

Monterey College of Law

EVIDENCE

Final Examination

Spring 2020

Professor J. Davenport

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.

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.

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.

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.

Prior Bad Acts.

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

Admissible if Independently Relevant.

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

Absence of Mistake or Accident.

In cases in which the defense of accident or mistake are asserted prosecution evidence of similar misconduct by the defendant is admissible to negate the possibility of mistake or accident. In this case, the prosecution will assert that the evidence that Andrew threatened Evan with a knife is relevant to show the Beatrice's death was not a result of accident or mistake. When evidence is admissible for a non-character motive, the restrictions placed on the form character evidence can take is not present. Thus, the prosecutor can introduce this evidence in their case in chief and in the form of Edward's testimony about the specific instance.

403: Whether the probative value is substantially outweighed by the prejudicial effect.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The defendant will argue that the probative value of the evidence is substantially outweighed by the danger of undue prejudice, confusing the issues and misleading the jury. "Unfair (or undue) prejudice" means not merely damaging to one party's case; it refers to a tendency to evoke an 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

Blue Book

NAME _____

SUBJECT Evidence

INSTRUCTOR J. Davenport

EXAM SEAT NO _____ SECTION Q1

DATE _____ GRADE _____

10^{7/8} x 8^{1/4}

25 - 24 PAGE

1 Logical Relevance

Good

Evidence is logically relevant if it has tendency 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. Here, the evidence Cody statement to ambulance personnel immediately after the stabbing stating "Andrew stabbed my mom because they were arguing" is relevant to show that Andrew is responsible for the mother's death.

Legal Relevance

Trial court has discretion to exclude evidence if the probative value substantially outweighs by the danger of unfair prejudice. This is known as the balancing test. Here, the probative value is high because it shows that Andrew is responsible for first degree premeditated murder of his mother.

Hearsay

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

Good!

asserted and is inadmissible unless an exception applies - the policy behind hearsay rule is the fear about reliability of in court testimony about out of court statements when the proponent is attempting to use statement as substantive evidence in case.

Here, Andrew's medical records which include the statement made by Cody to ambulance personnel immediately after the stabbing is an out of the court statement that is being offered to prove the truth of the matter asserted that Andrew stabbed his mom while both of them were arguing. The statement is only admissible if there is a hearsay exemption or exception.

Great!

Here, Cody's statement that "Andrew stabbed my mom because they were arguing" which is included in Andrew's medical records is double hearsay.

To be admissible, each ~~level~~ level of hearsay must have exception.

P: Prosecutor

Statement of medical diagnosis or treatment.

Here, the P could try to bring in the statement under statement of medical diagnosis or treatment. To be admissible, statement must be made for and reasonably pertinent to medical diagnosis or treatment and can be in furtherance of medical diagnosis or treatment. The statement can be made to any person in capacity of diagnosing or treating injury. Here, only made statement to ambulance personnel that his mother was stabbed. This is considered in furtherance of treating injury. However, the statement Andrew stabbed my mom should not be admitted to prove that Andrew is responsible for the mother's death. Therefore, can only admit ~~the~~ statement that pertains to medical diagnosis/treatment.

Good

Records of Regularly conducted activity.

P will also try to bring in the statement under business record exception. Under business record, the person who prepared the record must have duty to report the information, has personal knowledge of the

Fact or event recorded and report was prepared close in time to the events while still fresh in memory and it is a routine practice of business to prepare such record. The report was made in regular course of business. Here, P could bring in the record by stating that the entry by medical personnel was related to the nature of the business where they have responsibility to record every incident.

Authentication: Business record

To be admissible under business record, P must lay foundation and authenticate the business record by calling a custodian or other qualified person who can certify in person or in writing that record meet business record exception and that the adverse party received reasonable written notice of P intention to use business record. * Business records can be self authenticating if there is a signed declaration by the custodian of records

Excited utterance

P can also try to bring in the evidence under hearsay excited utterance. To qualify under excited utterance, an event must be so startling or at least stressful and declarant has personal knowledge and stmt was made while he was under state of nervous excitement. Here, Cody made the statement immediately after ^{the} stabbing. The event was startling and stressful when he made the statement. The theory of reliability of excited utterance is that the excitement suspends the ability to fabricate. However, here the defense could have an argument that Cody did not have personal knowledge since he was upstairs when the stabbing incident took place.

Present sense impression

Prosecution could also try to bring in the statement under Present sense impression. Present sense impression is when declarant made a statement while it was happening or very shortly

after the events and the statement relates to the event and the declarant must have personal knowledge.

Here the defense could again argue that Cody (the declarant) did not have personal knowledge of the event because he was upstairs when the incident took place.

Conclusion: I could likely bring in the evidence of Cody's statement under business record provided that record is properly authenticated and foundation is laid and defendant reasonable written notice.

2. Evan Testimony

Logical Relevance: Evan's testimony is logically relevant to show that Andrew is a drug addict and has a tendency to be violent when he is under the influence of drug.

Good! Legal Relevance: The evidence could be relevant to the defense because it

shows that Andrew is a drug addict with violent propensity but the probative value is also high as it aids the jury if Andrew is culpable of the murder.

Specific Acts of Misconduct

Here, the Prosecutor could bring the witness testimony under specific act of misconduct. Defense would object if it is offered solely to establish criminal disposition or a criminal propensity. However, P could argue that testimony of his neighbor could be used to show common scheme or plan ^{or identity}. This could be a stretch as the prejudicial value is too high. If it is admissible, defense could ask for limiting instruction for the sole purpose to show common scheme or plan/identity.

It could show lack of mistake or accident under this theory.

Lay witness

Opinion of lay witness testimony are generally inadmissible. However there are

are many cases where from the nature of subject matter, no better evidence can be obtained. Lay witness opinion is permissible

Good!

① When it is rationally based on the perception of the witness ② Helpful to clear understand or determine fact in issue ③ It is not based on scientific technical or other specialized knowledge. Here the statement that Andrew appeared to be under the influence of drug and that he pulled out the knife and threatened to stab Evan was rationally based on Evan's perception and it will help clear jury's understanding of Andrew's culpability and it is well within lay witness scope to testify abt Andrew being under the influence of drug

3. Logical Relevance: Andrew's testimony is relevant to show that he did not have the state of mind to commit the first degree premeditated murder of his mother

Legal relevance: The probative value is high as Andrew did not have the mental capacity to premeditate / plan a murder.

State of mind (Hearsay exception)

Defense could bring in Andrew's testimony under non hearsay state of mind. Here, Andrew's statements would be used to show that Andrew cannot commit a premeditated murder because he is delusional and he was ~~just~~ trying to cut his own arm when his mother grabbed the bloody knife which slipped and accidentally cut her. Since he did not have ^{the} state of mind premeditated he could not have committed the murder.

(Hearsay definition supra)

Impeachment (conviction of crime)

Impeachment is casting adverse light on the veracity of a witness after they have given testimony. When a witness takes the stand, they put their credibility at issue and open themselves up to impeachment. Here Andrew took the stand. P will try to impeach him by using conviction of crime. The fact that Andrew was

convicted of misdemeanor offense for threatening his neighbor Evan with weapon may usually be proved by eliciting an admission on direct or ~~or~~ cross examination or by record conviction. Under FRE, Andrew's character of truthfulness maybe attacked by any crime (of felony or misdemeanor) if it is a crime of dishonesty or false statement. Trial court has no discretion unless 10 year has passed since the date of conviction. If felony is not involving dishonesty that falls under 10 year limit, it is admissible base on judge's discretion where the probative value outweighs prejudicial effect. Here, ~~defendant~~ D would object because the misdemeanor does not involve crime of dishonesty. Unless Andrew testify that he is not convicted of misdemeanor offense, the evidence would not likely be admissible.

Great
Job!

Character Evidence

Under PRE in criminal cases, the D introduce evidence of his good character of the specif trait involve or evidence of victim's bad character trait when relevant to show D's innocence. Here, the defense attorney can prove character in the form of reputation or opinion. Here, Defense attorney can ask Andrew's former co-worker family and friends to testify specific trait that is at issue in ~~the~~ this case that he is not a violent person as the prosecutor is painting his image to be but infact he is a ~~people~~ peaceful man with a non violent nature. Here, ~~the~~ Andrew's witness can give their personal opinion concerning the trait of Andrew or testify Andrew's good reputation (or they have not heard anything bad) for trait involve in case. Here, defense counsel must make sure that he is not introducing general law abiding character because that is for CEC. ~~He~~ In this situation the prosecutor cannot cross exam

the witness using extrinsic evidence and the prosecutor must have good faith basis for inquiring abt the incident.

P cannot introduce extrinsic proof of bad act if witness denies knowing it.

2)

1. P calls Lindsey Law Clerk statement that Arlo mask, gun, cash

Relevance

Relevance is evidence that tends to make the existence of any fact of consequence to the determination of the action more or less probable that it would be without the evidence. Relevant evidence is material, probative, and competent. Materiality is evidence that relates to one of the elements going to prove or disprove a case. Evidence is probative if it contributes to proving or disproving a material issue. Evidence is competent if it does not violate the exclusionary rule.

Evidence is logically relevant if it does not violate FRE 403. 403 states that evidence is excluded if the probative value is substantially outweighed by the prejudicial effect.

Here, it is likely that the court would find Ls testimony to be relevant to the case at hand. Her testimony directly relates to the charges at hand, and goes to identity, as well as possession of the gun and mask and cash in question of the armed bank robbery.

Therefore Ls testimony would be deemed relevant.

Privilege - Attorney - Client

There are no privileges outlined Federally. Here, in CA, all privileges are statutory.

Privileged information is a confidential communication between properly related parties and incident to the relation. Confidentiality is physical privacy with the intent of the holders of the privilege to maintain privacy.

The attorney-client privilege protects communications made between an attorney and client, made during the professional consultation. The communications are protected under this privilege if the asserted holder is or sought to become a client, and made communications to a member of the bar, or someone in connection acting as a lawyer, relating to a fact which attorney was informed, and the privilege has been claimed and not waived.

Here, D would state that L is not permitted to testify because of attorney client privilege. It is commonly held that a law clerk at a firm is under the umbrella of the privilege if conducting normal business operations, such as sitting in on a meeting with an attorney and client. D would state that he was having a private meeting with his attorney and that L was there in capacity as a law clerk under A, and that the communication was intended to be private. However, a big aspect fo the privilege is that no outsiders are allowed to be present, otherwise the privilege is not invoked. In the situation at hand, the Dr. D, was also present in the meeting, and therefore revoked the attorney client privilege, and L is therefore permitted to speak of statements made during the meeting.

Therefore it is likely that the attorney client privilege, that would have existed between D and A and D and L, was revoked, waived, cancelled, due to the presence of Dr. D., a third party. Thus, the court would likely allow the testimony and statement of L.

Competence

Competency is the determination of an individual to be legally capable of being a witness. All persons are deemed capable unless shown to be otherwise or member of a recognized class.

There are no facts in evidence to show that L would be deemed incompetent and thus incapable of being a witness

Therefore, it is likely that L would be deemed competent to serve as a witness

Lay Witness

L would testify as a lay witness.

L is not asked to demonstrate or discuss any specialized knowledge, as that of a member of the legal field, or any other field. She is only to testify on her capacity to observe and pass on the statements made by H in her presence.

Therefore, L would be bound by the rules of a lay witness, and would be restricted to only discuss opinion and reputation as that of a lay witness

L would not be allowed to come to any conclusions or speculate.

However, given her testimony, that is not an issue, she is merely stating a statement made by H to the court.

Court would allow her to do so as a lay witness

2. P calls W, testify H told her "I robbed the bank"

Relevance

see above

Court would deem the testimony to be relevant, directly goes to an element of the case, more specifically fault and identity.

Therefore court would most likely find the testimony to be relevant.

Privilege - Marital

Privilege, see above. confidentiality, see above.

The marital privilege exists in both criminal and civil cases and is held by both spouses. The holder of the privilege can refuse to disclose communications or prevent the other spouse from disclosing confidential communications. The marital privilege protects confidential communications made between spouses while married, divorce does not retroactively terminate privilege, but communications made after divorce are not protected. The communication must be made during a valid marriage and have a reliance on intimacy. In cases against spouses, the testifying spouse holds the privilege, this does not apply as this is not a case of spouse v. spouse.

Here, W is attempting to relay a statement made by her husband, defendant H, while in the bedroom: "I robbed a bank." At the time of the statement, the spouses were married, and the communication was made in the intimacy of their home, bedroom, while alone, and it can be assumed that D intended for the communication to be confidential. Given that he just confessed to a crime to his wife, there is no reason to believe he intended the communication to be anything other than intimate and confidential. There was no third party present, and it was not in an abusiveness nature, or a statement of a business nature, and it was spoken (while not necessary). While the facts state that W filed for divorce, the facts show that the filing of the divorce occurred after the statement, and thus were still covered, because divorce does not retroactively remove the privilege, however the facts also state that they have since reconciled and are married, so past communications are covered. Because this is not a spouse v spouse proceeding, W does not have the ability to waive the privilege for the two of them and testify against her husband. D has the ability to invoke the privilege, thus preventing W from testifying

good Job!

Therefore, it is likely that D would object, invoke the privilege, and the courts would allow it and thus prevent H from relaying the statement made while in the bedroom.

Lay Witness

see above.

H would be brought in as a lay witness, and would be deemed to be competent because there are not facts to show otherwise. She would be allowed to speak on personal observations and opinions, and not make speculations or conclusions.

Not an issue

3. P calls Dr D burn mark and As statement to look into burn mark

Relevance

see above

Courts would likely find this line of questioning and witness to be relevant, goes directly to facts at issue. Dr discuss the burn mark and statements made regarding the burn, mask, and cash

Expert Witness

If P attempts to bring in DR D to discuss any medical knowledge, Dr D would likely be introduced as an expert witness. Expert witness are those who are qualified as an expert in their field, brought in to discuss matters relating to their area of expertise, and to discuss their opinion which is rooted in their area of expertise.

Dr. D, is a Dr. in the medical field, and treated the defendant, H, and would be brought in to discuss his treatment and observations. Because their are no set requirements for

qualifications as an expert witness, the fact that DR D is assumed to be a licensed medical practitioner in said state at issue, it is likely that Dr D would be allowed to speak on the matter at hand. As long as questions relayed to DR. D are contained to that of a medical nature, and to that of his area of expertise.

Therefore, it is likely that the court would allow DR D to be allowed to be brought as an expert witness.

Privilege - Dr-Patient

Privileged information is a confidential communication between properly related parties and incident to the relation. Confidentiality is physical privacy with the intent of the holders of the privilege to maintain privacy.

There is no federal DR/P privilege, however CA does honor the Dr. Patient privilege, expect in criminal proceedings. Here, this is a criminal proceeding for that of armed bank robbery, and the court would therefore not abide by the dr patient privilege.

The DR. Patient privilege consists of a professional medical relationship, with information acquired during the course of treating the patient, and the information acquired is necessary fo treatment.

Dr. D would attempt to discuss the burn mark, his observations, and the treatment for the burn mark, and given that this is in CA and is a criminal proceeding, DR. D would not be prohibited from doing so due to the dr. patient privilege.

Therefore, the courts would likely allow DR. D to discuss his medical observations and treatment of H's burn on his hip.

Also, There is no DR Patient privilege invoked during the phone call with A, so DR D would also be allowed to relay that statement on the phone.

Privilege - Attorney-Client

Privileged information is a confidential communication between properly related parties and incident to the relation. Confidentiality is physical privacy with the intent of the holders of the privilege to maintain privacy.

The attorney-client privilege protects communications made between an attorney and client, made during the professional consultation. The communications are protected under this privilege if the asserted holder is or sought to become a client, and made communications to a member of the bar, or someone in connection acting as a lawyer, relating to a fact which attorney was informed, and the privilege has been claimed and not waived.

There is no attorney client privilege that would prevent the DR from testifying. A is acting as Hs attorney, but his communication is not protected with a third party.

Therefore Dr D would not be prevented from relaying the statement made on the phone due to attorney client privilege

4. P calls Det. C tesify bullet and video

Relevance

see above

The court would likely find the testimony of Det C to be relevant because he is supposedly an expert i n firearms and lays the foundation for the video which goes to the elements of the crime and identify.

Expert Witness

see above.

The prosecution would attempt to bring in det c as an expert witness. Given his job as a police officer. he would be permitted to discuss his knowledge as a police officer

Deemed competent unless otherwise proven.

Burden of Production

The prosecution has the burden of producing evidence, which is the responsibility of providing evidence from which it can be concluded a fact at issue exists

Here, the prosecution attempts to introduce the bullet found at the scene as evidence. and used Det C as a witness to do so. As long as chain of custody has been followed, and best evidence rule applies, then it is likely that the court would allow Det C to introduce the bullet evidence.

Burden of Persuasion

The prosecution has the burden of persuasion, which is the duty to persuade the triar of fact that the fact at issue is true. the prosecution is using Drt C. to persuade the triar of fact that the bullet is real and is the same bullet used by the bank robber to commit the crime. If follows chain of custody and best evidence rule

Best Evidence Rule - Bullet

Thye best evidence rule expresses a preference for originals due to the possibility of inaccuracy in approximating the contents of a writing (or other medium) and the belief

that oral testimony based on memory presents greater risk of error than oral testimony in other situations.

Here, Det C is attempting to introduce the original bullet discovered at the crime scene.

Given that it is presumable an original, and if that is not in contention, the court would likely allow it as an original piece of evidence.

Best Evidence Rule - Video

see above

Here, Det C is attempting to introduce the foundation for the introduction of the video surveillance as evidence.

Unless in contention, there is nothing to suggest the video is not an original

Authentication

The requirement that the proponent of evidence provide a basis for the fact finder to believe that the evidence is what the proponent claims it is. This rule applies to documents and videos.

Here. The prosecution is attempting to introduce the video surveillance as evidence, and is using Det C. to authenticate the video as an original and true. Using Det D to authenticate by stating where the video was found and used to establish that it is legitimate. Most likely following the chain of custody and the police investigation in the acquisition of the video from the bank in the course of the police investigation

Therefore, it is likely that the court would find Det C capable of introducing and authenticating the bullet and video

3)

1. TOM OTTO TESTIMONY

RELEVANCE

FRE 401 defines relevant evidence as evidence that has any tendency to make a material fact (a "fact of consequence") more or less likely. Evidence is material if it relates to one of the substantive legal issues in the case or has a relationship to the weight or credibility of evidence. Relevant evidence is admissible if a judge believes it is sufficient to support a jury finding and all relevant evidence is admissible except as provided in the rules.

Here, the statement being offered has a tendency to make a material fact (the fact that Shibble threatened Karen) more likely and is likely to be deemed relevant.

EXCLUSION OF RELEVANT EVIDENCE

According to FRE 403 the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.

Here, the probative value is high but may be excluded if the court determines the risk of unfair prejudice substantially outweighs it.

HEARSAY

Hearsay is a statement other than the one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Evidence constitutes hearsay if the evidence is an assertive statement or act, the statement was made out of court, and the evidence is being used to prove the truth of the matter asserted.

Here, the statement was made out of court and if it is being offered to prove the truth of the matter asserted (that Shibble threatened Karen), it is inadmissible hearsay unless an exception applies.

ADMISSIONS OF A PARTY OPPONENT

In general, anything a party says or does is admissible if offered by the party's opponent. A statement made by the party in an individual or representative capacity is a personal admission. Any statement can be an admission as long as it is relevant. As long as the statement meets the low relevance threshold, was made by a party and is offered into evidence against that party then the admission will meet this exemption to the hearsay rule.

Here, the statement is relevant (discussed above), made by a party, and is offered into evidence against that party so the admission is likely to meet this exemption to the hearsay rule.

CONCLUSION - It is likely that the court will deem that there is a hearsay exemption due to the admission of party opponent exemption.

NON-HEARSAY

A statement is hearsay only if the immediate inference the proponent of the statement wants to draw is the truth of the matter asserted on the statement's face.

Here, if the prosecution is offering the statement to show the declarant's state of mind then it would be considered non-hearsay and be deemed admissible. However, the defendant should ask the judge for a limiting instruction if it is a jury trial.

CHARACTER EVIDENCE

Evidence of a person's character trait or predisposition is generally not admissible to show that he acted according to his character on a particular occasion. Generally such evidence is generally prohibited in both criminal and civil cases. The defense may argue that the statement is improper character evidence. Character evidence is admissible in civil cases when character is "directly in issue" and in such cases the proponent can use reputation, opinion, and specific acts. However, wrongful death is likely not a crime where character is directly in issue. As a result, if it is deemed character evidence the statement is likely to be inadmissible.

PRIOR BAD ACTS

Evidence about crimes, civil wrongs, and other specific acts a person engaged in, are generally inadmissible if such evidence is offered solely to establish a criminal disposition but are allowed as long as the evidence is not used to prove the nature or essential quality of that person. Permissible purposes include identity, preparation, intent, motive, plan, opportunity, absence of mistake/accident, consent or knowledge.

Here, the prosecution may offer this statement to prove intent or motive and if that it is the case it is likely to admitted into evidence.If that is the case, the statement is likely to be admissible.

BEST EVIDENCE RULE

The best evidence rule requires than on original writing, photograph, or recording be produced if the proponent of the evidence wishes to prove the contents of the item. The best evidence rule expresses a preference for originals because of the possibility of inaccuracy. The best evidence rule applies where the writing is legally operative or dispositive of where the knowledge of a witness concerning a fact results from having read it in the document.

Here, the witness is the cameraman so he didn't gain the knowledge from watching the recording, but gained the knowledge of the statement when he was filming. As a result the best evidence rule doesn't apply.

2. WILLIAM PLUMA TESTIMONY

RELEVANCE - Supra. Here, the testimony relates to determining what caliber bullet was used. However, there were no bullets or casing located at the scene so the court may determine that it doesn't have any tendency to make a material fact more or less likely and is irrelevant. But, i will continue my analysis in case the court disagrees.

EXPERT TESTIMONY

Expert testimony requires that the subject matter is appropriate for a expert testimony, the witness is qualified as an expert, and the opinion must be supported by a proper factual basis. The opinion may embrace the ultimate factual issue but not the ultimate legal issue.

APPROPRIATE - Expert testimony is appropriate when the subject matter of the testimony is beyond common experience and it is offered to assist the trier of fact in understanding the evidence.

Here, William Pluma is testifying to what caliber bullet was used in the shooting which is beyond common experience/knowledge. However, the defendant may argue that it isnt offered to assist the trier of fact in understanding the evidence because there were no bullets or casing located at the scene.

QUALIFICATIONS - A witness who is qualified as an expert by knowledge, skill, expertise, training or education may testify in the form or an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to

understand the evidence or to determine a fact in issue, the testimony is based on sufficient facts or data, the testimony is the production of reliable principles and methods, and the expert has reliability applied the principles and methods to the facts of the case.

Here, Hank will argue that William Pluma is qualified by knowledge and being a former Marine Sniper. However, the defendant will argue that the plaintiff failed to lay a proper foundation and being a former sniper doesn't prove that he is qualified expert.

DAUBERT TEST - Under Daubert, trial judges serve as gatekeepers and are responsible for independent screening of the reliability of the so-called science and of the expert witnesses. The court looks at the admissibility of scientific evidence by examining its scientific method, the application of that method to the facts of the case. Some factors that can be considered are has it been tested? subject to peer review? Error rate? What standards are applied? Does it have some acceptance in the relevant community?

Here, Hank argues that William uses ballistics gel and digital imaging for his test and that Youtubers with gun and science related shows have given his test positive reviews.

However, the defendant will argue that Youtubers with gun and science related shows doesn't constitute adequate peer review and that since they didnt offer any evidence that it has been adequately tested, what the error rate is, what standards are applied, and if it has adequate acceptance in the relevant community that is fails the DAUBERT test.

CONCLUSION - the court is likely to determine the Daubert test isn't fulfilled and the expert testimony is improper.

3. REX VANDER TESTIMONY

RELEVANCE

Supra. Here the testimony has a tendency to make a material fact more or less likely and is likely to be deemed relevant.

CHARACTER EVIDENCE

Supra. If it is determined that wrongful death puts character directly in issue then the prosecution can offer character evidence using reputation, opinion, and specific acts.

IMPEACHMENT

Under FRE 607, impeaching a witness means discrediting that witness's testimony by presenting flaws whether that are flaws in the person or flaws in the content of their testimony. There are numerous methods of impeachment.

Here, Hank is impeaching Shibble with conviction of a crime.

Conviction of a crime

The fact that the witness has been convicted of a crime may usually be proved by either eliciting an admission on direct or cross examination or by the record of conviction. Under FRE 609 a witness' character for truthfulness may be attacked by any crime felony or misdemeanor if it is a crime of dishonesty or false statement. However, if a 10 year period has elapsed then it is subject to a balancing test. If the conviction is a felony not involving dishonesty the balancing test that is applied depends on who the witness is. If the witness is the accused in a civil case FRE 403 applies and the conviction of a crime is excluded if its probative value is substantially outweighed by the danger of undue prejudice.

Here, the felony assault from two years ago will be subject to the FRE 403 analysis and is likely to fail the balancing test and be determined that its probative value is substantially

outweighed by the danger of unfair prejudice. However, the felony conviction of perjury will be admissible since it is a crime of dishonesty or false statement.

4. JIM WHITE'S TESTIMONY

RELEVANCE

Supra. The court will likely determine that it is relevant.

CHARACTER EVIDENCE

Supra. The defendant can introduce evidence of a pertinent bad character trait (under the FRE it must involve the specific trait that is at issue in the case) of the alleged victim through reputation evidence. The plaintiff can then rebut.

Here, the defendant is offering evidence of a pertinent bad character trait of Karen which does involve the specific trait that is at issue in the case through reputation evidence. As a result, it is likely to be deemed admissible.

SPECULATION

The plaintiff is likely to object that this calls for speculation and raise a motion to strike.

END OF EXAM
