

Monterey College of Law

EVIDENCE - Hybrid

Final Examination

Spring 2022

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION # 1

Dax is on trial for the robbery of a convenient store clerk. The robber wore a red and white long-sleeved T-shirt with blue jeans, a red and white beanie cap, with a red pompom and round black eyeglasses.

During the investigation of the robbery, Detective Logan spoke to the store clerk. The store clerk, told the detective that he feared for his life because the robber said, "Give me all the cash or else!" Also, the store clerk said the robber was dressed like Waldo from the "Where's Waldo" cartoon. Once the robber got the cash, he fled out the front door, but his beanie cap fell off inside the store. Detective Logan collected the red and white beanie hat and the store surveillance video. The authenticated surveillance video showed the robber dressed in Waldo attire.

At the police station, the detective received a tip that Dax was the robber. He was directed by the tipster to a home address. The detective arrived at the home address and was met by Cora, the Dax's wife. Dax was not home at the time. Cora claimed she was the tipster. Cora said that Dax told her he had robbed a convenient store. She gave the detective her husband's Waldo looking clothing and round black eyeglasses. Based all the investigation, Detective Logan legally arrested Dax and obtained a DNA cheek swab pursuant to a valid search warrant.

At trial, the prosecution presented the store clerk, the detective, Cora, Dax's wife, and a DNA expert.

Discuss all the evidentiary issues and arguments that would likely arise in each section below and the likely trial court ruling on the admissibility of the evidence.

Answer according to California Evidence Law.

1. During the prosecution's case, the store clerk testified that the robber wore "Waldo" attire and threatened, "Give me all this cash or else!"
2. Next, the prosecution presented Detective Logan. He testified to the collection of the beanie hat, the authenticated store surveillance video tape, and interview of the store clerk. Further, Logan testified he met with the tipster, Cora, Dax's wife. She gave him her husband's "Waldo" clothing voluntarily the detective what Dax said about the robbery.
3. Next, the prosecution called Cora. She surprised the prosecution by denying being the tipster, giving the detective any clothing items, or saying her husband told her anything. The prosecution showed Cora her witness statement, but she held fast in her denials.
4. Finally, the prosecution called a DNA expert who testified that the DNA from Dax's cheek swab and a beanie hat were compared. In the expert's opinion the DNA result was consistent with Dax's DNA. Further, the expert testified that Dax was guilty.

QUESTION #2

Dan is being charged with residential burglary in the case of People of the State of X vs. Dan.

The facts are as follows: On June 4th, 2021, Valerie returned to her home after vacation to discover that her front door was pried open. When she entered the home, it was ransacked, and numerous valuable items were taken. Valerie called police and Officer Walt arrived on scene and took the report. Valerie showed Officer Walt surveillance video from her home surveillance system located outside of her home which captured the suspect entering her home and leaving with her property on June 2nd, 2021. Valerie told Officer Walt that she did not know the person who entered her home. Upon viewing the surveillance Officer Walt said, "I know exactly who that is!" Officer Walt put out a "be on the lookout" for Dan. Dan was arrested two weeks later for this incident.

Assume the following occurred in the jury trial of Dan. 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 her case in chief, the prosecutor calls Officer Walt to the stand. Officer Walt testifies that he reviewed Valerie's surveillance video and immediately said, "I know exactly who that is!" Officer Walt testifies that he cannot pinpoint the exact number of years he had been aware of Dan but that he had seen him on numerous occasions in the 5 years since he had been on the force, including that he had seen Dan as recently as two weeks before the residential burglary. Officer Walt further testifies that he saw Valerie accidentally erase the surveillance video after showing it to him.
2. In the defense case in chief, Dan takes the stand and testifies that he did not commit the crime, and this is a case of mistaken identity. The prosecutor asks the following questions during cross examination?
 - a. Isn't it true you were convicted of a misdemeanor for perjury five years ago? The defendant denies it and the prosecutor seeks to introduce a certified copy of the defendant's conviction.
 - b. Isn't it true that you were convicted of a felony for vandalism two years ago?
 - c. The defendant admits he suffered that conviction and states, "I haven't had an incident since I've been out." The prosecutor then seeks to admit evidence that the defendant is pending trial in another residential burglary case that occurred a few days after the burglary in this case.

Question #3

Officer Wonderly was on patrol when he heard three loud bangs coming from the next street over. Officer Wonderly turned and drove his patrol car at a high rate of speed over to the area where the sounds came from. When he arrived, he found Vince, who was lying in the middle of the road and bleeding from his chest. Officer Wonderly radioed for an ambulance and began first aid. As Officer Wonderly placed a bandage on Vince's chest wound, he talked to Vince to keep Vince alert. Officer Wonderly asked, "what happened, man?" Vince responded, "my own homie shot me, man, over some chick. I can't believe Rico shot me, bro. He killed my ass over some chick!" Officer Wonderly asked what Rico's real name was, and Vince looked at him and said, "I ain't no snitch. I didn't say Rico did this. You got me twisted, homie. I ain't saying nothing else." Vince died of his wounds.

Officer Wonderly was familiar with the local criminal scene, and recognized the name Rico as belonging to a local gang member named Domingo. Within 10 minutes of clearing the scene of the shooting, Officer Wonderly went to Domingo's last known address. When Officer Wonderly arrived and knocked on the door, Domingo answered the door. Officer Wonderly asked Domingo if he had time to talk about something that had happened earlier that night. Before Domingo could say anything, Heriberta, a teenage female, came to the door and yelled "don't be trying to talk to my man about no shooting, that fool Vince is a snitch if you are showing up here." Domingo cut in, telling Heriberta, "shut up, woman," at which point Domingo stepped outside and said, "I don't know what she is talking about, sir, I don't know anybody named Vince, of Vance, or whatever. What is this regarding?" Officer Wonderly asked if Domingo was on parole, at which point he said he was and searchable for weapons. Officer Wonderly asked what Domingo's moniker was, and Domingo said, "Man, you know they call me Rico, don't play games with me, Wonderly."

During a constitutionally valid search of Domingo's apartment, officers located a semiautomatic firearm, which ballistically matched rounds of ammunition found in Vince's torso during an autopsy. The firearm was capable of holding 11 rounds of ammunition and was missing the same number of rounds from it as were used in the shooting. Heriberta was interviewed but invoked her right to an attorney. Domingo was arrested and charged with the murder of Vince. While in custody awaiting trial, Domingo and Heriberta got married.

The following occurred at the murder trial:

1. The prosecution called Officer Wonderly, who would testify that Vince told him, "My own homie shot me, man, over some chick. I can't believe Rico shot me, bro. He killed my ass over some chick," leaving out the second half of the statement, which the defense attempted to offer.
2. Prosecution called Heriberta to testify to her statement, "don't be trying to talk to my man about no shooting, that fool Vince is a snitch if you are showing up here," before Officer Wonderly ever mentioned the shooting.
3. Officer Tang testified in the prosecution's rebuttal case about his opinion of Domingo from having been a police officer for 10 years in the community and knowing Domingo. Specifically, Officer Tang would testify that Domingo was known as a ruthless killer who preferred firearms.

Discuss the admissibility of each item and any objections and their responses under the Federal Rules of Evidence only.

SPRING 2022 EVIDENCE EXAM ANSWER Q1 (SLizardo)

QUESTION # 1: ANSWER OUTLINE DAX- "Waldo"

***Please note: The issues below are mainly in an outline format. Students may argue otherwise so long as the arguments are supported.*

1. STORE CLERK'S TESTIMONY

RELEVANCE- *evidence must be both logically relevant and legally relevant to be admissible.*

Logical Relevance: Tendency Test

-Evidence is logically relevant if it tends to make the existence of a disputed fact of consequence to the determination of the action more or less probable than it would be without the evidence.

-Prosecution is offering the store clerk's testimony as an eyewitness account to establish the attire worn by the robber. The uniqueness of the "Waldo" looking attire, (red and white long-sleeved T-shirt, blue jeans, a red and white beanie cap with a pompom and round black eyeglasses) is logically relevant because it tends to be associated with the robber's unique attire.

- The robber's statement, "Give me all the cash or else!" tends to establish the force or fear element of robbery.

The evidence is logically relevant.

Legal Relevance: Balancing Test

-Trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. In balancing, the court will take into consideration undue consumption of time, confusing the issues and misleading the jury.

-It does not appear that the store clerk's eyewitness account would create unfair prejudice, so the trial court will allow the testimony in. The evidence is legally relevant.

Prop 8

*- In California, **Prop 8** applies to criminal cases, and provides that all relevant evidence is admissible even if it is objectionable.*

-However, Prop 8 evidence is subject to the being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exemptions.

- Evidence offered is exempt from Prop 8 because the evidence has probative value in determining the robber's clothing, ID and the threat.

- Risk of unfair prejudice this appears to be outweighed by the probative value in showing that the defendant is violent and makes threats.

Witness Competency

Personal knowledge is key for witness qualification. Factors that are part of credibility are: perception, memory, ability to communicate and truthfulness.

Here, the store clerk has personal knowledge of the robber's attire (red and white long-sleeved T-shirt, a red and white beanie cap with a red pompom and round black eyeglasses) and the threat. The description that the robber's attire looked like "Waldo" and threat may be helpful to the jury for force or fear.

However, the defense may object to the "Waldo" characterization and being not relevant. Also, the threat statement is too prejudicial and not probative.

"Waldo"- type attire may be argued as common knowledge for lay witness testimony since the "Waldo" character is a global phenomenon. Waldo is popular, unique, and as well-known as many Disney characters. The defense may argue the Waldo term is prejudicial by associating a cartoon character with the client.

Here, the court will allow the store clerk to testify. The testimony will go to the weight of the evidence, not its admissibility.

HEARSAY

-Hearsay is an out of court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies.

SPONTANEOUS STATEMENT EXCEPTION- By Robber

Here, the store clerk is relaying the threat made by the declarant (robber).

A statement that is otherwise hearsay be admissible as an exception if the statement made while the declarant (Dax) was under the stress of a startling or stressful event and the statement must concern the immediate facts of the stressful event.

- "Give me all the cash or else!" may be a spontaneous statement exception since it may be argued that the robbery is a stressful event since cash is being requested from the clerk under a demand.

The trial court will allow the robber's statement in under this exception because the elements are satisfied.

(NOTE: The call of the question was for CEC, not FRE Excited Utterance.)

ADMISSION BY PARTY EXCEPTION

-A statement is not inadmissible when offered against the declarant in a case where he is a party. The statement does not need to be about guilt.

- Dax is the defendant in a criminal case, so he is a party.

-Party who is offering the "Give me all the cash or else!" – is the prosecution.

-The parties are on separate sides.

- Court likely to allow the robber's cash demand since the elements are established.

STATE OF MIND EXCEPTION

-Statement of declarant's (the robber) then existing physical or mental condition or state of mind.

-Discussion of the statement by Dax. However, his physical or mental condition were not part of the statement. Here, the elements are not satisfied.

2. DETECTIVE LOGAN'S TESTIMONY

Logical Relevancy- defined above

Detective Logan's testimony tends to show the collection of a robbery clothing item, the beanie hat and the store surveillance video. Also, it is relevant for the description given by the store clerk. The surveillance video tends to establish there was a robbery, the clothing description and the threat made.

Further, the tipster information tends to prove the identity of the robber (Dax) and his attire.

Cora admits being the tipster and as Dax's wife may have inside information about the robbery.

The trial court will admit Detective Logan's testimony as logically relevant.

Legal Relevancy- defined above

On balancing probative and prejudicial interests, there does not seem to be dangers of misleading the jury, wasting judicial time, or confusing issues regarding Detective Logan's testimony. The testimony is legally relevant.

3. CORA'S TESTIMONY

Logical Relevancy: defined above.

-The logical relevancy is to prove that Cora is not only the tipster and gave the detective the Waldo clothing. Also, upon sharing information, Cora's witness statements tend to prove her husband committed the robbery because Dax admitted it to her.

-The problems of Cora's recant will be addressed below.

Legal Relevancy defined above.

Probative value in the tip, admission and clothing outweighs prejudicial value.

SPOUSAL TESTIMONIAL PRIVILEGE

-Specific relationships that are built on trust and confidentiality and protected from disclosure.

-One spouse cannot be compelled to testify against another spouse in a criminal proceeding. It can only be invoked by the spouse-witness and can only be claimed during marriage.

*- The facts seem to indicate that Cora was going to volunteer to testify against her spouse. The testifying spouse may testify against a spouse in **any proceeding**. Cora is the holder of the privilege. However, she has not only had a change of heart, but she denies being the tipster and talking to the detective.*

-Waiver of the privilege

- Exception: crime, here a robbery. Most likely admitted as an exception to privilege.

MARITAL COMMUNICATIONS PRIVILEGE

-The privilege protects confidential spousal communications and survives if the marriage ends by death or divorce. Dax and Cora are legally married at the time of her testimony.

Presumption of confidential communication in certain relationships

-No actual conversation between Cora and Dax about the Waldo clothing is given in the facts. No third parties were present in this private setting. However, there was an admission. Cora is repeating that her husband made an admission of guilt of having committed a robbery.

-Exception to Privilege: Crime, here robbery- likely admitted.

ADMISSION BY PARTY OPPONENT- DEFINED ABOVE

The problem: Cora is not the declarant, her husband is. The other problem is Cora is now recanting the statement of her husband admitting he had committed a robbery. She is also denying she is the tipster. However, see below on Prior Inconsistent Statements.

Detective Logan may be recalled by prosecution to lay foundation for impeachment.

PRIOR INCONSISTENT STATEMENTS

Prosecution may offer Cora's prior statements as admissible if offered to impeach her. She must be given an oppo

As such, the prior statements from Cora to Detective Logan would be considered non-hearsay. Here, with proper impeachment laid, the statements given to Detective Logan will be admitted.

4. THE DNA EXPERT

Logical Relevancy- defined above

-The DNA result is logically relevant because it establishes the identity of the Waldo robber as Dax. The guilt expert opinion may tend to establish identity but it invades the province of the jury. See below.

Legal Relevancy- defined above

-In balancing the probative value and unfair prejudice, the trial court will allow the DNA result as legally relevant. However, the expert's opinion that Dax was the robber is too prejudicial and will be excluded since it invades the province of the jury.

Expert DNA Qualifications

-An expert will be qualified if he/she has specialized knowledge, skill, training, or education that is beyond common knowledge. Also, the subject must be a proper subject matter, have reasonable reliance and helpful to the jury. Hypothetical questions may be asked of based on the

evidence. An expert may be challenged by the defense for bias, conflicts of interests or the basis of the opinion.

-Note: A Kelly hearing would not be proper since DNA has been accepted in the general scientific community as reliable. In short, DNA is not a new or novel procedure.

DNA Expert Opinion

-If proper foundation is laid for how the test were properly conducted, the DNA result would be a proper opinion for an expert.

Ultimate Issue: Dax's Guilt

-An expert opinion will not be allowed on Dax's guilt because this is a legal issue. As such, the expert would be invading the province of the jury.

SPRING 2022 EVIDENCE EXAM QUESTION AND ANSWER Q2 (O'Keefe)

Dan is being charged with residential burglary in the case of People of the State of X vs. Dan.

The facts are as follows: On June 4th, 2021, Valerie returned to her home after vacation to discover that her front door was pried open. When she entered the home, it was ransacked, and numerous valuable items were taken. Valerie called police and Officer Walt arrived on scene and took the report. Valerie showed Officer Walt surveillance video from her home surveillance system located outside of her home which captured the suspect entering her home and leaving with her property on June 2nd, 2021. Valerie told Officer Walt that she did not know the person who entered her home. Upon viewing the surveillance Officer Walt said, "I know exactly who that is!" Officer Walt put out a "be on the lookout" for Dan. Dan was arrested two weeks later for this incident.

*Assume the following occurred in the jury trial of Dan. 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 her case in chief, the prosecutor calls Officer Walt to the stand. Officer Walt testifies that he reviewed Valerie's surveillance video and immediately said, "I know exactly who that is!" Officer Walt testifies that he cannot pinpoint the exact number of years he had been aware of Dan but that he had seen him on numerous occasions in the 5 years since he had been on the force, including that he had seen Dan as recently as two weeks before the residential burglary. Officer Walt further testifies that he saw Valerie accidentally erase the surveillance video after showing it to him.*

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. Officer Walt's testimony is relevant because it ties Dan to the residential burglary.*

Officer Walt's statement, "I know exactly who that is!"

Hearsay: *Hearsay is an out of court statement offered for the truth of the matter asserted. Officer Walt's statement, "I know exactly who that is!" is hearsay because it is being offered to show Officer Walt knows who the suspect is.*

FRE 803(1) Present Sense Impressions - A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it

Officer Walt's Lay Witness Opinion Testimony

Opinion of a Lay Witness: If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- *Rationally based on the witness' perception;*
- *Helpful to a clear understanding of the witness' testimony or to determining a fact in issue; and*
- *Not based on scientific technical or other specialized knowledge within the scope of expert testimony (FRE 702)*

Officer Walt identified Dan from the surveillance video. FRE 701 requires that such testimony need only be based on the personal perception of the witness[.] The witness need not have witnessed the crime itself. Officer Walt's perception and knowledge would not be available directly to the jury without his testimony. The opinion of the officer is sufficiently based upon personal knowledge to permit its introduction [.] The officer has seen Dan on numerous occasions since he has been on the force and as recently as 2 weeks prior to the residential burglary. The question of the degree of the officer's knowledge goes to the weight rather than to the admissibility of the opinion.

The missing surveillance tape:

Best Evidence Rule: The best evidence rule applies only where the contents of a writing are at issue, such as when the contents of a writing directly affects legal rights that are at issue in the case (such as a contract, a will, defamatory writings and recordings, etc.) or where the knowledge of a witness concerning a fact results from having read it in the document.

The rule does not apply if the fact to be proved exists independently of any writing, the writing is collateral to a litigated issue or in the case of summaries of voluminous records or public records.

If the best evidence rule applies, then the proponent of the evidence has to either introduce the original (in this case the note) or a duplicate (an exact copy of the note) or provide a legally justifiable excuse why they cannot produce the original or a duplicate. A duplicate is admissible to the same extent as the original unless there is a genuine issue as to the documents genuineness or It would be unfair to admit the duplicate.

If you don't have the original or duplicate, you must convince the court that you have a satisfactory explanation why you do not have it:

- a. The original was lost or destroyed in good faith*
- b. The original is outside the jurisdiction and unobtainable*
- c. The original is in the possession of the adversary, who after notice, fails to produce it*

If the court is satisfied, then you can introduce any type of "secondary evidence" to prove the terms of the writing. This could include oral testimony, handwritten notes, photos, etc.

In the present case, the best evidence rule would apply. The officer's knowledge of the contents of the writing (the surveillance video) comes solely from watching the video. The officer cannot produce the original or a duplicate because the only copy of the original was accidentally erased. The prosecutor would have to ask the court to introduce secondary evidence of the contents of the document – the oral testimony of the officer, in lieu of the original or duplicate based on the fact that the original was destroyed accidentally by Valerie. If the court finds the explanation satisfactory, then the court will allow oral testimony about the contents of the writing.

2. *In the defense case in chief, Dan takes the stand and testifies that he did not commit the crime, and this is a case of mistaken identity. The prosecutor asks the following questions during cross examination?*
 - a. Isn't it true you were convicted of a misdemeanor for perjury five years ago? The defendant denies it and the prosecutor seeks to introduce a certified copy of the defendant's conviction.*
 - b. Isn't it true that you were convicted of a felony for vandalism two years ago?*
 - c. The defendant admits he suffered that conviction and states, "I haven't had an incident since I've been out." The prosecutor then seeks to admit evidence that the defendant is pending trial in another residential burglary case that occurred a few days after the burglary in this case.*

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. The prosecutor's questions are relevant to impeach Dan*

Impeachment: *The casting of an adverse reflection on a witness.*

Impeachment by showing a conviction of a crime: *Under certain circumstances, a witness may be impeached by proof of conviction of a crime. FRE 609. The fact that the*

witness (including a defendant who testifies in a criminal case) has been convicted of a crime may usually be proved either by eliciting an admission on direct or cross examination or by the record of conviction.

- a. **Crime Involving Dishonesty or False Statement.** The prosecutor seeks to impeach the defendant with a crime involving dishonesty.

Under the Federal Rules, a witness' character for truthfulness may be attacked (or impeached) by any crime (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of dishonesty or false statement. In most cases, the statutory elements will indicate whether such an act was required. An indictment, statement of admitted facts, or jury instructions may also be used to show that the crime required proof of dishonesty or false statement. The trial court has no discretion – not even under FRE 403 to disallow impeachment by such crimes. The only time when admission of this evidence is not automatic is when a ten-year period has elapsed since the date of conviction or the witness' release from confinement related to the conviction (whichever date is later). In that circumstance, the evidence is subject to a balancing test under Rule 609(b).

Analysis: The defendant is being impeached with a misdemeanor involving dishonesty (perjury). This is permissible. It is permissible for the Prosecutor to introduce a certified copy of the defendant's conviction.

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

Judgment of a Previous Conviction Exception. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

Public Records Exception. *To introduce a public record, the proponent of the record needs to establish the following:*

1. *The record was properly prepared*
2. *The record is in official custody*
3. *The person who prepared the record was a public official*
4. *The official had a duty to record the fact*
5. *The official had personal knowledge of the fact*
 - a. *NOTE: Rule 803(3) relaxes this requirement “in civil actions and proceedings against the Government in criminal cases ...” This permits the admission of findings about events when the investigating officer lacked firsthand knowledge of the event*
6. *The entry is factual in nature.*

- b. ***Felony Not Involving Dishonesty.*** *The prosecutor seeks to impeach the defendant with a conviction of a felony NOT involving dishonesty.*

*A witness’ character for truthfulness may be attacked, under the Federal Rules, by any felony whether or not it involves dishonesty or a false statement. However, if the felony is one that does not involve dishonesty or false statement, the trial court **may** exercise discretion to exclude it under.*

Accused in a Criminal Case. *If in a criminal case, the witness being impeached is the accused, the felony conviction will be admitted only if the government shows that its probative value as impeachment evidence outweighs its prejudicial effect. In this context, the prejudicial effect is the likelihood that a jury would misuse the conviction as propensity for the person to commit a crime as opposed to the permitted use as their propensity to be untruthful in court.*

Remoteness. *Under the federal rules, a conviction is usually too remote and thus inadmissible if more than 10 years have elapsed since the date of conviction or the*

date of release from the confinement imposed for the conviction, whichever is later. In extraordinary circumstances, such convictions can be admitted, but only if the trial judge determines that the probative value of the conviction substantially outweighs its prejudicial effect, and the adverse party is given notice that the conviction is to be used as impeachment (See FRE 609(b))

(Students should analyze its prejudicial effect vs. Probative value)

c. *Impeaching the defendant's credibility as a witness.*

Here, the defendant opened the door to his other pending criminal case by stating, "I haven't had an incident since I've been out" The fact that the defendant had another pending burglary case would not be admissible for impeachment with a prior conviction, because there was no conviction; it would not be appropriate impeachment as a prior bad act, because that type of impeachment requires an act of deceit or lying. The prosecutor will be permitted to impeach the defendant with his pending case to show that he was untruthful on the stand.

Limiting Instruction: *A limiting instruction should be given that the evidence is not being used to prove that the defendant has a propensity to commit burglaries; The evidence is relevant, if at all, on the issue of the defendant's credibility.*

SPRING 2022 EVIDENCE EXAM QUESTION AND ANSWER Q3 (HStarr)

Answer Outline

- *Officer Wonderly testifying to first half of statement*
 - *Relevance*
 - *Tends to show who committed the murder as well as the motive behind the murder.*
 - *It is relevant*
 - *Hearsay*
 - *It is a hearsay statement*
 - *Likely to be used for the truth of the matter, and unlikely there is another alternative use not for the truth of the matter.*
 - *803 Hearsay exceptions*
 - *Excited utterance – likely applicable*
 - *State of mind – potentially applicable*
 - *Statement made for medical diagnosis – possible but unlikely*
 - *804 Hearsay exceptions*
 - *Vince is unavailable*
 - *Dying declaration*
 - *Forfeiture by wrongdoing*
 - *Crawford*
 - *Primary purpose test*
 - *Likely admissible*
 - *Most important part of this is issue and rule**
 - *RoOC (107)*
 - *Rest of statement should come in under 107*
 - *Tactical considerations as to whether they should – extra points*
 - *Students should not spend time trying to independently find hearsay exceptions*
 - *403*
 - *Probative value is very high and undue prejudicial effect is minimal*

- *Important to distinguish between prejudice and undue prejudice*
- *Heriberta testifying about own statement*
 - *Relevance*
 - *Tends to show that she and Domingo knew about the murder, which suggests they were involved in the shooting*
 - *5th Amendment privilege against self-incrimination – extra points*
 - *Marital privilege*
 - *Spousal testimonial privilege*
 - *Potentially fraudulent*
 - *Otherwise likely applicable*
 - *Heriberta holds it and can waive it*
 - *Confidential communication privilege*
 - *Not applicable because not married at time of shooting*
 - *Not applicable because statement not confidential*
 - *Hearsay*
 - *Elemental hearsay to focus on the last two factors: declarant and for the truth of the matter asserted*
 - *Though Heriberta is the witness, she is also the declarant*
 - *It is unlikely that the prosecution is using this for the truth of the matter asserted – i.e., we know nothing about the shooting. Rather, the prosecution is using the assertion to the contrary – that mentioning is circumstantial evidence of her state of mind, i.e., knowledge that they were involved.*
 - *The “Vince is a snitch if you’re here” is more complex. Again, it shows the state of mind, but the truth of it is more important.*
 - *Hearsay exception should likely not be sustained at this stage, but if it is, it would be only to the TMA use*
 - *803 Exceptions*
 - *State of Mind*
 - *804 Exceptions*
 - *Unavailability*
 - *She is unavailable due to the exercise of the spousal testimonial privilege*

- *If student believes fraudulent use of privilege would lead to not being able to claim it, that is fine, but should still consider 804 exceptions*
 - *Statement against interest*
 - *Issue here would be whether the statement meets the requirements.*
 - *Given the issue with privilege and statement, this exception is unlikely to apply*
- *403*
 - *Students should be able to distinguish between prejudice and undue prejudice.*
- *Officer Tang's testimony*
 - *Relevance*
 - *If Domingo is a ruthless killer who prefers firearms, it is more likely he killed Vince despite them being friends*
 - *Character evidence*
 - *Propensity*
 - *This evidence could easily be used for propensity*
 - *MIAMICOP*
 - *Unlikely to be any applicable, but MO or Identity would be the most apt.*
 - *Conclusion should be that none are applicable*
 - *Mercy Rule Rebuttal*
 - *Had the defense attached the victim's character for violence or offered Domingo's character for nonviolence, the "door would be open" for prosecution to rebut*
 - *However, since the defense did not do this, it would not be admissible*
 - *403*
 - *Undue prejudice would substantially outweigh any probative value*

1)

1. Store clerk's testimony: Robber wore "Waldo" attire, "Give me all this cash or else"

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, the store clerk's testimony is relevant to prove the identity of the person who robbed the convenience store.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

Here, the probative value of the clerk's testimony is not substantially outweighed by the prejudicial effect.

HEARSAY

Hearsay is an out of court statement, of a person, offered to prove the truth of the matter asserted.

Here, prosecution wants the clerk to testify about what the robber wore and what the robber said. The statement regarding attire is not hearsay because that is based on the

clerk's personal observations. However, the defense would object to the testimony regarding "give me all this cash or else" is an out of court statement being used to show that the defendant robbed the store clerk.

Good!

HEARSAY EXCEPTIONS

Spontaneous Statements

There was an event; that was startling or stressful; they have personal knowledge about the event; and when the statement was made they were nervous or excited; under CA rules it is required for the statement to be a narrative of the event.

The prosecution would argue the statement is allowed to come in under the spontaneous statement exception to hearsay. The defendant is robbing the store clerk, which is a startling and stressful event; the clerk and defendant has personal knowledge about the event because the clerk was the person that the defendant robbed. Also, the statement was made when the defendant was nervous or excited. The defense would object because the clerk is not the one making the statement, it is the supposed defendant that made the statement, furthermore, the defendant is not narrating the event of a robbery. The prosecution would argue that this does qualify as a spontaneous statement because it is a narration; when the defendant (D) is robbing the clerk, he is saying to give him the money or else, which indicates the defendant is narrating that he is committing a robbery.

Good Analysis

The court would hold this is a spontaneous statement that is a hearsay exception and allow the statement to come in.

Present Sense Impression

There was an event; they had personal knowledge about the event; the statement was made at or near a time close to the event; and the statement related back to that event.

Here, the prosecution would argue if it is not a spontaneous statement, then this is a present sense impression. The D caused the event of robbery; robbery is startling or stressful for both the clerk and the D because he wants to ensure he get the money and gets away. The prosecution will also argue that the D made the statement near the time close to the event (which took place exactly at the time of the robbery); and the statement related back to the event. The defense would argue that the statement was not made close enough in time to the robbery.

The court would hold this is a present sense impression made and is an exception to the hearsay rule.

Statement of a Party Opponent

Any statement made by a party opponent can and will be used against that person in court.

Good
Here, the prosecution will argue if the statement of "give me the cash" doesn't fall under a hearsay exception, it qualifies as non-hearsay because it is a statement by a party opponent. The defendant is the party opponent who made the statement to the clerk, so the statement could be used against the D.

The court would hold the statement is of a party opponent and is non-hearsay, so it would come into evidence. * In California it is a hearsay exception

Witness Testimony

A lay witness is allowed to testify if they have personal knowledge, take an oath or affirmation to tell the truth, and the testimony will assist the finder of fact. A general exception to opinion testimony is allowing lay witnesses to testify about what someone looked like, identify a person, describe their mental state, etc.

Here, the description from the clerk about what the robber was wearing should be allowed because the clerk has personal knowledge from what he observed when undergoing the robbery by the D. The prosecution would argue that the clerk is a witness (W) and is allowed to testify to what he seen, heard, tasted or smelled. The prosecution will argue the clerk is allowed to testify to his opinion of the robbers close because he perceived what the robber was wearing.

Impeachment

Casting an adverse reflection of the veracity of the witness.

The defense would likely impeach the store clerk through sensory deficiencies. Specifically, defect in perception, the defense would cross examine the clerk (W) and ask if he has a defect in perception or memory; possibly the clerk was mistaken about what he observed the robber wearing. The defense could offer extrinsic evidence of memory defects or perception defect as proof of the sensory deficiency. However, the prosecution would argue that the video evidence confirms what the clerk described the D's attire to be.

2. Detective Logan: beanie hat; authenticated video; interview of store clerk; Cora's wife volunteering the clothing/statement

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, the beanie is probative of showing D owned a beanie that was similar to the robbers; the video is probative of showing the attire worse and the robbery occurring and Cora giving the clothing and admitting to the Detective what the Defendant said would tend to also prove Dax was in fact the assailant that robbed the store clerk.

The court would hold the evidence id logically relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

Here, none of the evidence is substantially outweighed by the prejudicial effect it could have on the fact finder.

The court would hold the evidence is legally relevant.

Great Job!

HAT/VIDEO TAPE/Cora Voluntarily Giving it Over.

The prosecution would argue the hat should be allowed into evidence because it proves that it was owned by Dax because they retrieved it from his residence and was voluntarily given by his wife Cora. The authenticated video tape further provides proof of the hat with the distinct beanie with a red pom pom worn by the robber. The prosecution would argue this is circumstantial evidence that proves Dax was the robber. The defense would

object that there is a chain of custody issue because there is no mention of where the hat was taken once retrieved and where it went until now being brought into court.

The court would allow the hat, authenticated video into evidence. *Good*

HEARSAY

Hearsay is an out of court statement, of a person, offered to prove the truth of the matter asserted.

Here, the defense would object because the detective is trying to use Cora's statement (made out of court) to prove that she gave the detective the Waldo clothing. The defense would claim if there is no hearsay exception, then the statement by Cora's wife about the similar "Waldo" clothing is inadmissible due to hearsay.

Hillmon Doctrine

The declarant had a plan or the declarant intended to carry out that plan

The prosecution would argue that Cora's statement falls under the hearsay exception of the hillmon doctrine because he told Cora about the plan and he intended to carry out the plan

The court would hold the hillmon doctrine applies.

CORA DESCRIBING TO THE DETECTIVE WHAT DAX SAID

Statement of a Party Opponent

Any statement made by a party opponent can and will be used against that person in court.

Here, the prosecution would claim that this is a statement of a party opponent because Dax told his wife that he robbed a store.

The court would find that Dax telling Cora about the robbery is a statement of a party opponent that could be used against him.

Witness Testimony

A lay witness is allowed to testify if they have personal knowledge, take an oath or affirmation to tell the truth, and the testimony will assist the finder of fact. A general exception to opinion testimony is allowing lay witnesses to testify about what someone looked like, identify a person, describe their mental state, etc.

The prosecution would argue that even if the statement itself is not allowed, then the detective should be allowed to describe what occurred when he retrieved the items from Cora because he is a lay witness with personal knowledge.

The court would likely allow the detective to testify about what happened when he picked up the belongings from Cora *Good*

Confrontation Clause

In a criminal case, when testimony is being used against the defendant for a prosecution, he has a right to confront the witness.

There isn't a confrontation clause issue because both the detective and Cora are present in court and readily available for cross examination.

3. CORA DENYING BEING TIPSTER, DENYING STATEMENT TO OFFICER ABOUT ROBBERY, AND WITNESS STATEMENT

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, the evidence that Cora identified her husband as the robber, made a witness statement confirming those facts, and being the tipster that led police to Dax's home is relevant to prove that Dax was the robber.

The court would hold the evidence is logically relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

Here, the probative value of the Cora's testimony or any of the above evidence is not substantially outweighed by the prejudicial effect.

The court would hold the evidence is legally relevant.

HEARSAY

Hearsay is an out of court statement, of a person, offered to prove the truth of the matter asserted.

The defense would object to Cora's tipster statement because it is an out of court statement, offered to prove that she identified Dax as the robber.

Statement of Party Opponent

(supra)

The prosecution would argue the statement made by Cora about identifying what her husband told her is a statement by a party opponent and is not hearsay.

The court would likely allow the statement of a party opponent. (however, see marital privileges below that could exclude her testimony)

Spousal Immunity Privilege

The spousal immunity privilege is the privilege not to be compelled to testify against their spouse. It is a complete bar on everything. It applies in criminal proceedings, but in CA it also applies to civil proceedings. Only the witness spouse holds the privilege. It only applies to valid marriages (doesn't apply to marriages involving bigamy, incest, benefit for immigration purpose or for any other fraudulent purpose). The spouse could not be compelled to testify against their spouse in any proceeding. The privilege must be asserted

during the marriage. Divorce or annulment terminated the privilege. But the privilege covers matters that occurred even before the marriage. *Great!*

The defense would object to the prosecution making Cora testify against her spouse Dax. Cora is the witness of the spouse holding the privilege and cannot be compelled to testify against Dax if she does not want to. Cora is refusing to testify and denying being a tipster, and doesn't want to cooperate (retracting everything she said). Cora and Dax's marriage is valid, they have not divorced. The defense would argue that Cora could not be compelled to testify.

Confidential Marital Communication

The privilege applies in criminal proceedings. Both Spouses can invoke the privilege. Does not apply to communications regarding spousal misconduct, routine business, or spousal abuse. The privilege lasts forever. Doesn't apply to statement made after divorce.

Here, both Clara and Dax could assert the privilege. Dax telling Cora that he robbed the store was made in confidence and allowing the statement would disrupt the harmony of their marriage.

The court would hold that either/both the spousal immunity priv or marital priv applies and Cora could not be compelled to testify.

Witness Testimony

A lay witness is allowed to testify if they have personal knowledge, take an oath or affirmation to tell the truth, and the testimony will assist the finder of fact. A general

exception to opinion testimony is allowing lay witnesses to testify about what someone looked like, identify a person, describe their mental state, etc.

The prosecution would argue that even if the statement itself is not allowed, then the detective should be allowed to describe what occurred when he retrieved the items from Cora because he is a lay witness with personal knowledge. The detective would also be allowed to describe what Clara told him when talking to her.

The court would likely allow the detective to testify about what happened when he picked up the belongings from Cora and being a tipster.

Good

4. DNA Expert

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, the DNA evidence matching to the beanie shows Dax was the suspect in the robbery.

The court would hold the evidence is logically relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

There is no substantial risk of the DNA prejudicing the Jury.

The court would hold the evidence is legally relevant.

Expert Testimony

An expert is only allowed when the subject matter is proper; needs to be qualified; and based their opinion on reliable facts, generally accepted in the scientific community.

Under Daubert the opinion must be based on scientific evidence that is : testable, rate of error; generally relied upon and accepted in the community/relied upon and popular in the community; peer review/publication; and systems of control for the type of scientific evidence. The expert cannot comment on their opinion if the person is guilty.

Here, the DNA expert is qualified because that's the type of work he does as a professional based on his knowledge, training, skill and experience. DNA is not a subject matter a lay jury/trier of fact would know and it would help the jury understand. DNA is a prevalent science that has been tested since the 1990s. DNA is generally accepted in the community. Scientists base their opinion on DNA evidence to match DNA to other suspects. It is relied upon in the scientific field. There are controls in place to make sure nothing faulty happens. There is peer review and publication on DNA. The defense would object, although the DNA expert is qualified the expert is not allowed to testify that they believe the D is guilty. The defense would argue that statement is completely/substantially prejudicial and does not let the jury do it's job by deciding a fact. The defense would argue it is not up to the expert to say his opinion on guilt or innocence.

The court would allow the expert opinion on if the DNA matched, but not that Dax was guilty.

Good!

4)

Officer Walt Testimony

Relevance- Evidence is relevant if it is probative meaning it has a tendency to prove or disprove a material fact of consequence.

Officer Walt's testimony is relevant to show that the man on the video surveillance is Dan. The video shows that Dan is the one who entered Valerie's house with the intent to steal.

Authentication- Authentication is testimony or evidence offered to verify that evidence is what the offering party says it is.

Walt can testify to knowing D for a number of years. He cannot recall exactly but he knows that he had seen him on numerous occasions in the past 5 years. The fact that Officer Walt has seen D numerous times can prove that Walt knows what D looks like and can easily identify him. Valerie may be able to authenticate that there was a surveillance video and that Officer Walt watched it before it was deleted.

Good

Best Evidence Rule- The Federal Rules use BER for documentary evidence to come into trial. The Best Evidence rule states that courts prefer an original or duplicate. The original document is more trustworthy than human memory. The witness may testify to the documentary evidence without the original if there is a good excuse the original being lost and there was a good faith reason for not producing it.

Officer Walt is testifying that he is identifying D on a surveillance video and so the original or duplicate video would be necessary here. Officer Walt testifies that he saw Valerie accidentally delete the video after showing it to him. Valerie did not delete the

Good
video on purpose to destroy evidence, it was merely an accident. The Court will likely allow Officer Walt to testify to the video surveillance without the original in court.

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

When Officer Walt watched the video he immediately said "I know exactly who that is!" The statement was made out of court and is offered to prove Walt knows who Dan is.

Excited Utterance- There is a hearsay exception when an event happened that was startling or stressful. The declarant made a statement while under the stress and the statement was about the event.

Good!
Officer Walt was startled in the moment that he watched the video and saw Dan who he recognized. The statement was made while he was startled and was describing the fact that he knew Dan.

Conclusion- The testimony of Officer Walt will likely be admissible.

Cross Examination of Dan

a.

Relevance- See above

This first question is relevant to show that Dan has a history of lying and so maybe he is lying now as he denies that he commit the crime.

Impeachment Prior Conviction- A prior conviction of a misdemeanor is typically not allowed in for impeachment evidence unless it is for untruthfulness or deceit. A felony

may be admissible to impeach unless it is a felony of over 10 years ago, although a 403 balancing test is necessary.

The Prosecution seeks to admit a conviction of misdemeanor for perjury from five years ago. The defendant denies the conviction. The prosecutor may use the extrinsic of the copy of the conviction because it is a conviction for untruthful character or deceit and is therefor automatically admissible.

b.

Relevance- See above

This is relevant to show that if the defendant was convicted of a felony for vandalism then maybe D has a tendency to destroy or harass people's property.

Character Evidence-Character evidence is evidence that displays the good or bad character of a party. Character evidence is not admissible in civil cases unless character is at issue in the case. Character evidence is not admissible by the prosecution in a criminal case unless the defendant opens the door by showing good character of the D or bad character of the Victim. If the door is opened prosecution is limited to opinion or reputation testimony.

The prosecution is asking the D if he was convicted of a felony for vandalism. The defense should object to inadmissible character evidence because the door was not opened to bring character into the trial.

Impeachment Prior Conviction- See above

The prosecution will argue that this is not character evidence and is merely being offered as impeachment evidence. The felony conviction (if true) is from two years ago and is therefore still relevant enough to use to impeach the D for not being a credible witness.

403 analysis- The 403 analysis is a balancing test which asks is the probative value of evidence substantially outweighed by the prejudicial effect.

The probative value of the conviction is that the defendant has been convicted before and therefore should be believed when he denying the burglary today in court. The prejudicial effect on the jury is when evidence has an emotional or gut reaction affect on the jury. The conviction of vandalism is not something that would likely stir outrage in a reasonable person. However, a criminal conviction should not be used as propensity evidence to show that if a person commits one crime they committed this one too. The prejudicial effect of propensity substantially outweighs the probative effect in this case.

Conclusion- The felony from two years ago for vandalism will not be admissible because it is propensity evidence and too prejudicial.

c.

Relevance- see above

This pending trial is relevant to show that once again this witness is not credible. It is relevant to show the jury that we cant believe a thing he says because he has convictions for untruthfulness and he is contradicting himself now.

Impeachment prior inconsistent- On cross examination a party may impeach a witness by showing a contradiction either before or after the cross examination. The party offering the impeachment evidence may use extrinsic evidence if properly authenticated.

The defendant says that he has not had an incident since the felony conviction. The prosecution then seeks to admit evidence that the defendant is pending trial in another residential burglary case. That burglary occurred a few days after the burglary in this case. Prosecution may offer the evidence of the other court case because court documents are self-authenticated because it is a public record.

403 analysis- See above.

The court will have to conduct another balancing test on the pending burglary charge because the second case cannot be used to prove the prosecution's burden in this present burglary case. The second burglary will prejudice the jury because the jury may see the burglary three days after this first one and assume that D is guilty because he has two charges pending against him. The prosecution will argue that if the conviction is looked at under the surrounding circumstances it is very probative to show that the D committed the burglary in this case. The second case will be highly prejudicial and has no tendency to prove or disprove the facts in this case.

Good!
Conclusion: The court will likely sustain the objection to this line of questioning because the second burglary case is not relevant to this case and is prejudicial against D as evidence of propensity. The court may allow a limiting instruction that states the conviction may be shown to assess the credibility of D as a witness but it may not be used to assess the likelihood that D committed the burglary in this case.

3)

1. Vince's Testimony

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, Officer Wonderly (OW) explaining Vince's declaration has a tendency to prove the identification of the person who shot him.

The court would hold the evidence is logically relevant. The court would hold the evidence is legally relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

Here, the probative value of the testimony is not substantially outweighed by the risk of undue prejudice from the jury.

The court would hold the evidence is legally relevant.

HEARSAY

Hearsay is an out of court statement, of a person, offered to prove the truth of the matter asserted.

The defense will object to OW's testimony because he is trying to relay an out of court statement made by Vince (V) that is being used to prove that Rico/Domingo (D) was the person who shot and ultimately killed V. The defense will argue this statement is not allowed in court.

HEARSAY EXCEPTIONS

Excited Utterance

There was an event; that was startling or stressful; they have personal knowledge about the event; and when the statement was made they were nervous or excited.

The prosecution will claim that V's statement is an excited utterance and is an exception to the hearsay rule. V was shot, which is a startling and stressful event, V had personal knowledge because he was the person that was shot and seen who shot him. Also, the statement was made when V was nervous or excited; being shot will cause any reasonable person to be nervous.

The court would allow V's statement as an excited utterance.

Present Sense Impression

There was an event; they had personal knowledge about the event; the statement was made at or near a time close to the event; and the statement related back to that event.

The event was V was shot, V and OW had personal knowledge about the event. V was the person shot and OW heard the "three loud bangs" and immediately rushed to the scene of where the noise came from. V made the statement to OW immediately after being shot. The facts indicate V was laying on the floor bleeding from his chest when OW

was assisting him. V's statement regarding who shot him related back to the event of being shot. The defense would argue that the statement was not made close in time because it took a while for OW to respond to the scene of the shooting, so this is not a present sense impression.

The court would hold this is a present sense impression.

Dying Declaration

The declarant is unavailable; it's for a prosecution for a homicide or a civil case; the declarant has an impending sense of death; they talked about the cause of that impending sense of death; and it was factual in nature.

Unavailable: a declarant is unavailable when a privilege applies to them so they are immune, they are absent from judicial reach; they are deathly/gravely sick or dead; the declarant refuses to testify, or the declarant forgot; etc.

Here, the prosecution would argue V's statement to OW is a dying declaration which falls under an exception to the hearsay rule. V is unavailable because he is now dead. V had an impending sense of death at the time he made his statement to OW because he even said "I can't believe Rico shot me...he killed my ass over some chick.": This statement tends to prove that V had an impending sense of death because he mentioned he knew he was going to die. V talked about the cause of death, as mentioned above he explained that "Rico shot me." The declaration by V was also factual in nature. When OW asked V what happened, V responded "my homie shot me, over some chick." The prosecution would claim the second half of the statement about V not being a snitch is not factual in nature so it would not be admissible under the dying declaration.

The court would hold that this is a dying declaration by V and is admissible under a hearsay exception.

Witness Testimony

A lay witness is allowed to testify if they have personal knowledge, take an oath or affirmation to tell the truth, and the testimony will assist the finder of fact. A general exception to opinion testimony is allowing lay witnesses to testify about what someone looked like, identify a person, describe their mental state, etc.

The prosecution would argue that OW is a lay witness that has personal knowledge about what occurred when he arrived at the shooting scene and saw V shot, on the floor bleeding.

The court would hold that OW could testify about his opinion and observation when he arrived at the scene.

2. Heriberta (H's) Statement

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, H's statement tends to show that Rico/D did in fact shoot V because H is saying that V is a snitch before OW even mentioned the shooting.

The court would hold the evidence is logically relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

Here, the probative value of the H's testimony is not substantially outweighed by the risk of undue prejudice from the jury.

The court would hold the evidence is legally relevant.

HEARSAY

Hearsay is an out of court statement, of a person, offered to prove the truth of the matter asserted.

The defense would object to H's testimony because it is hearsay. The prosecution is trying to use H's testimony to prove that D killed V, which is proving the truth of the matter asserted.

Non-Hearsay

Implied Adoptive Admissions

When a person makes a statement in the party's presence, that person heard and understood that statement, had an opportunity to deny that statement; but remained silent. A reasonable person in the same circumstance would have denied the statement.

Here, the prosecution would claim H's statement is an implied adopted admission that can be imputed onto D. D heard the statement because H made the statement in her

presence. D had the chance to deny that statement that "don't be trying to be talking to my man about no shooting, that fool Vince is a snitch." The prosecution would argue that D had an opportunity to deny that statement, but didn't; instead, he told H to "shut up woman." The prosecution would claim any reasonable person in D's circumstances would have denied shooting someone. The defense would argue that D thought it was a joke, H couldn't have been serious when making that statement, so that's why D never denied the statement about the shooting.

The court would find this was a non-hearsay implied adoptive admission made by H and now being imputed onto D.

Spousal Immunity Privilege

The spousal immunity privilege is the privilege not to be compelled to testify against their spouse. It is a complete bar on everything. It applies in criminal proceedings, but in CA it also applies to civil proceedings. Only the witness spouse holds the privilege. It only applies to valid marriages (doesn't apply to marriages involving bigamy, incest, benefit for immigration purpose or for any other fraudulent purpose). The spouse could not be compelled to testify against their spouse in any proceeding. The privilege must be asserted during the marriage. Divorce or annulment terminated the privilege. But the privilege covers matters that occurred even before the marriage.

Here, H is refusing to testify and does not want to cooperate. H is the witness spouse, so she is the holder of the privilege. H would claim because her and D are married, she refuses to testify and invokes her right to not be compelled to testify against her spouse. H is asserting the privilege during the marriage. H and D are not divorced. The defense would argue that H has a right to not be compelled to testify against D. The prosecution

would claim this is not a valid marriage because H and D did not get married until D was in custody and awaiting trial. The prosecution would claim that clearly they both got married for a fraudulent purpose, solely for the purpose of being able to invoke the immunity privilege. The prosecution would claim that OW would be allowed to testify to what he heard H say because a third party could not be prohibited from testifying about what they heard, even pertaining in instances of spousal immunity.

The court would hold the marriage is not valid because it was solely for the purpose of invoking the immunity privilege and cannot be asserted in this instance.

Confidential Marital Communication

The privilege applies in criminal proceedings. Both Spouses can invoke the privilege. Does not apply to communications regarding spousal misconduct, routine business, or spousal abuse. The privilege lasts forever. Doesn't apply to statement made after divorce.

The prosecution would argue that the statement was not confident because it was made in front a OW. The defense would argue that either D or H can invoke the marital communications privilege, which both will do here. The defense will argue that this was not routine business, spousal misconduct or spousal abuse. The defense will argue that even if D did in fact tell H about the shooting, it would be made in confidence. The defense would argue that admitting H's testimony would disrupt the harmony in the marriage.

The court would hold the marriage is not valid because it was solely for the purpose of invoking the marital communications privilege, furthermore, the statement was made in the presence of a stranger (OW) the the privilege does not apply.

The court would hold neither of the marital privileges apply.

3. Officer Tang (OT) Opinion of D being a "ruthless killer who preferred firearms"

RELEVANCE

Logical Relevance: Tendency Test: Evidence is logically relevant if there is a tendency to prove or disprove a fact of legal consequence.

Here, Officer Tang's (OT's) testimony is relevant for character evidence in order for the jury to understand D's character. The evidence is also relevant to show that D preferred firearms, so it is likely that he did in fact shoot V.

The court would hold the evidence is logically relevant.

Legal Relevance: Balancing Test: the court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of undue prejudice (confusing the jury, undue delay, waste of time, or presenting cumulative evidence etc.)

The defense would argue the probative value of OT's testimony is substantially outweighed by the prejudicial effect.

The court would hold it is the probative value is not outweighed by the prejudicial effect.

The court would hold the evidence is legally relevant.

CHARACTER EVIDENCE

The prosecution cannot offer character evidence until the D has opened the door. The D opens the door by taking the stand and testifying to his character regarding a certain trait. Generally, propensity evidence is not allowed because it could mislead the jury in thinking

if he did a crime before, he probably did it again in this current case. However, certain circumstances will allow propensity evidence such as Motive, Intent, Absence of Mistake, Common Plan or Scheme, and Identity. (but there needs to be a limiting instruction.)

Here, the prosecution wants OT to testify to his opinion of D, specifically that D is "ruthless killer who preferred firearms." The defense would object to this improper character evidence because D did not open the door to his character.

The court would hold OT's testimony is improper character evidence because the D never opened the door to his character.

Speculation

Also, the defense would object that the statement by OT is speculation because there is no evidence that indicates OT knows D to be a ruthless killer.

The court would hold that OT's testimony is also speculative and not admissible.

END OF EXAM