

Kern County College of Law

EVIDENCE

Final Examination

Spring 2020

Professor H. Starr

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

QUESTION 1

Andrew is being charged with the first-degree premeditated murder of his mother in the case of People of the State of X vs. Andrew. Andrew is a 30-year-old husband and father of two young children. In the months leading up to this incident, Andrew was laid off from his long term, well-paying job. He began working two jobs to support his family. Andrew began using methamphetamine to allow him to stay up the long hours he needed to work.

The following are undisputed facts of the case: On the day of the murder, Andrew was using methamphetamine. Andrew went to his mother's home to visit her. Andrew's mother, Beatrice and brother, Cody were home. Cody was upstairs when he heard Beatrice and Andrew screaming in the kitchen. Cody ran to the kitchen and saw Beatrice lying on the ground with one stab wound to her chest and Andrew bleeding profusely from wounds to his arm. Cody called 911 and the police and ambulance arrived shortly thereafter. Beatrice was pronounced dead at the scene. Andrew was taken to the hospital where he was treated for his injuries and arrested for murder.

The prosecution's theory is that Andrew and Beatrice were arguing and Andrew stabbed Beatrice out of anger, killing her. The defense theory is that Andrew was in a methamphetamine induced psychosis and began cutting his own arm. Beatrice tried to stop Andrew by grabbing the bloody knife from his hands and the knife slipped killing Beatrice accidentally.

Assume the following occurred in the jury trial of Andrew. 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 seeks to introduce Andrew's medical records which include a statement made by Cody to ambulance personnel immediately after the stabbing stating, "Andrew stabbed my mom because they were arguing."
2. Next, the prosecution calls Evan, Andrew's neighbor. Evan testifies that one month before the murder Andrew came to Evan's house and accused Evan of secretly videotaping him through his television. When Evan denied videotaping Andrew, Andrew pulled out a knife and threatened to stab Evan. Evan said Andrew appeared to be under the influence of drugs.

3. In the defense case in chief, the defense calls Andrew who testifies that he was delusional and trying to cut off his own arm when his mother grabbed the bloody knife and it slipped and accidentally stabbed her. On cross examination, the prosecutor asks Andrew if he has been convicted of a misdemeanor offense for threatening his neighbor Evan with a weapon.

4. Andrew has numerous potential character witnesses including former co-workers, family and friends who would testify that he has a peaceful, non-violent nature. What tactical issues should the defense attorney consider in deciding whether to introduce evidence of Andrew's good character?

Question 2

Hudson is being charged with armed bank robbery. During the crime, Hudson shot off a 9 MM firearm into the ceiling. He placed the firearm in his waistband which caused a burn mark on his hip that became infected. Hudson called Arlo, his attorney and asked for help on the bank robbery charges. Once Arlo met with Hudson, Arlo referred Hudson to Dr. Dyle for the medical injury.

Subsequently, Hudson met with his attorney, Arlo, Dr. Dyle and Lindsey, Arlo's law clerk. Suddenly, Hudson's wife, Wallis, barges into the meeting and says, "I am mad at you for cheating on me! I just told Detective Cosmo that you robbed the bank!" Wallis storms off and files for divorce. Hudson says to Arlo, in the presence of Dr. Dyle and Lindsey, "Wallis knows that I gave you my ski mask, firearm and cash to hide."

On the day of the robbery, Detective Cosmo investigated, seized one spent 9 MM bullet from the bank ceiling and a surveillance tape. The tape showed a masked robber shooting a firearm into the air and placing the firearm into his waistband. Detective Cosmo is a qualified firearms expert.

Assume the following occurred in a California state court. 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.

Answer according to California Law.

1. The prosecution calls, Lindsey, the law clerk, who testified that she was present at and heard all of Hudson's statements to Arlo about hiding the ski mask, 9 MM firearm and the cash.
2. Next, the prosecution presents, Wallis, Hudson's wife, who voluntarily testified that right after the robbery, Hudson told her in their bedroom "I robbed a bank." At the time of the trial, Hudson and Wallis had reconciled and are still married.
3. The prosecution presents Dr. Dyle who testified that he treated Hudson for an infected burn mark on the hip. Also, the doctor says that Arlo called him and asked him to look at Hudson's injury or "burn mark."
4. Finally, the prosecution presented Detective Cosmo. He testified that one spent 9 MM bullet was recovered from the bank ceiling. Also, he laid the foundation for playing the surveillance video to the jury.

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Question 3

John “Bizarre” Shibble owns and runs a roadside zoo in the Midwest specializing in big cats. His specialty is Snow Leopards. Known for being flamboyantly gay and for being an avid gun enthusiast, Shibble’s eccentricity led him to star on a reality show entitled “John Bizarre: The Leopard Prince.” Shibble has had an ongoing feud with Karen Best, an animal rights activist. The feud got worse and worse over the years.

One day, police found Karen Best’s body on the side of the road down the street from Shibble’s zoo. She had been shot three times in the chest, but no bullets or casings were located at the scene. Shibble was a primary suspect in the homicide case, but prosecutors did not charge him because there were no eyewitnesses to the killing and a lack of physical evidence for proof beyond a reasonable doubt.

Karen Best’s estate, through her husband, Hank, sues John Shibble in a Federal Court for intentional tort alleging wrongful death. Shibble denies all allegations and claims he was not even aware Karen Best was dead until he saw it on the news. The following evidence is proffered at the trial:

- 1) Hank calls Tom Otto, the cameraman, who filmed the reality show, to testify to the statement made by Shibble. While being filmed shooting explosive soda cans filled with Tannerite, Shibble said, “Yee Haw! Karen Best, you bitch, if I ever see you on my property, I’ll put a bullet in your head for real!”
- 2) Hank also calls an engineer, William Pluma, who is a former Marine sniper. Pluma testifies that he developed his own test to determine the caliber bullet used in a shooting. The test uses ballistics gel and digital imaging. Pluma will testify that You Tubers with gun and science-related shows have given his test positive reviews. The results of his test in this case suggest that Best’s bullet wounds were caused by a specialty cartridge: .347 Leopard Magnum.
- 3) Hank calls Rex Vander, a Federal Agent familiar with the feuding Shibble and Karen Best. Vander will testify Shibble has a criminal record that includes felony assault from two years earlier and felony perjury from five years earlier. He will also testify that his opinion was that Karen Best was a “sweet woman who did not seem the violent type.”
- 4) Shibble calls Jim White. White testifies that White told Shibble the well-circulated rumor in California that Karen Best had secretly gunned down her millionaire husband and fed him to the big cats she had rescued in order to inherit his fortune.

Discuss all the evidentiary issues and arguments that would likely arise in each section above, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Answer according to **Federal Law only**.

SPRING 2020 EVIDENCE EXAM QUESTION AND ANSWER

Andrew is being charged with the first-degree premeditated murder of his mother in the case of People of the State of X vs. Andrew. Andrew is a 30-year-old husband and father of two young children. In the months leading up to this incident, Andrew was laid off from his long term, well-paying job. He began working two jobs to support his family. Andrew began using methamphetamine to allow him to stay up the long hours he needed to work.

The following are undisputed facts of the case: On the day of the murder, Andrew was using methamphetamine. Andrew went to his mother's home to visit her. Andrew's mother, Beatrice and brother, Cody were home. Cody was upstairs when he heard Beatrice and Andrew screaming in the kitchen. Cody ran to the kitchen and saw Beatrice lying on the ground with one stab wound to her chest and Andrew bleeding profusely from wounds to his arm. Cody called 911 and the police and ambulance arrived shortly thereafter. Beatrice was pronounced dead at the scene. Andrew was taken to the hospital where he was treated for his injuries and arrested for murder.

The prosecution's theory is that Andrew and Beatrice were arguing and Andrew stabbed Beatrice out of anger, killing her. The defense theory is that Andrew was in a methamphetamine induced psychosis and began cutting his own arm. Beatrice tried to stop Andrew by grabbing the bloody knife from his hands and the knife slipped accidentally killing Beatrice.

Assume the following occurred in the jury trial of Andrew. 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 seeks to introduce Andrew's medical records which include a statement made by Cody to ambulance personnel immediately after the stabbing stating, "Andrew stabbed my mom because they were arguing."

Relevance: Evidence is relevant if has some tendency make the existence of a fact of consequence more or less likely than it would be without the evidence.

The statement of Cody contained in the medical records is relevant because it supports the prosecution's theory that Andrew killed Beatrice out of anger and refutes the defense of accident or mistake.

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

The medical records would be hearsay if offered for their truth

Business records exception to the hearsay rule:

1. The declarant (the ultimate source of the report) had a business duty to report the information
2. The declarant had personal knowledge of the facts or events reported
3. The written report was prepared close in time to the events contained in the report while it was still fresh in the declarant's memory
4. It was a routine practice of the business to prepare such reports
5. The report was made in the regular course of business.
 - a. This requires that the entry be related to the nature of the business.
 - b. Reports specially prepared for litigation are not made in the regular course of business

Typically, medical records are authored by doctors or other health professionals who have a business duty to report the information and personal knowledge of the facts reported. Medical records are written close in time to the events contained therein while they are fresh in the medical professional's memory. It is routine practice of the business to prepare such records. The records are made in the regular course of business.

The business record exception would not cover the statement made by Cody to the paramedic because Cody does not have a business duty to report to the paramedic. Cody's statement would have to be redacted from the business record unless another exception to the hearsay rule applies.

Excited Utterance: It could be argued that Cody's statement was an excited utterance.

1. An event occurred.
2. The event was startling, or at least stressful
3. The declarant has personal knowledge of the event.
4. The declarant made a statement about the event.
5. The declarant made the statement while he or she was under a state of nervous excitement

Cody just witnessed his mother, who suffered a fatal stab wound, in the kitchen and heard what transpired between his mother and the defendant prior to the stabbing. The event is stressful. It

was made to an EMT who arrived on the scene shortly after the incident occurred. His statement would likely be admissible under the excited utterance exception.

Authentication: Business records are self-authenticating if the custodian of records files a declaration indicating that the elements of the business records exception are satisfied. If this was done, a sponsoring witness is not required for the introduction of the evidence.

Best Evidence Rule: The best evidence rule applies where the document's contents are at issue – it is a legally dispositive document, or the contents of the documents are known to the witness only through reading the documents. The best evidence rule does not apply in this situation where the document is convenient proof of facts exist independent of the document. The medical records for Andrew do not implicate the best evidence rule.

Next, the prosecution calls Evan, Andrew's neighbor. Evan testifies that one month before the murder Andrew came to Evan's house and accused Evan of secretly videotaping him through his television. When Evan denied videotaping Andrew, Andrew pulled out a knife and threatened to stab Evan. Evan said Andrew appeared to be under the influence of drugs.

Relevance: Evan's testimony is relevant to rebut Andrew's claim of accident by showing that he has acted in a violent manner in the past while under the influence of methamphetamine.

Character Evidence:

The general rule is that information about a person's character may not be introduced to suggest that the person did something because he or she has a propensity to do such things. Both the Federal Rules and California prohibit the use of character to prove conduct in conformity with that character (propensity). See FRE 404(a)(1), CEC 1101(a)

Character evidence is not permissible in a criminal case unless the Defendant opens the door to his or her own good character. The prosecutor is seeking to introduce Evan's statement in their case in chief. The defendant has not opened the door to his good character. Even if the defendant opened the door to his good character, under the Federal Rules, the prosecutor would be limited to cross examining the defendant's character witness about if they had heard or knew of prior relevant acts of the defendant and would be prohibited from introducing extrinsic evidence if the witness was not familiar with that information. The prosecutor could also call their own character witnesses, but those witnesses would be limited to stating their opinion of the defendant's character or the defendant's reputation for the trait in the community.

emotional bias against one party without having a substantial effect on a disputed issue. Evidence is unduly prejudicial “when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction.” The defense will argue that this evidence is prejudicial because of the danger that jurors will believe that Andrew is a dangerous person and convict him based on his past acts. The prosecutor will argue that this evidence goes directly to core issues presented at the trial – whether the incident was a premeditated murder or an accident. Weighing both considerations, the court will likely permit the evidence because although the evidence is significantly prejudicial it also has a significant probative value on material issues presented in the case.

Lay Opinion Evidence:

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’s perception, helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge. Typically, courts will allow lay witness opinion testimony on issues such as the general appearance or condition of a person, including intoxication or sobriety.

3. In the defense case in chief, the defense calls Andrew who testifies that he was delusional and trying to cut off his own arm when his mother grabbed the bloody knife and it slipped and accidentally stabbed her. On cross examination, the prosecutor asks Andrew if he has been convicted of a misdemeanor offense for threatening his neighbor Evan with a weapon.

Relevance/Impeachment:

Under the federal rules, a witness may be impeached by a prior conviction in one of two circumstances:

Crime Involving Dishonesty or False Statement. 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.

Felony Not Involving Dishonesty. A witness’ character for truthfulness may also be attacked, under the Federal Rules, by any felony whether or not it involves dishonesty or a false statement. As the offense is a misdemeanor and not a felony, this would not be a proper avenue for impeachment.

Prior Bad Act Impeachment. This conduct would also not qualify for impeachment as a prior bad act, as the prior bad act must be an act of dishonesty or false statement. Threatening someone with a knife would not qualify.

Objection sustained; the prior conviction is not admissible.

4. Andrew has numerous potential character witnesses including former co-workers, family and friends who would testify that he has a peaceful, non-violent nature. What tactical issues should the defense attorney consider in deciding whether to introduce evidence of Andrew's good character?

Note: There could be a variety of answers to this question. The idea is to ensure that the student understands the character evidence rules and can articulate how that would impact a decision to use character witnesses.

Introducing evidence of character witnesses who indicate that Andrew has a peaceful, non-violent character would be beneficial for Andrew to support his theory of the case. It would also allow the jury to see that Andrew has many people in his life that support him and can attest to his good character.

The potential cons of introducing character evidence really depends on the court's decision as to whether the jury will hear Evan's evidence about Andrew threatening to stab him with a knife. If the court rules that evidence is inadmissible under a prior bad act theory, then Andrew would open the door to allow the prosecutor to question his character witnesses about threatening to stab Evan to show that Andrew's character witnesses do not know Andrew's character well enough to be credible on that issue. If the court rules that Evan's testimony is admissible, then the potential negative effect of introducing Andrew's character evidence is diminished.

Evidence-Q # 2: ANSWER OUTLINE-Prof. S Lizardo

*** **PLEASE NOTE:** Arguments may have a different point of view. Okay so long as logical, used the rules and critical thinking. **

1. LINDSEY 'S TESTIMONY, THE LAW CLERK

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

Logical Relevance

-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 Lindsey's testimony to establish the identity of the robber as Hudson, and that he used a firearm, was masked and stole cash from the bank. -

Legal Relevance

-Trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

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 identity of the shooter and the location of the weapon.

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

HEARSAY

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

- What Lindsey heard Hudson say was an out- of- court statement offered to prove the identity of the robber as Hudson, that a firearm and ski mask and that Arlo was given these items along with cash from the robbery.

SPONTANEOUS STATEMENT EXCEPTION–Lindsey repeating what Hudson said

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

- “Wallis knows that I gave you my ski mask, firearm and case to hide, ” may be a spontaneous statement exception since it may be argued that Hudson may still be under the stress of his wife barging into the meeting. However, this exception is not likely to prevail if the event, the robbery, has had a significant lapse of time.

Exception does not apply. -

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

ADMISSION BY PARTY

-A statement is not inadmissible when offered against the declarant in a case where he is a party.

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

-Party who is offering the robber’s testimony – is the prosecution

-The parties are on separate sides.

-Since Hudson made the statements of asking Arlo to hide the firearm, the ski and cash, these are Admissions by a Party Opponent and will be admitted into evidence.

STATE OF MIND

-Statement of declarant’s then existing physical or mental condition or state of mind.

-Discussion of statements by Hudson to Arlo.

CONTEMPORANEOUS STATEMENTS

-A statement that is otherwise hearsay will be admissible as an exception if the statement made by the declarant is explaining his conduct while the declarant is engaged in that conduct.

- Lindsey that is repeating Hudson’s statements concerning the robbery, the ski mask, the firearm and cash. She is not explaining her own conduct.

- Exception does **not** apply.

PRIVILEGE

Specific relationships that are built on trust and confidentiality protect disclosure of certain information.

ATTORNEY – CLIENT PRIVILEGE – Lindsey’s Presence at Meeting

-The attorney-client privilege allows the client the right to refuse to disclose confidential legal information between the client and the attorney. The attorney has separate ethical obligations aside from the privilege.

- Arlo is H's attorney and is having a confidential client communication with Hudson. The law clerk, Lindsey is present. (Dr. is there, too- under separate discussion below)

-**"Reasonably Necessary"- Third Party's Presence / Eavesdropper or not**

Hudson's admission about being the robber to his wife, Wallis, may qualify for the crime or fraud exception. However, the exception is generally limited to future crimes. Hudson did ask his attorney to hide the gun, ski mask and cash.

Then, Hudson advised Arlo that his wife knew of his conduct in requesting help in hiding the items. Furthermore, the statements by Hudson to Arlo may be considered "consciousness of guilt."

The third- party presence of Lindsey, the law clerk. would defeat the privilege and her hearing Hudson's statements to Arlo the request to hide the ski mask, firearm and cash would be deemed admissible unless she is termed an **eavesdropper or reasonably necessary to Arlo's meeting with Hudson.**

(Note: OK if students argue otherwise, so long as logical.)

2. WALLIS'S TESTIMONY- TELLING HUSBAND'S ADMISSION OF BEING ROBBER AND KNOWLEDGE ARLO IS HIDING ROBBERY ITEMS

SPOUSAL TESTIMONIAL PRIVILEGE

-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.

- Here, Wallis is volunteering to testify against her spouse. The testifying spouse may testify against a spouse in **any proceeding**. Wallis is the holder of the privilege.

-Waiver of the privilege

MARITAL COMMUNICATIONS PRIVILEGE

-The privilege protects confidential spousal communications and survives if the marriage ends by death or divorce.

-Apparently, Hudson tells Wallis about the robbery. No third parties were present and this shared confidential communication was in their bedroom.

- Hudson and Wallis are legally married at the time of her testimony. Although Wallis did file for divorce, the parties had reconciled by the robbery trial.

- Presumption of confidential communication in certain relationships. Had Wallis just seen the ski mask, the firearm and cash, the viewing would not be protected.

(Note: OK if students argue other way so long as a logical argument.)

3. DR. DYLES'S TESTIMONY

RELEVANCY- see rules above.

Dr. Dyle's testimony is logically relevant because the doctor treated Hudson for an infected burn and the robber was seen on the video to place a firearm in his waistband. There can be a reasonable inference that the identity of the robber is Hudson.

The defense will argue that the doctor's testimony is too prejudicial and not probative. The jury may weigh the doctor's testimony more because he is a doctor and not a layman. Also, the testimony is speculative. However, after balancing the interests, the trial court will admit the testimony.

PHYSICIAN – PATIENT PRIVILEGE: ATTORNEY REFERRED

-A physician– patient relationship is protected from disclosure if the patient's confidential communication was for the purpose of diagnosis or treatment. The holder of the privilege is the patient, here is Hudson who was treated for an infected burn.

The key issue is since Arlo, H's attorney did the referring, is the doctor now covered under the umbrella of the attorney- client privilege? If the physician was contacted for the purpose of a pending litigation, there may be an extension of the attorney -client privilege.

Defense may argue that since Arlo referred Hudson and this was treatment for an infected burn, the testimony should be excluded. This testimony is covered by both privileges- the attorney-client and the physician-patient privilege. Also, since Dr. Dyle was present at the meeting with Arlo and Hudson, is likely the attorney was consulting Dyle for the robbery trial.

(Note: an argument may be made that Dr. Dyle is not protected by attorney-client privilege and was really a third party in the meeting, hence the privilege was waived.)

EXCEPTION: CRIME OR FRAUD

-Recognized exception to disclosure if crime or fraud.

-Since the physician was made aware of the robbery and the hidden items during the meeting with Arlo and Hudson. He also heard Wallis say Hudson was the robber. This serves to be an exception to privilege.

4. DETECTIVE COSMO'S TESTIMONY- THE SPENT 9MM BULLET & SURVEILLANCE TAPE

RELEVANCE- see rules above.

Detective Cosmo's testimony about seizing a 9MM bullet from the bank ceiling has a tendency to show the robber fired a firearm into the air. Since he is a qualified firearms expert, he will be allowed to testify to the caliber of the bullet he recovered.

The logical relevancy of the surveillance video has a tendency to show the robber as wearing a ski mask and shooting off a firearm into the air. This conduct shows intimidation and fear which is a requirement of robbery.

Defense will object to the testimony and presentation of the surveillance tape as too prejudicial and not probative. Since the video shows the violent act of shooting off a firearm some jurors may convict Hudson on that fact alone.

AUTHENTICATION OF SURVEILLANCE VIDEO

Chain of custody is established because Detective Cosmo was the investigating detective for the bank robbery and seized the bank surveillance video. He can identify the date, time and location of his seizure.

SECONDARY EVIDENCE RULE

-The contents of writings may be proved by secondary evidence unless a genuine dispute. This includes copies, duplicates or reproduction of original. The Best Evidence Rule has been abolished in California.

- Applies only when evidence is offered to prove material items of writings.

- The surveillance video will be considered a writing since sound recordings are covered under writings.

ANSWER-Evidence Final Examination-Spring 2020- Question 3

1) Section 1

- a. Logical Relevance:
 - i. Is logically relevant: shows intent to kill
- b. Legal Relevance:
 - i. Highly prejudicial, but not unduly so (not an impermissible inference).
 - ii. 403 objection likely to be overruled
- c. Hearsay:
 - i. General Rule: Yes, likely to be considered hearsay.
- d. Hearsay Exceptions:
 - i. Non-hearsay: Admission by party 801(d)(2)
 - ii. 803(3) – State of Mind/Hillmon Doctrine
 - 1. Other exceptions not likely to apply:
 - a. Business records: The show is the record
 - b. Recorded recollection: The show is the record
 - 2. 804 Exceptions don't apply (not unavailable):
 - a. Statement against interest
- e. Best Evidence Rule:
 - i. The cameraman is a witness himself, and does not require testimony about what was in the recording
 - ii. The recording itself would be required if the BER applied due to no apparent exception

2) Section 2

- a. Logical Relevance: shows that the caliber used in the killing is available to defendant, so it is relevant. Low bar for relevance here is key.
- b. Legal Relevance: Depending on ruling on expert witness, may be prejudicial in that it exaggerates the reliability of the evidence and the probative value relies entirely on the name of the cartridge being tied to the nickname of Shibble.
 - i. Result could go either way on this on this, but the main factor will likely be time wasting for something so minute.
- c. Expert Testimony:
 - i. Qualification as an expert: Will probably qualify
 - ii. *Daubert* applicable because FRE:
 - 1. Generally accepted: No
 - 2. Peer review/Publication: Yes, but not ideal
 - 3. Testability: It can and apparently has been tested

4. Rate of error: unknown
5. Independent research: Apparently yes, but not ideal
 - a. Court's discretion as gatekeeper will be key here, and it could go either way (although I would lean toward exclusion)

3) Section 3:

- a. Relevance: Felony assault – as propensity, tends to show he is violent. As non propensity, does not tend to prove anything (little factual support for anything else)
- b. Bad Character evidence:
 - i. Felony assault
 1. It is character evidence – specific instances
 2. Propensity – Violence – not allowed
 3. MIAMI COP Exceptions: None apparent
 4. Impeachment: No indication that Shibble has testified and so can't be impeached
 - a. If he does testify, the applicable rule is that it must be admitted subject to 403
 - b. No age out
 - ii. Felony Perjury
 1. Propensity – Crime – not allowed
 2. MIAMI COP Exceptions: None apparent
 3. Impeachment: No indication that Shibble has testified so he can't be impeached
 - a. If he does testify, it qualifies as an act of dishonesty or false statement
 - b. No age out
 - iii. 403:
 1. Prejudice: Propensity is the likeliest impermissible inference; time wasting as witness appears to have no other purpose.
 2. Probative Value: Little to nothing given lack of MIAMI COP or impeachment value
- c. Good character evidence:
 - i. Relevance: It does not seem to prove anything since her actions are unknown and don't appear to be central to the case

1. No claims of self-defense
 2. No claim of violence
 - ii. Nonviolent opinion
 1. It is character evidence: opinion
 2. Propensity – nonviolence – not allowed
 3. Mercy Rule: Does not apply to victim in civil case
 4. “Opens the Door” to impeachment
 - iii. 403:
 1. Prejudice: Makes the victim more likeable, meaning that anyone who feuded with her is less likeable, and the jury may turn it into a “popularity contest”
 2. Probative value: decreases likelihood that jury will invent self-defense argument on its own
 3. Given that it is already probably not admissible, 403 will likely keep it out.
 - d. Tactical: Should not object because it may allow for rebuttal testimony
- 4) Section 4:
- a. Logical Relevance:
 - i. Rebutts evidence that Karen Best was nonviolent, even if independently inadmissible
 - ii. May help establish a claim of self-defense, though that is not the theory upon which Shibble is relying
 - b. Legal Relevance:
 - i. Will tend to enflame the passions against the victim, potentially leading them to find Shibble not liable despite facts; may distract jurors from central issues
 - c. Hearsay:
 - i. General rule: It can be used as hearsay, and there is a substantial likelihood the jurors will take it as true
 - ii. Not-Hearsay: May use it to demonstrate that Shibble believed that Karen Best was dangerous, and therefore he had a valid claim of self-defense
 1. Note: Self-defense is not his defense, so this use would make the not-hearsay logically irrelevant
 - iii. Excepted Hearsay: No apparent exceptions apply

1)

1. Tom Otto's Testimony

Relevance

The defense should object to Otto's testimony as being irrelevant.

Relevant evidence means evidence having any tendency to make a fact more or less probable, and the fact is of consequence.

Evidence is relevant as it shows that Shibble did not like Karen and likely would do harm to her which makes it probable he committed the intentional tort for wrongful death.

Evidence is relevant and will not be excluded as irrelevant.

Authentication

Defense should object to the video as not being properly authenticated.

When introducing writings or other physical evidence, the proponent must produce evidence sufficient to prove that the item is what the proponent purports it to be. If the physical evidence is properly authenticated, the document is admissible.

Pluma filmed the show, therefore he is a person with knowledge who can properly authenticate the recording.

Once properly laid foundation, the evidence will be authenticated.

Best Evidence Rule

The defense should object to admission of the shooting of the reality show and state that Pluma can simply testify to the contents.

The best evidence rule states that the original is required when evidence is offered to prove the contents of a writing, recording, or photograph. The original is not required when a person has personal knowledge of the contents.

Here, the video recording is the original as it is what captured the statement made by Shibble. However, since Pluma was the one who filmed the show, it could be argued that he was present and had personal knowledge, therefore the original is not required. It is likely that edits were made or that Pluma did not pay attention to the entire shooting therefore the original, in this case the recording is required.

The recording meets the best evidence rule requirements.

Hearsay

The defense should object to the testimony as hearsay.

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

The statement was made by declarant Shibble while the show was recorded outside of court. If offered by the plaintiff to prove that he would put a bullet on Karen it would be offered for the TMA.

The testimony is inadmissible unless a proper exception applies.

Statement Against Interest

The plaintiff should counter that the testimony is admissible as a statement against interest.

A hearsay statement is admissible if the declarant is unavailable, and the statement subjects him to criminal liability or is against his pecuniary interest such that a reasonable person would not make the statement if it were not true. Corroborating circumstances are required.

403

Relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect could be analyzed through a variation of the following

factors: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time or needlessly cumulative of facts.

2. William Pluma's testimony

Relevance

The defense should object to Pluma's testimony as being irrelevant.

Relevant evidence means evidence having any tendency to make a fact more or less probable, and the fact is of consequence.

Expert Testimony

Expert witness who is qualified through knowledge, skill, experience, training, or education may testify as to the opinion where scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine facts in issues. The testimony must be a product of reliable principles and methods and reliably applied to the facts in the case. The reliability is determined by applying a non-exhaustive list of factors like testing, rate of error, general acceptance, publication, and peer review.

The expert has former marine sniper experience therefore likely knowledgeable when it comes to firearms. However, only reviews for his own test has been by you tubers which is not reliable. In addition, this is unlikely to help the jury since there is no evidence of what type of weapon was used to kill Karen.

403

Plaintiff should object to this expert testimony.

Relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect could be analyzed through a variation of the following factors: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time or needlessly cumulative of facts.

Not probative of the facts in issue, and the methods used are not reliable which could confuse the jury and waste time of the court.

Evidence will be excluded as unfairly prejudicial.

3. Vander's testimony

Relevance

The defense should object to Vander's testimony as being irrelevant.

Relevant evidence means evidence having any tendency to make a fact more or less probable, and the fact is of consequence.

The evidence is relevant as it tends to show that Shibble is a violent person which makes it more probable that he in fact committed the tort that is being alleged against him for Karen's death.

Evidence will not be excluded as being irrelevant.

Character Evidence

Defense should object to the testimony regarding D's past criminal record as improper character evidence.

Character evidence is specific acts, opinion, and reputation testimony used to draw opinions of a person's character. Character evidence may not be used in order to prove that a person acted in conformity therewith. The prosecution cannot present character evidence until after the defendant has opened the door. Once the door has been opened, the prosecution can cross examine the defendant with reputation, opinion and specific instances.

The evidence of the prior conviction will be excluded as impermissible character evidence.

Other Crimes, Wrongs, or Acts

The plaintiff can support admission of the prior conviction by also admitting for another purpose.

Evidence of a crime, wrong or other act is inadmissible to show propensity to prove he committed the crime in question. However, this evidence may be admissible for another

purpose such as proving motive, intent, knowledge, opportunity, preparation, absence of mistake/accident, identity, or common scheme and plan.

Lay opinion

403

The defense should object to evidence being unfairly prejudicial.

Relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect could be analyzed through a variation of the following factors: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time or needlessly cumulative of facts.

The jury is likely to give a federal agent's testimony too much weight and it would unfairly prejudice the defendant by taking these past crimes as evidence that he is violent and therefore should be excluded.

4. White's testimony

Relevance

The plaintiff should object to Otto's testimony as being irrelevant.

Relevant evidence means evidence having any tendency to make a fact more or less probable, and the fact is of consequence. Irrelevant evidence is inadmissible.

Evidence that a rumor that Karen secretly gunned down her husband and fed him to big cats is relevant as it negates the "sweet woman" character that other witnesses testify to. However, the issue here is the intentional tort claim filed by Karen's husband against Shibble which is not relevant to this cause of action.

The evidence will be excluded as being irrelevant.

Reputation Testimony

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The defense should object to this evidence as being unfairly prejudicial.

Relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect could be analyzed through a variation of the following factors: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time or needlessly cumulative of facts.

The probative value of this evidence is low as it is likely irrelevant. Even more so, if the jury heard this evidence they would make impermissible inferences that Karen was a gold digger and only cared about money to the point that she had her own husband killed, and if that were true then she deserved to be shot.

This evidence would be excluded as unfairly prejudicial.

END OF EXAM

2)

1) LINDSEY'S TESTIMONY

D should object to Lindsey's (L) testimony as not relevant.

Evidence relevant if it has any tendency to make a fact of consequence more or less probable. In CA, the fact must be in dispute. Prop 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing.

In the instant case, testimony that L heard D say he gave the his attorney 1) a ski mask, which often used to hide faces, 2) a 9MM firearm, of which the same type of bullets were found at the crime scene, 3) money, which is what criminals rob banks to get, makes it more probable that D did commit the crime. Additionally, the fact that he want to an attorneys office, where L works, makes it more probable that he needs help with the law.

Thus, a court is likely to overrule the objection .

D should object to L's testimony about D's statement to Arlo (A) as inadmissible hearsay.

Hearsay is an out or court statement (OCS) made by a declarant to offered to prove the truth of the matter asserted (TMA). Hearsay is inadmissible without an applicable exception.

In the instant case, D told made the statements at his attorneys office, not in this court room, making it an OCS. Additionally, the prosecution called L and is presumably seeking to admit the evidence for TMA, which takes this statement under the hearsay requirement.

Thus, a court is likely to sustain the objection and exclude the evidence.

Prosecution should counter D's hearsay objection to L's testimony about D's statement to Arlo (A) with the admission by a party opponent exception.

Under CEC 1221, a hearsay statement made by a party in an individual or representative capacity is admissible for TMA as an hearsay exception when used by the proffering party agaisnt the party who made the statement.

In the instant case, the prosecution is proffering this D's statement in a criminal case against D.

Thus, a court is likely to overrule D's hearsay objection and admit the testimony.

Prosecution should counter D's hearsay objection to L's testimony about D's statement to Arlo (A) with the statement against interest exception.

Under CEC 1230, a hearsay statement is admissible if the declarant is unavailable and subjects him to criminal liability, such that a reasonable person would not make that statement if it were not true. A person is considered unavailable to testify if he is exempted by a privilege.

In the instant case, the facts say that D did not take the stand and suggest that he is asserting his right against self incrimination, making him unavailable. His statement is relevant as to the mask, potential weapon and the cash he got from the robbery, subjecting him to criminal liability.

Thus, a court is likely to overrule D's hearsay objection and admit the testimony.

D should object to L's testimony about D's statement to Arlo (A) under the attorney-client privilege (ACP).

Under the CEC, confidential communication between a client and an attorney for the purpose of seeking legal advice or representation is privileged. Employees of the attorneys such as legal clerks and paralegals do not destroy the privilege of they are present. Doctors can be present if they are assisting in interpreting a condition. The client holds the privilege that survives firing and death.

In the instant case, the facts show that A is D's attorney, suggesting an AC relationship. The communication was a statement that was made at A's office, with the paralegal the DR that A called, suggesting that it was made in communication. Prosecution can argue that because the wife was there, the statement was not confidential. However, the facts show that D waited until his wife was outside, to make the statement. Another argument can be made that because the DR was there, he is an unauthorized third party the makes the statement not confidential destroying the privilege. DRs can be present and statements made in their

presence do not break confidentiality if they are made to help interpret a trathmnet, but because the facts show that A reffered D to the DR, *after* D met with A, the doctor was not present to interpret a medical injury. So, his presence does break the confidentiality requirement and breaks privilege.

Thus, a court is likely to overrule the objection and admit the testimony.

D should object to L's testimony about D's statement to Arlo (A) under 352.

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect can be caused by evidence that is misused by a jury or evidence that inflames the emotions of the jury against the defendant.

In the instant case, the statement is highly probative because it connects the D with the scene of the crime, the mask, the cash, and the weapon. The danger here is not misuse, because the evidence is only admissible for the TMA. The prejudice may be because it was made at an attorney's office, the jury may infer guilt because of that. However, that danger does not rise to the level of being so substantial as to outweigh the probative value of statement.

Thus, a court is likely to overrule the objection and admit the testimony.

2) WALLIS' TESTIMONY

D should object to Wallis' (W) testimony about D's statement to her as not relevant.

Evidence relevant if it has any tendency to make a fact of consequence more or less probable. In CA, the fact must be in dispute. Prop 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing.

In the instant case, W testified that D admitted that he robbed the bank which makes it very probable that D did in fact rob the bank.

Thus, a court is likely to overrule the objection .

D should object to W's testimony about D's statement to her as inadmissible hearsay.

Hearsay is an out of court statement (OCS) made by a declarant to offered to prove the truth of the matter asserted (TMA). Hearsay is inadmissible without an applicable exception.

In the instant case, D made the statements at his home to his wife, not in this court room, making it an OCS. Additionally, the prosecution called W and is presumably seeking to admit the evidence for TMA because he has to prove that D did rob the bank, which takes this statement under the hearsay requirement.

Thus, a court is likely to sustain the objection and exclude the evidence.

Prosecution should counter D's hearsay objection to W's testimony about D's statement to her with the admission by a party opponent exception.

Under CEC 1221, a hearsay statement made by a party in an individual or representative capacity is admissible for TMA as an hearsay exception when used by the proffering party against the party who made the statement.

In the instant case, the prosecution is proffering this D's statement in a criminal case against D.

Thus, a court is likely to overrule D's hearsay objection and admit the testimony.

Prosecution should counter D's hearsay objection to W's testimony about D's statement to her with the statement against interest exception.

Under CEC 1230, a hearsay statement is admissible if the delarant is unavailable and subjects him to criminal liability, such that a resaonable person would not make that statement if it were not true. A person is considered unavailable to tesify if he is exempted by a privilege.

In the instant case, the facts say that D did not take the stand and suggest that he is asserting his right against self incrimination, making him unavailable. His statement that he robbed a bank absolutely subjects him to criminal liability.

Thus, a court is likely to overrule D's hearsay objection and admit the testimony.

D should object to W's testimony about D's statement to her under the spousal testimonial privilege (STP).

California recognizes STP in criminal and civil cases. Under the privilege, encompass the right of witness-spouse not to be forced to testify against their current spouse. The witness-spouse holds the privilege. This applies to testimony about events before or during marriage, and expires upon divorce or annulment.

In the instant case, W voluntarily agrees to testify, which as the privilege holder, she is allowed to do, and her husband, D, cannot stop her. Additionally, the fact that they divorced, and got back together, may suggest that the marriage was a sham attempt to prevent W from taking the stand.

Thus, a court is likely to overrule the objection and admit the testimony.

D should object to W's testimony about D's statement to her under the marital communications privilege (MCP).

California recognizes MCP in criminal. Under the privilege, the spousal communication must be confidential, made during the marriage, and both spouses jointly hold the privilege so that either can refuse to disclose or prevent the other from disclosing the confidential communication. The privilege begins with marriage and continues indefinitely. encompass the right of witness-spouse not to be forced to testify against their current spouse. The witness-spouse holds the privilege. This applies to testimony about events before or during marriage, and expires upon divorce or annulment.

In the instant case, D made the statement to his wife at home in the bedroom, which suggests it was confidential. They both were married at the time, which takes this within the privilege, regardless of the divorce and later potentially shamful re marriage. Since both spouses are holders of the privilege, despite W's eagerness to testify, D can assert the privilege to prevent W from testifying about this statement.

Thus, a court is likely to sustain the objection and exclude the testimony.

Prosecution should counter D's objection to Wallis' (W) testimony about D's statement to her under the crime and fraud exception to the MCP.

In CA, if the marital communications were made in furtherance of a crime or a fraud, then the privilege is destroyed.

In the instant case, because the statement was "I robbed a bank" and not "lets rob a bank" the communication was not made in furtherance of the crime, it was only about the crime, and thus does not break the privilege.

Thus, a court is likely to sustain the original objection and exclude the testimony.

D should object to W's testimony about D's statement to Arlo (A) under 352.

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect can be caused by evidence that is misused by a jury or evidence that inflames the emotions of the jury against the defendant.

Court should already kick it out.

Thus, a court is likely to overrule the objection and admit the testimony.

3) DR. DYLE'S TESTIMONY

A) TREATMENT OF HUDSON

D should object to DR's Testimony about treating D as not relevant.

Evidence relevant if it has any tendency to make a fact of consequence more or less probable. In CA, the fact must be in dispute. Prop 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing.

In the instant case, W testified that D admitted that he robbed the bank which makes it very probable that D did in fact rob the bank.

Thus, a court is likely to overrule the objection .

D should object to DR's Testimony about treating D under the Doctor-Patient Privilege (DPP).

In CA, the DPP protects communication between a patient and doctor when the patient consults the doctor for medical treatment or diagnosis and the communication was pertinent to the diagnosis or treatment. DPP is not restricted to just confidential comms.

In the instant case, D went to the doctor to seek treatment for his hip, which was in furtherance of the diagnosis. However, DR is not testifying to communications, only that he treated D, thus the privilege does not apply.

Thus, a court is likely to overrule the objection and admit the testimony.

Prosecution should counter D's objection to object to DR's Testimony about treating D under the crime and fraud exception to the DPP.

In CA, if the DP communications were made in furtherance of a crime or a fraud, then the privilege is destroyed.

In the instant case, no communications

Thus, a court is likely to sustain the original objection and exclude the testimony.

D should object to object to DR's Testimony about treating D under 352.

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect can be caused by evidence that is misused by a jury or evidence that inflames the emotions of the jury against the defendant.

In the instant case, the jury might give more weight that because the DR makes this statement, he is more credible. However, because the tape showed that D put the gun to his hip, treatment of a him is very probative, and not outweighed by the prejudice.

Thus, a court is likely to overrule the objection and admit the testimony.

B) ARLO'S STATEMENT

4) DETECTIVE COSMO'S (C) TESTIMONY

D should object to C's testimony as not relevant.

Evidence relevant if it has any tendency to make a fact of consequence more or less probable. In CA, the fact must be in dispute. Prop 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing.

In the instant case, C testifies that he found the evidence at the crime scene, which he can authenticate and identify. That evidence being introduced makes it more probable that D committed the crime.

Thus, a court is likely to overrule the objection .

D should object to C's testimony as under the Secondary Evidence Rule (SER).

California adopted the SER, where testimony regarding the contents of the writing may be admissible where the original is lost, destroyed, unless by bad faith or by proponent of the testimony.

In the instant case, the facts state that C recovered the tape at the crime scene and that he has laid sufficient foundation, which suggests that it is available to show to the jury. If it can be used to show to the jury, then the testimony would not be allowed. D could object to this

D should object to C's testimony under 352.

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect can be caused by evidence that is misused by a jury or evidence that inflames the emotions of the jury against the defendant.

In the instant case, the prejudicial effect of the testimony can be that the jury will give his testimony more weight.

Thus, a court is likely to overrule the objection and admit the testimony.

END OF EXAM

3)

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Should Andrew object to the medical records on relevance grounds?

Evidence must be both logically and legally relevant to be admissible. Evidence is logically relevant if it makes a fact at issue more or less likely to be true. It is legally relevant if that fact is of consequence in determining the outcome.

The medical records only relevant purpose is the hearsay statement they contain, which makes the question of Andrew's guilt more or less likely to be true. The fact at issue is central to determining the outcome of the case.

Andrew should not object, and the court should overrule an objection.

Should Andrew object to the medical records on hearsay grounds?

Hearsay is an out of court statement, made by a party opponent, offered to prove the truth of the matter asserted. Multiple layers of hearsay require exceptions for each layer.

The medical records are statements, created by declarants in the form of doctors and nurses. The medical records themselves may be offered to prove some fact contained within them, but the most likely use is to get in the second layer hearsay statement by Cody.

Andrew should object to hearsay.

Are there any exceptions in play?

Records of regularly conducted business activities are excepted from the hearsay rule. Records qualify if they are of the sort that a business usually keeps, are made at the time by persons with knowledge, the record was made in regular course of business, the statements have no indications of the unreliability, and there is a guardian or caretaker who can testify to their veracity.

Here, medical records are of the sort generally kept by doctor and other medical personnel. They are generally made at the time of the interactions by persons with personal knowledge. These records were seemingly kept in the regular course of business and most likely do not contain any indicia of unreliability. If a caretaker of these records is available, the records will most likely fall within the exception for regularly conducted business records.

The medical records most likely fall within the exception for business records.

Andrew should object to hearsay, but the court will most likely overrule.

Should Andrew object to Cody's statement in the medical records on hearsay grounds?

Hearsay is an out of court statement, made by a party opponent, offered to prove the truth of the matter asserted. Multiple layers of hearsay require exceptions for each layer.

Here, the statement was made by Cody, a declarant. The statement was made out of court. And the statement is most likely going to be offered for the truth of the matter asserted, that Andrew killed Beatrice because they were fighting.

Andrew should object to hearsay.

Are there any hearsay exceptions or exclusions applicable to the medical records?

Statements made under the stress of an exciting event are excepted as excited utterances. The statements do not have to be immediate in time, only while still under the stress of the event. Statements made for the purpose of medical diagnosis are not made inadmissible by the hearsay rule.

Here, the statement was made to the EMTs immediately after the stabbing, which is most likely close enough in time that it will be considered to be under the stress of the incident and therefore excepted as an excited utterance. The statements were NOT made for the purposes of medical diagnosis or treatment, despite being made to medical professionals.

The statement falls under the excited utterance exception to the hearsay rule.

Andrew should object to the medical records under hearsay, but the court will most likely overrule the objection.

Should Andrew object to the medical record on 6th amendment grounds?

The sixth amendment affords criminal defendants the right to face their accuser, but this only applies to "testimonial" statements.

Cody's statement was most likely testimonial in nature, due to the fact that there was no longer any pressing emergency such as an ongoing crime or medical emergency. That it was given to an EMT rather than a police officer weighs against it being testimonial in nature, but the court will be wary of any perceived subversion of the 6th amendment.

Cody should object under the sixth amendment, and the court is likely to sustain the objection.

Should Andrew object to the medical records under FRE 403?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect.

Here, there is some prejudicial value to be found in the fact that this statement was found in his medical records, but this prejudice is minimal and the probative value of the statements is unlikely to be substantially lower than the probative value.

Andrew may object, but the court will overrule.

Should Andrew object to Evan's testimony on relevance grounds?

Evidence must be both logically and legally relevant to be admissible. Evidence is logically relevant if it makes a fact at issue more or less likely to be true. It is legally relevant if that fact is of consequence in determining the outcome.

Here, the evidence of Andrew's prior violent tendencies makes it more likely that he attacked Beatrice, a fact that is at issue and determinative of the outcome. It also goes partly to the defense of his drug induced psychosis.

Andrew should not object and the court should overrule.

Should Andrew object to Evan's testimony as impermissible character evidence?

Character evidence is impermissible to show that a person acted in conformity at a given time. It may however be admitted for a non-propensity use, such as motive.

Here, the testimony does show a character for violence, for delusions, and for paranoia. However, it may be admissible for intent, motive, planning or preparation, or absence of mistake. However, none of those is particularly likely to make the evidence admissible.

Andrew should object, and the court will likely sustain the objection.

Should Andrew object under 405 for improper use of specific incidents of conduct?

When character is permissible, it may only be by opinion or reputation unless specific instances are required for a specific charge or defense.

Here, there is no such specific charge or defense, thus specific instances of conduct are improper.

Andrew should object and the court should sustain that objection.

Should Andrew object to Evan's testimony as hearsay?

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

Andrew is a declarant. The statement was made out of court. However, it is most likely not being offered to prove the truth of the matter asserted, that Evan was videotaping Andrew through his TV, and instead goes to character evidence, motive, or intent.

Andrew should object, but the court will likely overrule.

Should Andrew object to Evan's testimony as improper lay opinion?

A lay opinion is admissible if it is rationally based on the witness's observations, is not based on any technical or specialized knowledge, and is useful to the trier of fact.

Here, Evan made the observations, and the opinion is useful to the trier of fact. Andrew will argue that the opinion that he was on drugs is specialized medical knowledge, and not rationally based on Evan's observations. The prosecution will argue that such an opinion is rationally based on Evan's observations and common knowledge, and that no specialized knowledge is required to make such a determination. The prosecution likely has the stronger argument, and the opinion will be admissible.

Andrew should object to improper lay opinion, but the court will most likely overrule the objection.

Should Andrew object to Evan's testimony under 403?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect.

Here, there is substantial prejudicial effect as a result of the implicit character evidence in Evan's testimony. This most likely outweighs the minute probative value of the testimony.

Andrew could object, and the court would likely sustain the objection.

Should the prosecution object to Andrew's testimony on relevance grounds?

Evidence must be both logically and legally relevant to be admissible. Evidence is logically relevant if it makes a fact at issue more or less likely to be true. It is legally relevant if that fact is of consequence in determining the outcome. The defendant has an ironclad right to testify on their own behalf.

Andrew's testimony is relevant to his intent, which is determinative of the action. However, even if his testimony is not relevant, he has a right to testify on his own behalf.

The prosecution should not object, and the court would overrule.

Should the prosecution object to Andrew's testimony on grounds of impermissible character evidence?

A defendant may place their own character at issue in a criminal trial.

Andrew is the defendant in a criminal trial, therefore he can put his own character at issue. The statement doesn't appear to have any character evidence, but rules get weird when dealing with criminal defendants.

The prosecution shouldn't object and the court would overrule.

Should the prosecution object to Andrew's testimony under FRE 403?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect.

There is no undue prejudice against the prosecution's case caused by this evidence. FRE 403 clearly does not apply.

The prosecution should not object and the court would overrule an objection.

Should Andrew object to the question as improper impeachment?

Evidence of felony conviction is admissible against a criminal defendant if it is more probative than prejudicial.

this is a misdemeanor, therefore it is not admissible for impeachment purposes. Even if it were a felony, it is most likely more prejudicial than probative.

Andrew should object, and the court should sustain.

Evidence of Andrew's good character allows the prosecution to bring out the big guns, not only tearing down the defense, but also showing that he possesses the exact opposite qualities. Under FRE 404, the defendant has the right to put their own character at issue, but that opens the door for the prosecution to do the same.

END OF EXAM