, they can testify against their spouse.

Here, Darryl is the defendant-spouse in a criminal case. Hillary, the witness-spouse, is able to invoke or waive the privilege, while Darryl is not. Although they are married, the privilege applies to Hillary, not Darryl.

Because the privilege ~~does not apply~~ to Darryl, the Court will overrule.

3. Darryl could object, invoking his marital communications privilege.

A marital testimonial privilege exists in both civil and criminal cases and serves to protect communications made during a marriage between spouses. The communication must be intended to

be confidential; however, in the event a spouse discusses the confidential communication with a third-party, the privilege is destroyed. The communication must have been made during the marriage, and the status of the marriage is immaterial at the time of the testimony. Either spouse may invoke the privilege.

Here, Darryl, a criminal defendant, can invoke the marital communications privilege against Hillary for the conversation they had on the night of the crash. However, Hillary did make the statement to Officer Owen, thus destroying the privilege.

Because the privilege has been destroyed, the Court will overrule.

4. Darryl could object to improper character.

Evidence of a person's character is inadmissible to prove they acted in accordance with that character on a given occasion. Character evidence is admissible to prove motive, intent, absence of mistake, identity, common scheme or plan, opportunity, or preparation. Intent is the mens rea involved in committing a crime or act.

Here, Darryl will argue that Hillary's testimony is improper character and is serving as propensity evidence, as it tends to show that he lied and falsely reported his car being stolen because Darryl is a lying cheat. However, the state will more successfully argue that Hillary's testimony tends to prove Darryl had intent to defraud or lie about his involvement in the crash. It tends to prove that Darryl had the requisite mens rea required.

Overruled

HEARSAY?

5. Darryl could object to 403.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, undue delay, confusing the issues, or misleading the jury.

Hillary's testimony is highly probative in that it tends to prove the intent behind Darryl's acts and false statements. It also tends to show that he was involved in the crash which caused the serious injuries and death of Victor, and that he fled the scene following. The prejudicial effect is not unduly prejudicial against Darryl, and the probative value is substantially greater in value.

Overruled.

3. Eugene Einstein's testimony

1. Darryl should object under relevance.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

Here, Eugene's testimony has a tendency to make the fact that Darryl's vehicle caused the crash.

Overruled.

2. Darryl should object as to an improper expert opinion.

An expert may testify to an ultimate issue in a case. His testimony must be helpful to the trier of fact, it must be based on some specialized training, experience, education, or skill, and the expert must believe in his opinion to a reasonable degree of certainty.

Eugene's testimony may be helpful to the trier of fact, because he would testify as to an ultimate issue in the case (who caused the crash.) His expert opinion is based on his specialized training and education, as he has a PhD in physics and is the author of a book on the application of the law of physics to colliding billiard balls and other objects. There is no indication in the facts that Eugene does not believe in his testimony to a reasonable degree of certainty, especially because he wrote a book about it.

Overruled.

3. Darryl should object as to improper scientific evidence.

The Court must analyze the following Daubert factors in federal court to determine whether scientific evidence should be admitted:

1. whether the evidence is published and subject to peer review
 2. whether the evidence has been tested in the past
 3. whether there is a known error rate
 4. whether it is accepted by the general scientific community in which it belongs
-

Here, Eugene's testimony would be regarding the application of the law of physics to colliding billiard balls and other objects. There is no indication has a known error rate. The scientific studies have not been peer reviewed, and his theories have not been applied to vehicle crashes.

Sustained.

4. Darryl should object under 403.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, undue delay, confusing the issues, or misleading the jury.

Eugene's testimony and his scientific findings would likely confuse the issues and/or mislead the jury. His theories do not meet the requirements of Daubert, making his testimony not credible. The probative value is not outweighed by the risk of undue prejudice, because although the jury would be provided information regarding his theory of the cause of the crash, his scientific evidence does not meet the requirements of Daubert.

Sustained.

2)

A 1) Vicky's Testimony

NOT MONOLITHIC
1) INITIAL TESTIMONY
2) FIRST PR OR STATEMENT
3) SECOND PR OR STATEMENT
4) VICKY'S STATEMENT
RECALLED BY VICKY

SOLID ISSUE

1. The defense should object to Vicky's testimony as irrelevant.

GOOD RULE

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. In California, the "truth in evidence" provision states that relevant evidence is admissible subject to a 352 balancing test.

GOOD PROPS RULE

Here, Vicky's testimony and the video footage of her out-of-court statements both have a tendency to show that she was the victim of domestic violence. It also has a tendency to show that David had motive and intent to hurt Vicky.

FACT

RULE

FACT

ALSO SHOWS SHE LIED

Overruled.

GOOD, CONCISE, RESPONDS TO ISSUE

GOOD ANALYSIS - COULD BE DEEPER, BUT CLEAR & SOLID.

2. Defense should object to Vicky's testimony as a violation of the spousal testimonial privilege.

A spousal testimonial privilege exists in criminal cases during which a defendant-spouse is charged and tried with a crime. The witness-spouse holds the privilege, and the defendant-spouse cannot invoke the privilege. The spouses must be married at the time of the testimony for the privilege to apply. If this privilege is invoked, the witness-spouse cannot be compelled to testify against their spouse; however, if the privilege is waived, they can testify against their spouse.

The facts do not indicate that Vicky and David are married. In the event they were married at the time of Vicky testified, Vicky would be considered the witness-spouse, who holds the privilege. David would not hold the privilege, as he is the defendant-spouse. David cannot invoke the privilege, only Vicky can, as she is not the defendant in the case.

Overruled.

GOOD - THIS IS EXAMPLE OF GOOD ISSUE SPOTTING ON INCOMPLETE FACTS WELL DONE

3. Defense should object to Vicky's testimony as a violation of the marital communications privilege.

A marital testimonial privilege exists in both civil and criminal cases and serves to protect communications made during a marriage between spouses. The communication must be intended to be confidential; however, in the event a spouse discusses the confidential communication with a third-party, the privilege is destroyed. The communication must have been made during the marriage, and the status of the marriage is immaterial at the time of the testimony. Either spouse may invoke the privilege.

The facts do not indicate that Vicky and David are married. In the event they were married at the time the communication was made prior to David's attack on Vicky, both Vicky and David would hold the marital privileges communication. The communication was made inside the home, but Vicky destroyed the privilege by disclosing the confidential communication to Officer West.

Overruled.

4. The defense should object to playing of Vicky's out-of-court statements as hearsay.

Hearsay is an out of court statement made by a declarant offered to prove the truth of the matter asserted.

The statement was made out-of-court by Vicky, a declarant, a person. The truth of the matter asserted by the footage showing Vicky coming out of the house and yelling that David tried to kill her is that David did, in fact, physically attacked Vicky.

Sustained subject to prosecution's introduction of hearsay exceptions.

5. The prosecution should counter that the statements being offered are prior inconsistent statements being offered to impeach the witness.

Prior inconsistent statements are admissible as substantive evidence to impeach a witness and point out inconsistencies with her testimony. Impeachment casts an adverse reflection on the veracity of the witness's testimony.

Vicky's prior inconsistent statements were inconsistent with the statements she made on the stand. Vicky told Officer West that David hit her over the head with a phone, punched her in the face, and strangled her. She also yelled that David tried to kill her when she came out of

LESS SO HEARD -
IT'S NOT
A COMM. -
WITH NOT
BEING IN HIS
ADDRESSING?
NOT OF TIME A
BUT "SHOULD"
OUTSIDE TO BE
"COULD BE"
OBJECTION

PRESENCE
OF 3RD
PERSON -
JEWEL

MUCH MORE
LIKELY ISSUES

ASIDE FROM
LACK OF DEPTH
IN TMA
IS GOOD

HOW DO WE KNOW IT IS
NOT SOLELY FOR
IMPEACHMENT?
WHOLE CASE IS THIS,
SO PROBABLY FOR TMA

GOOD, BUT IN CA ITS ALSO FOR
TMA AND

the house, both of which are inconsistent with her current testimony, in which she stated that she lied to police about David hurting her.

Sustained. *ODD PHRASING BUT LESS IMPORTANT WHEN A PORTION IS ON POINT*

6. The prosecution could also counter defense's objection by arguing Vicky's statement was admissible hearsay under hearsay exceptions.

USE OF STATICS MAKES STRUCTURE CLEAR - GOOD THING
FOR AFTER
CONCLUSORY WHICH STATEMENT?
WHAT FACTS TELL US SHE IS/ISN'T
Spontaneous statement: A statement made during an exciting or stressful event or condition is admissible hearsay when the declarant makes the statement while still under the stress of excitement of the event or condition.

Here, Vicky made a statement while still under the stress or excitement of being attacked and physically abused by David and regaining consciousness. The statement was made during the stressful event or condition, i.e., that David tried to kill her.

Sustained.

Not quite like this resembles
Contemporaneous Statement: A statement made describing an event or condition that is made cade during or immediately after the event or condition.

Here, Vicky is describing the abuse she just endured by David when she yells that David tried to kill her. She is making this immediately after the abuse as she is walking out of the house.

Sustained.

State of Mind: A statement regarding the declarant's then-existing state of mind, physical, sensory, or emotional condition is admissible hearsay.

Vicky is describing her current state of mind and her physical condition as she was in fear for her life and was severely beaten by David.

Sustained.

RELATED BY VICKY TO OFFICER?
A2) Jewel's statement:

1. Defense should object to relevance.

Evidence is relevant if it has any tendency to make a fact of consequence more of less probable than it would be without the evidence. In California, the "truth in evidence" provision states that relevant evidence is admissible subject to a 352 balancing test.

HOW MANY TIMES HAVE I SAID DON'T DO THIS

Here, Jewel's statement is relevant because it has any tendency to show that David was attacking her when Vicky was regaining consciousness.

Overruled.

2. Defense should object to the statement as inadmissible hearsay.

*HEARSAY HEARSAY?
WIN HEARSAY?
LAYERS?*

Hearsay is an out-of-court statement made by a declarant offered to prove the truth of the matter asserted.

Here, the statement was made out of court by Jewel, a declarant. It is being not being offered to prove the truth of the matter asserted; rather, it is being offered to show effect on the listener. The prosecution will rebut this argument by saying that because Jewel said that the cops were coming, David got off of Vicky and walked away - it was not used for the truth of the matter.

BUT VICKY IS SAYING THAT BEING USED FOR MA?

Overruled, as it is not hearsay.

*CRAWFORD?
352?*

B. Jewel's testimony

1. Defense should object to relevance.

Evidence is relevant if it has any tendency to make a fact of consequence more of less probable than it would be without the evidence. In California, the "truth in evidence" provision states that relevant evidence is admissible subject to a 352 balancing test.

Here, Jewel's testimony is relevant because it tends to show that the 9-1-1 call was what the prosecution claims it to be. It tends to show that she has personal knowledge of the 911 call because she can testify as to her own voice and because she had personal knowledge of the events taking place.

IT TENDS TO SHOW CONTENT OF CALL IS TRUE. IE V IS VICTIM?

Overruled.

2. Defense will object as improper authentication.

An item of evidence is authenticated if it is proven that the item of evidence is what the proponent purports it to be. One's voice can be authenticated by personal knowledge of the voice.

Jewel is able to testify as to the authenticity of the 911 call. She has personal knowledge, i.e., she has a true, justified belief in the fact that she is on the 911 call. She was the one who made the phone call and was witnessing the events as they were occurring. Jewel is able to purport that the piece of evidence is what it says it is - a 911 call recorded at the time Jewel called emergency services after she found Vicky.

Overruled.

3. Defense will object as to inadmissible hearsay.

Hearsay is an out-of-court statement made by a declarant offered to prove the truth of the matter asserted. A declarant is a person. An assertion is a strong belief in a statement's truth.

Here, the 911 call is an out-of-court statement made by Jewel, a declarant, offered to prove that her mother was in serious danger and was being attacked by David.

Sustained subject to hearsay exceptions offered by the prosecution.

4. The prosecution will counter that the 911 call is admissible under the public records exception.

A public record is admissible if it details the daily activities of the agency or office and was made either under the duty to report what was occurring or to report factual findings or conclusions based on an investigation.

Here, The 911 call was made by the operator while under the duty to report the crime occurring while Jewel was narrating the events.

Original objection overruled.

5. Defense may object on Sixth Amendment grounds.

LOTS OF TIME SPENT HERE

TESTIFY

FACTS TO SUPPORT?

-> How do we know THAT'S WIT? ? ?

SPONTANEOUS STATEMENT? WHAT? ? ?

-> THIS IS NOT ADDRESSED? PUBLIC RECORDS FOR CONTENT OF 9-11 CALLER'S STATEMENTS?!?! NO

Under the Sixth Amendment, a criminal defendant has a right to confront witnesses being used against him. The defendant must be able to cross examine witnesses. → WHAT ELSE? TESTIMONIAL?

Here, defense will argue that Jewel's statement to the 911 operator was testimonial and was therefore subject to cross examination. MEANING WHAT? CONCLUSORY → RULE FOR THIS?

6. The prosecution will counter that the statement was made under the threat of an ongoing emergency YOU MAKE ASSERTION THE ANALYZE CASE?

Under Crawford, statements made to a law enforcement officer or first responder is considered non-testimonial if it is being offered to meet an ongoing emergency.

Here, Jewel was reporting that her mother was being severely injured by David, an ongoing emergency, as she didn't know if her mother would survive or not. The statement was non-testimonial because it was being offered to meet an ongoing emergency.

Overruled.

7. Defense will object under 352.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, undue delay, confusing the issues, or misleading the jury.

Here, defendant will argue that the evidence is unduly prejudicial because he was unable to cross examine Jewel when she made the statement to 911 operators. The statement, based on Crawford, was non-testimonial, and it tends to show that there was an ongoing emergency wherein Vicky was in serious danger.

Overruled.

C. Priscilla's testimony

1. Defense should object to relevance under 350.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. In California, the "truth in evidence" provision states that relevant evidence is admissible subject to a 352 balancing test.

Poorly organized

OVERALL YOU DON'T GRASP WITH A VERY WELL.

How DOES THIS RELATE TO NOT A VERY GOOD ANALYSIS

Priscilla's testimony has a tendency to show that David acted in conformity with abusive habits and domestic violence in the past. It tends to show that he has a violent nature and has hurt women in the past.

Overruled.

2. Defense will object to improper character

Evidence of a person's character is inadmissible to prove they acted in accordance with that character on a given occasion. Character evidence is admissible to prove motive, intent, absence of mistake, identity, common scheme or plan, opportunity, or preparation. Intent is the mens rea involved in committing a crime or act. In California, prior bad acts involving domestic violence, sexual assault, or child molestation are admissible to prove the defendant engaged in similar behavior in the present case.

THIS IS THE SAME THING. PROBABLY HAVE OWN FRAC BUT OK

Defendant will argue that the evidence is inadmissible propensity evidence. He will further argue that because he was never charged or arrested, the evidence is inadmissible character evidence that will allow the jury to draw an impermissible inference. The prosecution, however, will argue that based on California law, the evidence of David's prior acts, despite never being charged, are admissible when it relates to the charge at hand and is a prior bad act of domestic violence.

DON'T RESTATE ISSUE

WHERE IS THAT IN THE RULE

Overruled.

3. Defense will object under 352.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, undue delay, confusing the issues, or misleading the jury.

WHAT DID YOU CLAIM FROM ATTRIBUTION OF THIS OBSERVATION OF THIS APPLICABLE LEGAL RULE TO A PARTY

Here, David will argue that the prejudicial effect is substantially and unduly greater than the probative value of bringing in prior bad acts of domestic violence. He will argue that it will lead the jury to make an impermissible inference regarding his propensity to commit domestic violence again. However, California law allows for prior bad acts of domestic violence to come in for a current case involving domestic violence, and David's prior bad acts of domestic violence are relevant to his current felony domestic violence charge.

THIS IS A CONCLUSION WITH AN ARGUMENT AND NOT ANALYSIS

WHAT

Overruled.

↳ WHAT DOES THIS MEAN HERE?

HOW IS THIS PERTINENT TO 352 ANALYSIS

END OF EXAM

START WAS PROMISING - SEEMS
LIKE YOU GOT SLOPPY AS YOU
FELT MORE RUSHED. ANALYSIS BECAME
CONCLUSORY, RUSHED, AND UNHELPFUL
BUT YOU HAD A STRONG START.

IN YOUR FUTURE STUDIES, YOUR ANALYSIS
NEEDS WORK. EVERYTHING ELSE IS
FAIRLY ON POINT