

Kern County College of Law

EVIDENCE

Final Examination

Spring 2022

Prof. H. Starr

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.

- 1. 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.

- a. **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)

b. 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

- Undue prejudice would substantially outweigh any probative value

1)

1.

Dax should object to the clerk's Testimony under logical relevance

Evidence is relevant if it has a tendency to make a fact of consequence more or less probable than without the evidence. California's Prop 8 "truth in evidence" amendment presumes all evidence is relevant pursuant to a 352 balancing test.

→ No - THAT ALL REL. EVID. IS ADMISSIBLE
Dax is on trial for robbery, and the attire that the robber was wearing as well as his statement demanding cash makes it more probable that Dax was the perpetrator.

The court should overrule the objection.

Dax could object to the clerk's testimony that the robber wore a Waldo outfit as lay witness opinion

WHAT?

Lay witness opinion is generally inadmissible unless it is rationally based on the witnesses perception, helps the jury understand a fact of consequence, and is not based on scientific, technical or specialized knowledge.

The clerk saw the robber in person, so his opinion that the robber was dressed as Waldo is rationally based on his perception, it helps the jury understand that the robber was dressed a certain way which can help identify who the robber is, and is not based on any specialized knowledge.

The court will overrule this objection.

Dax should object to the clerk's testimony about the robber's statement as hearsay

Hearsay is an out of court statement made by a declarant offered to prove the truth of the matter asserted. A statement is an oral or written assertion, or nonverbal conduct intended as an assertion. A declarant is a person.

The robber made the statement at the convenience store during the robbery, which is out of court. The robber made an oral assertion that he wanted the cash from the clerk, so he made a statement. the robber is a person. The robber wanted to rob the store, so his statement "give me all this cash or else" is offered to prove the truth of the matter asserted.

NOT THE POINT -
ASSERTION BE PRECISE
IS IT ASSERTION?
"GIVE ME CASH"
ASSERTS WHAT?
"OR ELSE"
ASSERTS?

The court should sustain the objection

The prosecution will counter with hearsay exceptions

Spontaneous statement

A statement made by the declarant about a startling situation, to explain the situation.

Dax is a declarant and he made a statement, but he was not startled by the situation, as he was the one that initiated it. He did explain the situation, as he wanted the clerk to give him all the money.

The court will reject this exception.

Contemporaneous statement

A statement made by the declarant during their conduct or circumstance, to explain their conduct or circumstance.

Dax is a declarant and he made a statement. His statement was made during the conduct/robbery, and it was to explain what he was doing, since he demanded that the clerk give him all the cash or else.

The court will accept this exception.

Dax should object to the clerk's testimony under legal relevance

Evidence is admissible as long as the probative value is not substantially outweighed by the prejudicial effect.

The clerk's testimony has a high probative value, as he identifies the clothes the robber was wearing, and shows that the robber intended to rob the store. The prejudicial effect is low, as the jury will need this information to come to a conclusion.

The court should overrule the objection.

2.

Dax should object to Logan's testimony under logical relevance

Evidence is relevant if it has a tendency to make a fact of consequence more or less probable than without the evidence. California's Prop 8 "truth in evidence" amendment presumes all evidence is relevant pursuant to a 352 balancing test.

Logan testifying about finding the beanie at the store, and seeing the surveillance tape makes it more probable that the robber was dressed like Waldo.

The court should overrule the objection

Dax should object to Logan's collection of the beanie as not properly authenticated

A piece of real evidence can be authenticated by testimony that identifies it, and a showing of the unbroken chain of custody.

The beanie is unique enough (a very identifiable red and white pattern), that Logan would be able to identify it as the same one that was in the store when he arrived. After he arrived he was the only person to touch it, creating an unbroken chain of custody.

The court should overrule the objection.

Dax should object to Logan's testimony about the surveillance video under the secondary evidence rule

The original of a writing is required if the contents of the writing are in dispute. A writing can be something written down/typed, a photograph, a video etc. In California, oral testimony is not allowed as secondary evidence to prove the contents of a writing unless: the original is lost or destroyed, unimportant to the proceedings.

The video is a writing, and it's contents are in dispute as Dax is contending he didn't rob the store, so the original is required. The original is not lost or destroyed, it is important to the proceedings, so Logan cannot orally testify to it's contents.

The court should sustain the objection.

Dax should object to Logan's testimony about what Cora said that Dax told her as layered hearsay

Hearsay is an out of court statement made by a declarant offered to prove the truth of the matter asserted. A statement is an oral or written assertion, or nonverbal conduct intended as an assertion.

TESTIMONY
WAS TO
TAPE
COLLECTION
NOT
CONTENTS

A declarant is a person. For layered hearsay to be admissible, it must be shown that each layer is either not hearsay, or hearsay with an exception/exemption.

Layer 1: Cora's Statement to Logan: Cora made her statement to Logan at her home, which is out of court. Cora made an oral assertion so she made a statement, and is a person. Cora is offering the statement by Dax to prove that he did rob the convenience store, so it is for truth of the matter asserted.

Layer 2: Dax's statement to Cora: Dax made his statement to Cora sometime outside of court. Dax made an oral assertion, so he made a statement, and is a person. Dax made his statement to let Cora know that he robbed the convenience store, so it is for truth of the matter asserted. This statement is hearsay.

The court should sustain the objection.

The prosecution will counter both statement layers of hearsay as being exempt/an exception

Layer 1: C

Layer 2: Statement by a party opponent ✓

A statement made by a party opponent is not hearsay. The statement doesn't have to be against their interest at the time it was made, only when it is used against them.

Dax is the defendant, so he is a party to the case, and the opponent to the prosecution. The statement was made against his interest at the time it was made, and is still against his interest in the current proceeding.

The court will reject the prosecutions arguments

Dax should object to Logan's testimony about what Cora said under marital communications privilege

In a valid marriage, any communications between spouses that are intended to be confidential, and are confidential, can be excluded. Either spouse can assert this privilege.

Dax and Cora were married at the time that Dax told her about robbing the store. It is unclear from the facts as to when Dax told Cora, but it can be assumed that he told her in their home as he would

want to make sure no one else heard, and there is no indication that anyone else did hear. Dax has the right to assert this privilege regardless of what Cora wants.

The court should sustain the objection.

Dax should object to Logan's testimony under legal relevance

Evidence is admissible as long as the probative value is not substantially outweighed by the prejudicial effect.

The probative value of Logan's testimony is high, as he is connecting the Waldo clothing to Dax, and a statement by his wife implicating him as the robber. The prejudicial effect is also high, but does not substantially outweigh it.

The court should overrule the objection

3.

Dax should object to the prosecutions witness statement under logical relevance

Evidence is relevant if it has a tendency to make a fact of consequence more or less probable than without the evidence. California's Prop 8 "truth in evidence" amendment presumes all evidence is relevant pursuant to a 352 balancing test.

The witness statement has a tendency to prove that Cora is lying on the stand, which makes it more probable that she is lying to protect Dax for robbery.

the court should overrule the objection.

dax should object to the witness statement under legal relevance

Evidence is admissible as long as the probative value is not substantially outweighed by the prejudicial effect.

The probative value is very high to show that Cora is lying now, and the prejudicial effect will not outweigh it.

The court should overrule the objection.

4.

Dax should object to the DNA experts testimony under logical relevance

Evidence is relevant if it has a tendency to make a fact of consequence more or less probable than without the evidence. California's Prop 8 "truth in evidence" amendment presumes all evidence is relevant pursuant to a 352 balancing test.

The expert's testimony has a tendency to show that the robber's beanie is connected to Dax through his DNA. this makes the fact that Dax robbed the store more probable.

The court should overrule the objection.

Dax should object to the DNA experts testimony as an opinion

Expert witness opinion testimony is admissible if the testimony helps the jury understand a fact through scientific, technical or specialized knowledge, the expert is knowledgeable in their field, the expert testifies from a proper basis, and the expert is firm in their belief. Kelly/Frye test: for new techniques, the expert must show that the technique is generally accepted by other experts in the field.

The DNA expert is presumed to be an expert from the facts. DNA testing requires specialized scientific knowledge to understand, so the expert is helping the jury by testifying about it. The expert is testifying based on his own experience, and the fact that the beanie was shown as being the same one from the robbery. The expert is firm in his belief about the testing and his opinion that the DNA from the beanie matches Dax's. DNA testing is not a new technique, but nonetheless it is widely accepted by experts in the field.

The court should overrule the objection.

Dax should object to the experts testimony that he is guilty as a legal conclusion

Expert testimony is allowed to embrace the ultimate issue, but they cannot tell the jury what legal conclusion to come to.

The DNA expert can testify that the DNA from the cheek swab and that found on the beanie are the same and came from the robber which is embracing the ultimate issue in the case, but he cannot say that Dax is guilty, as this is telling the jury what conclusion they should come to.

The court should sustain the objection.

Dax should object to the expert's testimony under legal relevance

Evidence is admissible as long as the probative value is not substantially outweighed by the prejudicial effect.

The probative value of the expert's testimony is very high, as he can clearly show the jury that the DNA from Dax and the DNA on the beanie are consistent with each other, which will lead the jury to conclude that Dax is the robber. The prejudicial effect of his testimony is also very high, as he told the jury that Dax is guilty, and the jury will give greater weight to an experts opinion on guilt especially after he has matched the DNA. The court might have to give a special instruction to ignore the expert's second statement.

The court will most likely sustain the objection.

*Clined
work*

2)

1. THE DETECTIVE

The defense could object to the officer's testimony as logically irrelevant.

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

The officer's testimony has a tendency to prove that he knew who Dan was after seeing the surveillance footage, which is why he put out a "be on the lookout" for Dan, leading to Dan's arrest.

The defense's objection should be overruled.

The defense should object to the officer's testimony about evidence collection under the Best Evidence Rule.

The Best Evidence rule states that the original is better than a non-original, and testifying to the contents of an original without introducing the original is discouraged, unless the original was lost, destroyed, or otherwise unobtainable by the proponent. (INTENT/FAITH IN DESTRUCTION?)

The officer is testifying to the contents of the video surveillance without the prosecution admitting the video surveillance itself, which is a violation of the Best Evidence Rule. However, because Valerie accidentally deleted the footage, the prosecution is unable to obtain the video footage itself and, thus, is unable to introduce it into evidence.

The defense's objection should be overruled.

The defense should object to the officer's statement, "I know exactly who that is!" as hearsay.

Hearsay is an out of court statement made by a declarant offered to prove the truth of the matter asserted. While California has a rule allowing officers that have been on the force for 5+ years to testify to one level of hearsay, this case is in State X, which has adopted the FRE.

The officer is a person who made the statement outside of court. The statement is being offered to argue that Dan committed the robbery.

The defense's objection should be sustained.

The prosecution should rebut the defense's objection using the hearsay exemption of a statement made by a party opponent.

Statements made by a party opponent fall under the category of hearsay exemptions. These are statements by a party or someone authorized by a party offered by a party opponent.

This exemption would only apply if the prosecution designates the officer as the investigating officer of the case, because that would make him the party opponent to the defendant. If that were to occur, the officer's statement would fall under a statement made by a party.

Without the officer's designation as the prosecution's investigating officer, the defense's objection remains sustained.

THIS IS NOT TRUE. IO IS NOT A PARTY AND DEF NOT OPPONENT

The prosecution should rebut the defense's objection using the hearsay exemption of prior statements by a testifying witness.

Prior statements by a testifying witness is a hearsay exemption divided into three categories: prior inconsistent statement, prior consistent statement, and prior statement of identification. For this case, a prior statement of identification identifies a person perceived by the witness at a previous time.

The exemption that would apply in this case is the prior statement of identification. The statement made by the officer is his exclamation that he "knows" who the robber is, leading him to put out a "be on the lookout" for Dan. However, this is a weak argument because it does not identify Dan himself in any way; instead, it

The prosecution should rebut the defense's objection using the hearsay exception of excited utterance.

The excited utterance exception applies regardless of the witness's availability. It is a statement relating to a startling or stressful event or condition made while the declarant was under the stress of excitement that event caused.

The prosecution will argue that the officer was under the stress of excitement of identifying Dan as the robber in the present case. However, the surveillance footage showed only Dan entering and leaving the house, but it did not show the robbery itself or any other startling event, so the officer was most likely not under the stress of excitement.

The defense's objection remains sustained.

The defense should object to the officer's testimony about his relationship with Dan as logically irrelevant.

See rule above.

The officer's testimony that he "had been aware of Dan" for many years has a tendency to prove he could identify Dan, which is what he did after seeing the surveillance footage at Valerie's house.

The defense's objection should be overruled.

The defense should object to the officer's testimony about his relationship with Dan as legally irrelevant.

See rule above.

Because the officer's statement of "I know exactly who that is!" will most likely be sustained as hearsay, the officer's testimony about seeing Dan on numerous occasion, included two weeks before the burglary, serves little probative value and only serves to prejudice the jury into thinking Dan is a troublemaker with multiple run-ins with the law. The jury will end up deciding the verdict based on the presumption that Dan is a criminal with frequent run-ins with the law, rather than the evidence presented in the case.

The defense's objection should be sustained.

2. DAN'S TESTIMONY

The prosecution could object to the Dan's testimony as logically irrelevant.

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

Dan's testimony has a tendency to prove that his identity was mistaken and he did not commit the crime.

The prosecution's objection should be overruled.

a. Misdemeanor for Perjury

The defense should object to this question as logically irrelevant.

See rule above.

Dan's misdemeanor for perjury has a tendency to prove that he has a propensity to lie.

The defense's objection should be overruled.

The defense should object to this question as impermissible character evidence.

Evidence of a person's character or trait is impermissible to prove an act in conformity therewith.

The prosecution seeks to admit the testimony and certified copy of Dan's misdemeanor for perjury to prove that because he lied once, he will lie again, and this is propensity evidence that is inadmissible character evidence.

The defense's objection should be sustained.

!!!
CHARACTER
AND
IMPERMISSIBLE
TRAITED
DIFFERENTLY

The prosecution should rebut the defense's objection as impeaching the defendant using prior convictions.

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness or by testimony in the form of opinion about that characteristic, but evidence for truthfulness is admissible only after the witness's character for truthfulness has been attacked. Prior convictions of a crime must be a felony/crime involving dishonesty or moral turpitude and must be less than 10 years old.

The prosecution seeks to introduce Dan's crime of dishonesty, which occurred less than 10 years ago, to show that Dan has a character for untruthfulness. Dan can be impeached since he died having the conviction because the prosecution can show a certified copy of the court records proving Dan had a previous conviction of a crime involving dishonesty.

The defense's objection should be overruled.

The defense should object to the introduction of Dan's misdemeanor for perjury as legally irrelevant.

See rule above.

The defense will argue that the introduction of Dan's perjury conviction from 5 years prior will unfairly prejudice the jury into believing Dan is simply a liar--he lied once and now he's lying about not committing the burglary. Rather than deciding the verdict by the evidence in the case, the jury will believe that Dan is a liar based on his previous conviction, so he *must* be lying about not being the robber.

The defense's objection should be sustained.

b. Felony for Vandalism

The defense should object to this question as logically irrelevant.

See rule above.

Introducing Dan's felony for vandalism has a tendency to show that he vandalized once, so he knows how to do so and proceeded to vandalize Valerie's house.

The objection should be overruled.

The defense should object to this question as impermissible character evidence.

Evidence of a person's character or trait is impermissible to prove an act in conformity therewith.

The prosecution seeks to admit vandalism conviction to prove that because he vandalized once, he will do so again, and this is propensity evidence that is inadmissible character evidence.

The defense's objection should be sustained.

The prosecution should rebut the defense's objection as impeaching the defendant using prior convictions.

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness or by testimony in the form of opinion about that characteristic, but evidence for truthfulness is admissible only after the witness's character for truthfulness has been attacked. Prior convictions of a crime must be a felony/crime involving dishonesty or moral turpitude and must be less than 10 years old.

Vandalism is not a crime of moral turpitude or dishonesty, so it does not contribute to Dan's character for truthfulness or untruthfulness as a witness.

The defense's objection should remain sustained.

The defense should object to this question as legally irrelevant.

See rule above.

The introduction of this felony serves only to unfairly prejudice the jury and paint Dan as a criminal, which would cause the jury to believe that Dan the Felon who has lied and committed vandalism in the past certainly did so in the present case, which is not what the rule of evidence intended.

The defense's objection should be sustained.

c. Previous Incidents

The defense should object to this question as logically irrelevant.

See rule above.

Dan's testimony has a tendency to prove that he has a propensity to lie and burglarize homes.

The objection should be overruled.

The defense should object to this question as legally irrelevant.

See rule above.

The introduction of this wrongdoing serves only to unfairly prejudice the jury and paint Dan as a criminal, which would cause the jury to believe that Dan the Felon who has lied and is a serial burglar in the past certainly did so in the present case, which is not what the rule of evidence intended.

The defense's objection should be sustained.

3)

1) Wonderly's testimony that "My Homie shot mesome chick."

Defendant could object to relevance

Relevance: Evidence is relevant if it has any tendency to make a disputed fact or issue in the case more or less probable.

The statement tends to prove the identity and motive of Rico as the shooter.

The judge should overrule the objection

Defendant ^{sited} could object the statement as hearsay

Hearsay: An out of court statement, made by a declarant, offered for the truth of the matter asserted.

The statement was made out of court because it occurred in the street where Vince was shot. Vince was a person, therefore a declarant. The statement is being offered to the truth of the matter asserted that Rico shot Vince, and for motive, "over some chick", (but the motive is also asserted in the statement).

The judge should intend to sustain the objection

The prosecution should counter that this was a dying declaration

Dying declaration: in a murder or civil case, a statement made by a unavailable declarant while they believed their death was imminent * CONTENT IS ...

This is a murder trial, and the declarant Vince is unavailable because he is dead. The statement was made while Vince believed his death was imminent because he said "He killed my ass."

The judge should overrule the objection

The prosecution should also counter that this is an excited utterance

Excited utterance: a statement made contemporaneous to a startling event, about the startling event.

L > KIND OF

START SWEET AND DISPUTED FACT, DON'T LEAVE RUMOR ELEMENTS TO IMPLIED CONCLUSIONS

The statement was contemporaneous because it was made right after Vince was shot as he was bleeding in the street. The statement was about the event because it identified Rico as having shot him.

CONCLUSION?

Rule of optional completeness: When party introduces part of a statement the opposing party may introduce the remainder

ISSUE? ANALYSIS?
CONCLUSION?

2) Heriberta's statement

403?
CRAWFORD?

Defendant could object to relevance

Relevance: Evidence is relevant if it has any tendency to make a disputed fact or issue in the case more or less probable.

The statement tends to prove she knew something had happened to Vince, that Rico had shot him, because Officer Wonderly had not mention why he was there yet.

The judge should overrule the objection.

Defendant could object the statement as hearsay

Hearsay: An out of court statement, made by a declarant, offered for the truth of the matter asserted.

The statement was made out of court because it occurred at Rico's last known address. Heriberta is a person, therefore a declarant. The statement however is not being offered to the truth of the matter asserted that "Vince is a snitch if you are showing up here."

The judge should overrule the objection

Defendant could object under the spousal testimonial privilege

Spousal/adverse testimonial privilege: In criminal cases the privilege prevents a spouse from being compelled to testify against their spouse. The privilege can be asserted only by the testifying spouse and requires the parties to be married at the time of the testimony and can cover communications and events that preceded the marriage.

Rico/Domingo and Heriberta are married at the time Heriberta is called to the stand. The event occurred prior to the marriage, but the privilege protects a spouse from having to testify against their

AND NOW
YOU DON'T
CONSIDER
EXCEPTIONS

GOOD! BUT
THE IMAGED
ASSERTION IS
VINCE TOLD YOU RICO
DID IT AND TOLD
THE TRUTH.
ITS HEARSAY

spouse at all in order to maintain the "harmony" of the marriage. If Heriberta asserts the privilege here it would apply.

The judge should intend to sustain the objection. (MAKING HER UNAVAILABLE UNDER 804...)

The prosecution should counter that the crime/fraud exception applies

The marriage must be legitimate for the adverse testimonial privilege to apply.

Case!
Heriberta was a teenager at the time of the murder and they were only married while Domingo was in custody awaiting trial. The adverse testimonial privilege does not apply to sham marriages made solely to fraudulently assert the privilege.

The judge should overrule the objection

3) Officer Tang's rebuttal testimony

Defendant could object to relevance

Relevance: Evidence is relevant if it has any tendency to make a disputed fact or issue in the case more or less probable.

The testimony tends to show that Rico/Domingo is known to police to be dangerous and has a propensity to kill with firearms.

The judge should overrule the objection

The defendant should object to impermissible character evidence

Character/propensity evidence is inadmissible to prove an act in conformance with that character/propensity

Officer Tang testimony is essentially that the defendant has a reputation/character for being a ruthless killer who prefers firearms. The testimony is being offered here to show that Rico/Domingo acted in conformity with that character when he murdered Vince.

*MIAMI??
COP.??*

END OF EXAM

MISSED ISSUES BUT
OVERALL WELL PUT
TOGETHER. BE CAREFUL
ABOUT FINDING "NOT HEARSAY"
BECAUSE IT MAY BLIND YOU
TO APPLICABLE EXCEPTIONS.
GOOD ORGANIZATION!