

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*

- o *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*
 - o *Issue here would be whether the statement meets the requirements.*
 - *Given the issue with privilege and statement, this exception is unlikely to apply*
- o 403
 - *Students should be able to distinguish between prejudice and undue prejudice.*
- *Officer Tang's testimony*
 - o *Relevance*
 - *If Domingo is a ruthless killer who prefers firearms, it is more likely he killed Vince despite them being friends*
 - o *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*
- o 403
 - *Undue prejudice would substantially outweigh any probative value*

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1)

Store Clerk

Relevancy

Logical Relevance - Tendency Test

Under CEC, evidence having a tendency to prove or disprove any disputed fact of consequence. Here, the fact is that there was a robbery and the evidence is the store clerk testimony that the robber wore Waldo attire and made a threat. The evidence is logically relevant because it goes to show what the robber looked like and what was said during the course of the crime. Therefore, it is likely that the court will find it logically relevant.

Legal Relevance - Balancing Test

Relevant evidence may be excluded if the probative value is substantially outweighed by the dangers of unfair prejudice, jury confusion or waste of time. Here, there is evidence of what the robber wore and what was said during the course of a crime, and when put on a scale it is not unjustly outweigh any dangers of unfair prejudice, it will not confuse the jury or be a waste of time. Therefore, it is likely that the court will find it legally relevant.

Prop 8

Applies to California (CA) criminal cases and allows all relevant evidence to be admissible unless it relates to a number of exceptions including but not limited to hearsay, privilege or secondary evidence rule. Here, there are no facts to indicate that we are in California, however, we are told to apply California Evidence Law. Additionally, this was an act of robbery of a convenient store and the prosecution is trying Dax. Therefore, we must apply prop 8 because it is a California criminal case.

Witness Competency

A Witness must be competent to testify by having personal knowledge, by being able to recollect, by being able to communicate, and to take an oath. In CA, the witness must also be able to understand the duty to tell the truth (difference between truth and lie). Here, the witness, the store clerk, has personal knowledge of the robbery because he was present when the robbery was occurring and was threatened. The witness is able to recollect what happened during the course of the robbery and maintains consistent statements during his report to Detective Logan and during the prosecution's case. We are given facts to indicate that he did communicate what occurred during the robbery. It is likely that the witness also took an oath because he gave testimony in the prosecution's case. The witness must understand the duty to tell the truth and we are given no facts to indicate that this witness struggle with telling the truth, nor did he falter in his prior statement and testimony. The defense could argue that the witness might have been mistaken as to the events of the robbery including what was said and what the robber wore because often times people are nervous, scared, and in a sense go blind to their surroundings when put into a high stake situation. However, this argument will fail because the witness is competent to testify and he maintains his recollection of what occurred.

Lay Witness

Opinion testimony by a lay witness is admissible when it is helpful to a jury; rationally based on witness perception; and not based on specialized knowledge. Here, the witness testimony of the events of the robbery including the Waldo attire and what was said during the crime was helpful to the jury because it provided an account of what happened. The testimony was rationally based on the witness's perception because the witness was there while the robbery was occurring. The witness did not have any specialized knowledge and was simply doing his duty as a convenient store clerk when the robbery went down. Again, the defense might argue that the witness's perception was not

rational, but again this argument will likely fail because the witness is credible and maintains their recollection of what happened.

Therefore, it is likely that the witness will be found credible and the testimony admissible.

Hearsay

An out of court statement offered for the truth of the matter. *asserted*.

Hearsay Exception

Reliability

Contemporaneous Statement

Under CA, a statement made by the declarant describing the conduct as he was (contemporaneously) engaged in that conduct. Here, the store clerk stated that the robber said "give me all this cash or else". This was the statement used during the course of the robbery. The defense may argue that this statement does not specifically describe what actual events are occurring. However, it is likely that this argument will fail because it is sufficient enough to get in and let a reasonable fact finder to decide.

Spontaneous Statement

Under CA, a statement made that described or explained the event or condition while the declarant was under the stress of the excitement of the event. Here, the store clerk stated that the robber said "give me all this cash or else!" This statement was made under the stress of excitement (!) of the event of a robbery and it describes what the robber requested the store clerk to do. Again, the defense may argue that it is not sufficient enough, but again that argument will likely fail because the statement was made in a spontaneous and exciting event under stress and described the condition of the crime.

Therefore, it is likely that the statement will be admissible because it falls within the hearsay exceptions of contemporaneous statement and spontaneous statement.

missed, admission by Party

Detective Logan

Relevancy

Logical Relevance - Tendency Test

Supra. Here, the evidence is the testimony of Detective Logan and the fact that there was a robbery. Detective Logan gave testimony as to his finding while investigating, specifically on the collection of the beanie, the authenticated store surveillance video tape, and his interview of the clerk. He further testified as to the tipster, Cora, and the clothing she gave him. The evidence has a tendency to prove the disputed fact of a robbery. Therefore, it is likely that it will be found logically relevant.

Legal Relevance - Balancing Test

Supra. Here, we are given no facts to indicate any of this evidence would be substantially outweighed by any dangers of unfair prejudice, a waste of time or confuse the jury. Therefore, it is likely that it will be found legally relevant.

Prop 8

Supra.

Witness Competency

Supra. Here, the detective has personal knowledge as to the events that occurred after the robbery because he conducted an investigation after the crime was committed. He collected evidence, the hat that was left, he sought out other means of identifying the

culprit, the video where he confirmed the clothing described by the clerk's statement. He later received a tip that Dax was the robber and when following up on that lead, Cora claimed she was the tipster. The detective had recollection of this investigation and was able to testify to those event during the prosecution's case. ^{He} We was able to communicate his testimony under oath and understood the duty to tell the truth. Therefore, it is likely that the detective was competent to testify.

Lay Witness

Fact testimony?

Supra. The detective's testimony was helpful to the jury as it provides the conduct of his investigation and how he made an arrest. His opinion testimony was rationally based on his perception of his investigation. The defense may argue that the detective has specialized knowledge because he is a trained public servant. However, it is likely that this argument will fail because his opinion is not based on any technical or expert knowledge. It solely based on his findings from his investigation of the robbery. Therefore, it is likely the opinion testimony will be admissible.

?
 Why would
 Dse do
 this?
 Did you
 mean
 Res.?

Isn't Det a "fact witness"?

③ Cora's Testimony

Relevancy

Logical Relevance - Tendency

Supra. The evidence being the testimony of Cora and the fact that there was a robbery. The evidence has a tendency to prove that a robbery occurred. Therefore, it is likely that the evidence is logically relevant.

Legal Relevance - Balancing

Supra. On a scale, the evidence does not prove that the probative value is substantially outweighed by the dangers of unfair prejudice, jury confusion or waste of time. Therefore, it is likely that evidence will be deemed legally relevant.

Prop 8

Supra.

Witness Competency

Impeachment

Impeachment is used to undermine the credibility of a witness. A witness may be impeached by extrinsic or intrinsic evidence. Here, Cora testifies and denies that she was the tipster, denied giving the detective any clothing or saying her husband told her anything. The prosecution can argue that she is under oath and has a duty to tell the truth. During her testimony, the prosecution also provides her with her prior statement (extrinsic evidence - prior inconsistent statement). However, she maintains her denials. Any party can impeach a witness.

Basis of Impeachment is Prior Inconsistent Statements - can't Det Logan, now be called to get in the streets of husband? - Admitted by party -

Privilege

Spousal Testimony Privilege

One spouse cannot be compelled to testify against the other in a criminal proceeding, however it does not prevent them from testifying. The holder of the privilege is the witness spouse and can only be claimed during marriage but covers before and during marriage. Here, the defense can argue that the wife was compelled by the prosecution and cannot testify against her husband in this criminal proceeding. However, a witness spouse

can so choose to testify. Therefore, it is likely that the court will find the privileged waived by the witness spouse.

Marital Confidential Communication

Marital Communication is confidential during the course of marriage and survives divorce. Both spouses are holders of the privilege and can prevent the other from disclosing marital confidential communication. Here, the defense can argue that the communication between Dax and Cora are confidential and therefore should be inadmissible. It is likely that the defense's argument will win because Dax as husband can prevent his wife from testifying.

Exception? crime / Fraud

(4)

DNA Expert Testimony

Relevancy

Logical Relevance - Tendency

Supra. The evidence being the testimony of the DNA expert has a tendency to prove the disputed fact of a robbery occurring therefore it is likely the evidence as being logically relevant.

Legal Relevance - Balancing

Supra. On a scale, the DNA experts testimony is does not unfairly prejudicial, show jury confusion or is a waste of time. Therefore, it is likely that evidence will be deemed legally relevant.

Prop 8

Supra.

Witness Competency

Supra. The DNA expert is able to communicate, recollect as to his findings, has personal knowledge as to the tests, and able to take an oath, as well as tell the truth. It is likely his testimony will be admissible.

Expert Witness

Opinion testimony of an expert witness is admissible when it is helpful to the jury; expert is qualified; and expert has factual basis and reasonable certainty of his opinion. **(Reasonable Degree of Certainty)** Expert testimony must be based on reliable principles. Under CA Kelly Frye, evidence must be found to be valid and reliable among experts in the field. Here, the DNA expert gave testimony as to his findings that are helpful to the jury in connecting the cheek swab and the hat left at the crime; he is qualified by the state to conduct these types of exams, and under Kelly Frye, he based his opinion off of DNA analysis that are regularly conducted in labs. However, he may not state that Dax was guilty. He may only provide his findings.

Not Kelly-Frye

No this was not a novel procedure

END OF EXAM

overall - good

2)

1) Officer Witness

Logical Relevance:

The tendency for offered evidence to make a material fact of consequence more likely than not.

Here, the officer's testimony is logically relevant because it tends to show that the defendant committed the crime because he was able to identify the man through the surveillance footage.

Legal Relevance:

A balancing test between the probative and prejudicial value of evidence. Evidence that is prejudicial may confuse the issues, waste time, or be prejudicial in that it causes a strong emotional reaction from the jury.

This evidence will not be made inadmissible because of legal relevance because the prejudicial value is minimal because this evidence can be (~~summarily~~) introduced to the jury, is not per se prejudicial in that it does not disgust, and can be summarily introduced to the jury.

Witness Competency:

All witnesses are presumed to be competent. A witness may be prevented from testifying if the party moving to exclude their testimony can show that the witness lacks the capacity for memory, communication, perception. All witnesses testifying must make an oath or affirmation, and understand the legal requirement that they tell the truth.

Here there are no facts that indicate that the officer is per se incompetent to testify. The lack of pinpoint memory of the exact number of years he was aware of Dan is insufficient to attack the witness's ability to have present memory. The memory of the witness need not be perfect, but of sufficient quality that the memory can be relayed, at least in part. It is the role of the jury to assign the value/weight to the particular testimony.

Lay Witnesses:

Lay witnesses must have percipient (first-hand) knowledge of that which they are testifying, based on what they actually perceived. Additionally, they must presently recall memories of that which they are testifying.

Here, while the witnesses memory is not perfect they are able to sufficiently relate the reason why they recognized the defendant as the man in the video.

Hearsay:

An out of court statement, offered to prove the truth of the matter asserted.

Here, this statement is hearsay because it was made out of the instant trial and is offered to prove the truth of the matter asserted, chiefly that the officer had positively identified the defendant as the individual in the video.

Excited Utterance:

Any statement made by the declarant, while the declarant is under the stress of an event and the statement reflects upon the event.

Here, the excited utterance hearsay exception applies because the declarant was under a stressful situation, having perceived the identify of the suspect in the video. Being able to identify a suspect based on surveillance video at the scene of the crime, particularly one

with which the officer has personal knowledge, must have caused the witness stress. Additionally, the statement was exclaimed by the declarant, indicating that he was under stress, causing him to shout. Additionally, the statement reflects upon the cause of the stress, because the declarant is relating that it was the identification of the declarant that made him exclaim.

The defense will argue that this does not apply to this exception because the stressful event was not of sufficient stress to qualify. They will argue that the only stress that qualifies is that which causes a person to be angry, fearful, or scared. This argument will fail because a stressful event can be any event which causes the declarant to enter a heightened state of arousal, increasing the likelihood that the statement that was made was truthful.

~~Contemporaneous Reflection~~ Present Sense Impression (PSE)

Any statement made by a declarant, which reflects upon the event that the declarant perceives, and is made contemporaneous to the perception of the declarant is not made inadmissible because of hearsay.

Here, the declarant is describing/reflecting upon the event that he is perceiving, that he observes the defendant in the video tape. This statement was made contemporaneously to his observation because he sees the event occur and makes his statement at the same time. As such, this statement will not be made inadmissible because of hearsay.

Writing

A writing is any item which bears human writing or symbols. It may be (but is not limited to) documents, video, sound recordings, pictures, or inscriptions on physical items.

Here, the surveillance video is considered a writing because it is a video.

Authentication

All writings must be authenticated. Authentication is proof that the item is what it purports to be. The burden for authentication is that of a reasonable juror would find that an item is authenticated.

Here, the surveillance video will need to be authenticated. This video may be authenticated by the home owner because the home owner has personal knowledge of what the video shows, but it may also be authenticated by the police, who also have personal knowledge of the interior of the home. This burden can be met because a reasonable juror would find that the video, as described by the officer, is what he said it was.

Best Evidence Rule

The best evidence rule requires that when the contents of a writing is in dispute, the original be submitted into evidence. The best evidence rule allows for witnesses to describe writings that can not be submitted due to destruction only when there is no bad faith cause for the destruction.

Here, the best evidence rule would normally require that the video tape be submitted into evidence. This rule allows for the testimony of the officer in its place however, because there is not a bad faith reason for it to have been destroyed, in that the officer is testifying that it occurred accidentally. It would have been in bad faith if the parties had intentionally destroyed the evidence to prevent its admission to trial.

The defense will argue that the video was destroyed in bad faith. This argument will fail because there does not appear to be any evidence to this point, and the court will permit the testimony as such.

2) Defendant Dan Witness

Impeachment:

Witnesses may be impeached when their motivation or bias is exposed to the jury, which leads the jury to weigh the reliability of a witness's testimony. Witnesses may also be impeached by a showing that they have made present inconsistent statements, past inconsistent statements, or have committed prior crimes or prior bad acts. Either party may impeach any witness.

needs full discussion

Logical relevance: Rule, see above

All of the below referenced crimes are logically relevant because they tend to demonstrate the defendant's veracity for truthfulness.

Legal Relevance: rule, see above

All of the below referenced crimes may, or may not be, legally relevant because although they may be ~~summarily~~ be introduced, they run the risk of the jury misusing their purpose not just for impeaching the credibility of the witness, but for the improper purpose of assuming guilt in the instant trial. This is discussed in detail below. The court should consider the use of limiting instructions, which instruct the jury for what purposes the evidence may be used, but the court should also consider whether the jury would none-the-less still use the evidence for an improper purpose.

2a) Misdemeanor Perjury

Impeachment by Past Misd. Crimes

Witnesses may be impeached for past crimes when they have been convicted of a misdemeanor of moral turpitude, subject to a balancing test.

*Careful, this is FRE, not CEE
dishonesty or false stmt, etc.*

Here, the witness may be impeached using this past crime because the nature of the crime was that of ~~moral turpitude~~. The prosecution will want to admit this evidence to cast doubt on the reliability of this witness, while the defense will argue that it is overly prejudicial to the Defendant, in that it may unfairly cause the jury to disbelieve the defendant. This argument will fail, and the past crime will be permitted to be used to impeach the defendant. This crime in particular weighs very heavily on the defendant's character for truthfulness, which the judge will likely permit the jury to consider in weighing the strength of his testimony.

REC
Language
this is
FRE *

This must be a conviction, not just a crime. Arrests can be crimes.

2b) Felony Vandalism

Witnesses may be impeached for past crimes when they have been convicted of a felony for ~~moral turpitude~~ within the last ten years (not subject to balancing test), but for felonies that are not ~~moral turpitude~~, the balancing test automatically applies.

REC
Language

Here, felony vandalism is a crime of ~~moral turpitude~~ because to qualify as felony vandalism the dollar amount of destruction must be over a certain amount, which reflects that the Defendant has a poor moral compass. As such, the admission of this crime will not be subject to a balancing test and is automatically allowed into the case. If felony vandalism is not of ~~moral turpitude~~, then the crime will be admissible but only subject to the court's discretion. The court may view this crime as causing the jury to make an unfair inference that the defendant is guilty in the present case because of that prior conviction, and he may limit its admissibility.

Can
was for
FRE

3c) Specific Contradiction

Witnesses may be impeached by specific contradiction when the witness testifies to a falsehood, which is evident upon the showing of some showing by the examiner. If the

matter is collateral, the examiner may only use intrinsic evidence, but where the matter is direct to the issues of the case, extrinsic evidence may be used.

Here, the prosecution is attempting to impeach the defendant's statement by contradicting it with a showing of proof. This will not be permitted however, because the showing of proof is collateral to the present issue because the instant trial is regarding the robbery of Valerie's house, not the robbery that occurred a few days after this burglary. Additionally, this evidence would still be subject to the legal relevance balancing test, and the court will be likely to exclude its admission because of the risk of unfair use by the jury to determine that the defendant was guilty in the present case, just because he was charged with another burglary.

No, it's a residential burglar, not robbery.

END OF EXAM

overall good.
• Some misreading of facts
• Some using CEC when FRE was the call

3)

1.

FRE: LOGICAL RELEVANCE Tendency Test

Evidence is logically relevant if it has a tendency to make any fact of consequence to the action more probable than without the evidence.

Wonderly's testimony is logically relevant because it tends to make more probable homicide as the cause of Vince's death, which is what the case is about.

FRE: LEGAL RELEVANCE Balancing Test

Trial courts have discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice, issue confusion, misleading jury, wasting time, or presents unnecessarily cumulative evidence.

Wonderly's testimony is highly probative because it is of the complaining victim's/decedent's last words. It is unlikely to be wasting time, because Vince's death is the subject of the case.

PERSONAL KNOWLEDGE

All testifying witnesses need personal knowledge, which is knowledge gathered first-hand and not through hearsay. Otherwise it is HS. Exceptions allow Expert witnesses to base testimony off peer/study knowledge that is not the expert's own first hand knowledge.

Wonderly is "familiar with the local crime scene" giving her extensive personal knowledge.

WITNESS COMPETENCY:

Witnesses may testify so long as they can accurately perceive, remember, reliably recount, understand the legal obligation to tell the truth, have personal knowledge of their testimony. Age and health concerns that impact ability to recount reliably or understand what is the truth vs lie may disqualify a witness from testifying.

NO facts indicate Wonderly is incompetent.

EXPERT WITNESS: OFFICER WONDERLY is POLICE EXPERT if she has specialized knowledge within the force as ballistics expert

Sufficiency level of proof. Expert witness testimony is admissible when the subject matter requires technical, scientific, or specialized knowledge. Experts must be sufficiently qualified in their field (does not have to be formally licensed, just qualified), present testimony that is helpful to the trier of fact; experts may answer hypothetical as well as leading questions on Cross examination; expert's knowledge MAY be based upon peer hearsay or other inadmissible sources as long as they are helpful to the trier of fact.

Experts may opine on ultimate FACTUAL issues, but NOT opine on ultimate legal issues.

Police officers are less likely to be seen as experts than for example Detectives, who are experts. BUT, Wonderly demonstrates a level of ballistics knowledge above the average police squad member, she will be an expert.

Hearsay: Out of court statement offered for truth of the matter asserted. Vince's words were out of court, repeated by another (Wonderly), as he is a declarant now unavailable (dead.)

FRE RESIDUAL CATCH ALL: If the statement does not fit under any other HS exception/exemption, and if the statement is the most probable piece of evidence available, the statement may be admissible under FRE Residual Catch All.

CONFRONTATION CLAUSE/6th Amendment/Primary Purpose: Satisfied if Defense has the opportunity to cross examine. Primary Purpose of Vince's dying words are in emergent situation when he is on the brink of death, which is an unlikely situation to lie during.

Burden of Proof for CC is ^{not so} beyond a reasonable doubt Confrontation Clause will be invoked because this is a criminal case. All criminally accused have a constitutional right to confront their accusers. CC is fulfilled as long as defense has a reasonable OPPORTUNITY to cross-examine accusers.

Crawford, and Davis cases demonstrate Primary Purpose Test for HS or non-HS testimony. Primary Purpose Test looks to whether the declarant made their statement during a perceived ongoing emergent situation. If so, then the statement carries a high degree of indicia as it is unlikely one would lie during an emergency; the primary purpose is to get help/aid is not testimonial and therefore NOT HS.

If the declarant made their statement NOT during an ongoing emergency, and instead made their statement pending an ongoing litigation, then the statement IS testimonial and will be subject to HS analysis.

HS EXCEPTION BUSINESS RECORD:

In criminal cases, police statements are NOT likely to be seen as business records.

7
 FRE COMPLETION DOCTRINE: Part of/another document may be offered into evidence to give EXPLANATORY EVIDENCE to help the trier of fact understand/contextualize the original piece of evidence's CONTEMPORARY CIRCUMSTANCES. Defense wants to admit the second half of Vince's statement under Completion Doctrine, which would be admissible.

FRE DYING DECLARATION (DD) "I cant believe Rico shot me...He killed my ass" is ADMISSIBLE under Dying Declaration.

DD is allowed in criminal HOMICIDE cases, when the declarant may be unavailable due to DEATH, made the statement regarding the circumstances of their death, expecting death (DECLARANT NEED NOT DIE in FRE rules).

This is a Murder trial, which satisfies criminal case homicide circumstances. Declarant Vince is unavailable due to death. He made the statement about Dom shooting him, which was the cause of Vince's death, and "He killed my ass" implies Vince expects to die very soon.

*, needed Excited Utterance as exception
 , Forfeiture*

2. *Heriberto*

FRE: LOGICAL RELEVANCE Tendency Test

Evidence is logically relevant if it has a tendency to make any fact of consequence to the action more probable than without the evidence.

Heriberto's testimony is logically relevant as it tends to make Dom's activity in the shooting of "that fool Vince" more probable than without the testimony.

FRE: LEGAL RELEVANCE Balancing Test

Trial courts have discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice, issue confusion, misleading jury, wasting time, or presents unnecessarily cumulative evidence.

Heriberta's testimony does not present undue prejudicial issues.

PERSONAL KNOWLEDGE

All testifying witnesses need personal knowledge, which is knowledge rationally gathered first-hand and not through hearsay. Otherwise it is HS. Exceptions allow Expert witnesses to base testimony off peer/study knowledge that is not the expert's own first hand knowledge.

Heriberta is Domingo's wife; she was at Dom's house when Wonderly arrived; Heriberta has personal knowledge of Dom.

WITNESS COMPETENCY:

Witnesses may testify so long as they can accurately percieve, remember, reliably recount, understand the legal obligation to tell the truth, have personal knowledge Of their testimony. Age and health concerns that impact ability to recount reliably or undersatnd what is the truth vs lie may disqualify a witness from testifying.

Herierta is presumed competent as the facts do not indicate otherwise.

Lay Witness

Lay witness testimony must be given rationally applied, by a competent witness, with personal knowledge, that is helpful to the trier of fact, and NOT based on scientific, technical/specialized (expert) knowledge.

Heriberta is a lay witness.

FRE RESIDUAL CATCH ALL: If the statement does not fit under any other HS exception/exemption, and if the statement is the most probable piece of evidence available, the statement may be admissible under FRE Residual Catch All.

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

SPOUSAL TESTIMONIAL PRIVILEGE: NOT COVERED, Crime/Fraud Exception (below)

Spouses are not compelled to testify against each other in criminal proceedings while they are married. Spouse needs other spouse's consent to testify, but spouse is allowed to. They are married described as each other's husband and wife. Heriberta may invoke Spousal Testimonial privilege, but may not if Dom were to not want her to.

Heriberta WOULD have to testify as to her statements to Wonderly.

MARITAL COMMUNICATIONS PRIVILEGE: Heriberta may refuse to disclose confidential communications unrelated to Vince shooting that she and Dom made to each other either before, during, or after marriage, but Heriberta MUST testify regarding her statements to Wonderly.

Marital Communications prevents the mandatory disclosure of confidential statements made from one spouse to the other; the privilege survives marriage and extends to pre

marital statements if they were intended to be made to be confidential between the spouses. Discussing a robbery is highly confidential, BUT crime/fraud exception may apply.

She is not invoking Marital Communications when she refuses to disclose during the interview; she is invoking her 6th Amendment right to counsel.

CRIME FRAUD EXCEPTION TO PRIVILEGE: KNOWN Future plans for Crime or fraud are exempt from privilege, and will be open to cross examination without protections (above.) PAST crime/fraud is NOT under the exception, and remains privileged.

It is likely Heriberta knew of the crime before Dom committed it, as she said she doesn't know about any shooting and "Vince is a snitch" -- all before Wonderly asked her anything about the crime of Vince's shooting. Marital privileges would be revoked under Crime Fraud exception.

PARTY ADMISSION: Admission against Party Opponent

Heri's own words of denying Dom's past crimes BEFORE Officer inquired are a party admission hearsay exemption, indicative of reliability because it tends to go against the declarant's proprietary, pecuniary, or social interests. She is allowed to be unavailable, as she is here invoking privilege.

ATTORNEY CLIENT PRIVILEGE: Heri berta WOULD hold the privilege but There is no attorney yet. Cannot invoke Atty-Client, but she can refuse to testify until she has present counsel.

3. Ofc Tang

FRE: LOGICAL RELEVANCE Tendency Test

Evidence is logically relevant if it has a tendency to make any fact of consequence to the action more probable than without the evidence.

Tangs testimony is logically relevant because he has known Dom for 10 years, and Dom is the suspect for the case at bar. Admissible.

FRE: LEGAL RELEVANCE Balancing Test

Trial courts have discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice, issue confusion, misleading jury, wasting time, or presents unnecessarily cumulative evidence.

Tang's testimony "Dom is a ruthless killer" is likely to be INADMISSIBLE due to being overly prejudicial to Dom and would lead jury to improperly draw conduct in conformity with current charge.

CONFRONTATION: Supra

CC is satisfied as long as Dom has an opportunity to cross examine Tang, which he does. No Statements were made to Tang with the primary purpose of getting help during a pending emergency, so they are testimonial and subject to HS analysis.

PERSONAL KNOWLEDGE

All testifying witnesses need personal knowledge, which is knowledge rationally gathered first-hand and not through hearsay. Otherwise it is HS. Exceptions allow Expert witnesses to base testimony off peer/study knowledge that is not the expert's own first hand knowledge.

Tang has personal knowledge of Dom; he has known Dom for 10 years.

HS: supra

Tang's testimony is not hearsay if he phrases it as opinion or reputation testimony, and not for the truth of the matter Tang asserts.

WITNESS COMPETENCY:

Witnesses may testify so long as they can accurately perceive, remember, reliably recount, understand the legal obligation to tell the truth, have personal knowledge Of their testimony. Age and health concerns that impact ability to recount reliably or undersatnd what is the truth vs lie may disqualify a witness from testifying.

No facts indicate Tang is incompetent.

Objection: EXPERT WITNESS opining on legal issues: supra

Tang, like Wonderly, may be considered an expert within the police community if he has a higher degree of specialized work/skill than the average squad member. Ballistics work is highly specialized and considered Expert. T is an expert.

?

*Where does it say
ofc Tang is presently testifying?*

If Tang's testimony that Dom is a "ruthless killer who prefers firearms" is understood by the court as opining on the issue of Dom's guilt, that is inadmissible expert opinion beyond the scope of factual opineing or hypothetical explaining.

Objection: Improper State of Mind NON HS

State of mind NON HS purpose shows circumstantial evidence of a declarant's then-existing physical/mental state NOT FOR THE TRUTH OF THE MATTER ASSERTED, but for alternative reasons like to show effect on listener. BUT, opposing counsel may NOT draw conclusions as to what a Defendant must have been thinking. Tang's testimony Dom prefers firearms may be inadmissible and highly prejudicial with minimal probative value.

Objection: IMPERMISSIBLE CHARACTER EVIDENCE: REPUTATION

Tang's REBUTTAL testimony that Domingo is a "ruthless killer who preferred firearms" is IMPERMISSIBLE because Domingo has not opened the door to character testimony. IMPERMISSIBLE use of reputation from a non-community member.

Character evidence is generally inadmissible to show present conduct in conformity based upon past acts/descriptions of character that are not at currently at issue. Character evidence may be given through reputation within one's community (work, business, school, etc), specific instances of conduct, or give opinion evidence on Defendant's character traits. Defendants may offer any character evidence in criminal trials. Prosecution may NOT offer contradicting character evidence on Defendant's testified trait, until Defense OPENS THE DOOR by initially offering (likely positive) evidence of their own good character. Prosecution may NOT use character to conclude guilt, but only to show defendant's negative traits with the hopes of impeaching defense's arguments of positive character.

Prosecution is allowed to impeach Defense positive character traits brought into issue here during Prosecution's rebuttal. BUT, Tang testifying that "Domingo was known as a

ruthless killer who preferred firearms" may be argued by defense as impermissibly drawing guilty conduct in conformity with past actions separate to those of the charge.

If Tang were merely testifying as to Domingo's reputation within their relevant community, Tang's testimony would be admissible. But, crucially, Tang and Domingo ARE NOT PART OF THE SAME COMMUNITY -- Tang is a police officer and Dom is "a local gang member." They are not part of the same community and Tang may not be a reliable source of his reputation within their shared community.

END OF EXAM

- Careful on the typos -
(no points taken off)
- 6th A Confront. clause ≠ beyond a n^o doubt
- Excited utterance missed
- Forfeiture missed