

Monterey College of Law

EVIDENCE

Final Examination

Spring 2024

Judge J. O'Keefe

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION 1

Slasher was charged in a California state court with the attempted murder of Von, his business manager. Slasher was in his driveway when he stabbed Von in the ribs with a knife. Slasher yelled, "Thief, I know you took my money!" Von bled profusely but survived his injuries. Von was unavailable to testify.

Nosey, age 95, was a neighbor who lives across the street. He saw Slasher stab Von and heard Slasher's accusation. Immediately, Nosey called 911. He has known both Slasher and Von for six years.

When Slasher saw Nosey, he panicked, and called Ashton, his attorney. Ashton advised him that she was on a speaker phone with Quinn, the jury consultant for the law firm. Slasher said, "I just stabbed Von and his blood is all over my clothes! He had gun, it was self-defense!" Ashton told Slasher to come over to the office. When Slasher arrived at the office, Ashton was in her office with Quinn. Ashton directed Quinn to get rid of the bloody clothes and get Slasher new ones. Quinn complied. At trial, Slasher did not testify.

Detective Dodd arrived at the crime scene and lawfully seized the knife from the driveway and a receipt inside the house for the purchase of a knife from a nearby sporting goods store.

At the sporting goods store, the detective interviewed the manager. The manager verified the receipt and stated that he had personally sold the knife to Slasher two hours before the crime to Slasher. The manager was a retired US Army military knife expert. He described the purchased knife as a military-style (Kabar) 5.8" fixed blade with a hilt, (guard). Also, the manager stated that he believed that Slasher was trying to murder Von because the hilt on the knife was for the purpose of keeping the hand from slipping onto the blade during a stabbing attack.

The prosecution called the following witnesses below in the case-in chief.

Answer according to California law. Assuming all appropriate objections were timely made, should the court have admitted:

1. Nosey's testimony? Discuss.
2. Detective Dodd's testimony? Discuss.
3. Quinn's testimony? Discuss.
4. The manager's testimony as a percipient witness and expert. Discuss.

Question 2

Pete was injured at Rock Wall Adventure Park (RWAP) after falling off a 20 foot-tall rock climbing wall. Pete has sued RWAP for damages claiming that RWAP acted negligently in securing his harness before he began climbing on RWAP's rock wall. In defense, RWAP will seek to establish that careless conduct by Pete played a major role in the incident because Pete removed a part of his safety harness to take a selfie at the top of the wall which caused Pete's fall and injuries.

Assume the following occurred in the jury trial of Pete v. RWAP. 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.

Apply the **Federal Rules of Evidence**.

1. In the Plaintiff's case in chief, Pete testifies that he was using the safety harness properly when the harness suddenly slipped causing him to fall and become injured. He denies improperly removing the harness. On cross-examination, RWAP asks Pete if he was once fired from working as a security guard because he was caught stealing merchandise from a warehouse. RWAP seeks to introduce Pete's termination letter saying he was fired for stealing. Pete objects.

2. Pete next calls Edgar Mountain. Mountain will testify that after he graduated high school, he spent the next 30 years traveling the world mountain climbing. He has personally used the harness used by RWAP hundreds of times and has seen hundreds of other people use the harness. In his experience, the harness will only slip if not secured properly. Additionally, he spoke to Wanda, another RWAP patron, who was present the day Pete fell. Wanda told Mountain that the RWAP employee who put Pete's harness on did not secure it properly. Mountain's opinion is that RWAP's failure to secure the harness resulted in Pete's fall.

3. In the defense case in chief, the defense introduces the incident report of Matt, the manager of RWAP. The incident report says the following:

I (Matt) did not personally see Pete's fall. Five minutes after the accident, I interviewed Bob, another patron at RWAP. Bob said he "saw the whole thing and that Pete unsecured the top part of the safety harness so that he could take a selfie." A day later, I interviewed Ted, the employee who secured the harness. He said he secured it properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie.

4. RWAP calls Matt, the RWAP supervisor, to the stand. Matt testifies that he saw Pete on the date of the fall and Pete had a very distinctive tattoo of a dinosaur skateboarding on his neck and was wearing a hot-pink T-shirt that said, "I'm with Stupid." Matt then seeks to introduce a Snapshot he took from a Facebook page entitled "Crazy Fails." Matt often looks at that Facebook page because he finds it humorous as it shows people getting hurt doing stupid things. The Snapshot depicts the torso of someone falling from a rock-climbing wall. You cannot see the person's face, but the person has a very distinctive neck tattoo of dinosaur skateboarding and a hot-pink T-shirt that says, "I'm with stupid." Matt testifies the tattoo and T-shirt are identical to Pete's. The photo does not have a date or time stamp and Matt testifies on cross-examination that Facebook was not contacted to directly provide the image to RWAP. Pete objects.

Question 3

Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. 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. Use the **Federal Rules of Evidence**.

1. The prosecution seeks to call Tom’s attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.
2. Tom's wife, Sarah, is called to testify as a witness for the prosecution. The prosecution seeks to elicit the following testimony from Sarah:
 - Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry.
 - Tom confided in Sarah about their financial struggles and his plans to commit the burglary.The defense objects.
3. On cross-examination, the defense asks Sarah:
 - Isn’t it true that you told Tom you are going to divorce him because you discovered he was cheating on you?
 - Isn’t it true that you have a misdemeanor conviction for embezzlement that occurred last year?

Evidence – SLO - MCL - HYB-Sec2

Spring 2024

Prof. Lizardo & Judge O'Keefe

ANSWER OUTLINE

Q1 (Prof. Lizardo)

SUMMARY ANSWER OUTLINE- Slasher

Please note students may offer different outcomes or rules. This summary is intended to highlight the major issues and rules. Not all the hearsay exceptions need to be addressed. The main ones are spontaneous statement, admission by party and state of mind. Some issues are in summary form only.

1. Testimony of Nosey

As per CEC 350, only relevant evidence is admissible.

Logical Relevance/ CEC 250 Tendency Test-

Evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the action. Here, Nosey is a percipient witness Slasher stabbing Von and hearing the accusation that Von is a thief. Also, he called 911 since he recognized Von needed medical help.

Here, the attempted murder consists of the defendant (Slasher) taking at least one direct but ineffective step toward killing another person, (Von.) A direct step requires more than planning or preparation. The stabbing may be argued by the prosecution as a direct step. However, the defense may argue that there was no intention to kill, and that Slasher was only angry at Von stealing from him. Therefore, the defense may request a lesser included jury instruction.

Thus, the court may rule Nosey's testimony is logically relevant and admissible.

Legal Relevance/Balancing Test CEC 352- *the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.*

The probative value of Nosey's testimony greatly outweighs any unfair prejudice. It does not seem likely Nosey's testimony would confuse, mislead or be a substantial danger of undue prejudice or a waste of time for a jury.

Thus, the trial court will rule the eyewitness testimony as legally relevant and admissible.

Witness Competency Age 92 – *for a witness to be competent to testify, under CEC it states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the "truth" or cannot communicate. In short, witnesses must have the capacity to observe, recollect, communicate, and affirm to be truthful.*

Here, even though Nosey is age 92, it does not appear Nosey has any issues that affected his memory or communication skills. His testimony is relevant because he is a percipient witness. Therefore, his competency is not compromised, and he may testify regarding the stabbing. Also, he has known both Slasher and Von for six years, so he is familiar with them and their voices.

Hearsay- “Thief, I know you took my money!”

Defined as an out-of-court statement offered to prove the truth of the matter asserted. This is offered for the truth of the matter and how the stabbing occurred is inadmissible unless there is an exception. Below are some exceptions.

Spontaneous Statement Exception

Defined as a statement by the declarant that describes, explains, or narrates an act or event that happened when the declarant was under the stress of excitement of an event.

Here, the original declarant is Slasher, so Nosey is repeating the accusation in court. Here, Nosey has known both Slasher and Von for six years, so he can identify both.

The trial court will rule the statement is a spontaneous statement and admissible.

Admission Exception

Under CEC, an admission is a statement of a party offered against the party. It does not need to involve guilt or liability. Here, the statement is being offered by the prosecution against Slasher.

Contemporaneous Statement Exception

Requires a statement to describe or explain an event as it is occurring. It is like the spontaneous statement exception but does not involve a stressful event.

The trial court will rule the statement is a contemporaneous statement and is admissible.

State of Mind Exception

Requires the statement by a declarant's (Slasher's) then existing state of mind, emotion or physical sensation may be admissible.

Here, Slasher is exclaiming to Von that he is a thief. It does not appear that Slasher had time to concoct a story,

The trial court will rule this exception applies and the statement is admissible including how the stabbing happened and may go into the reasons for the attack.

Declaration against Interest- *if argued, student needs to reasonably assume that Slasher is not available since unavailability is required. The facts state that Slasher did not testify.)*

MIMIC - used by Prosecution.

It may be argued that the prosecution may use MIMIC, for motive. Slasher's statement overheard by Nosey, "Thief, I know you took my money!" may be argued as the motive for the stabbing. However, if Nosey testifies based on what he overheard, the trial court may not allow the prosecution to use MIMIC.

2. Detective Dodd's Testimony

(Note: there should be no discussion on any Fourth Amendment search and seizure issues because the facts stated the knife was lawfully seized along with the receipt)

Logical Relevancy- tendency test

Legal Relevancy- balancing test

Writing- The Receipt

Under CEC, the definition of a "writing" is broad and includes, but is not limited to handwriting, typewriting, electronic mail, or other forms of communication.

Here, the receipt is a writing under CEC. The receipt is for a knife and may be relevant as to what instrument, (knife) was used in the attack on Von.

Authentication

This provides that the proponent must provide sufficient information that the item is what it purports to be, the receipt for the knife.

Here, Dodd located the store manager who had personal knowledge since the receipt was from the sporting goods store and he sold the knife.

Therefore, this satisfies the sufficiency test. Therefore, the store manager can verify the receipt and authenticate.

Secondary Evidence Rule

Under the CEC, the Secondary Evidence Rule is applied when the contents of a writing are in issue. Writings may include documents, photos, or recordings. At times, copies may be used if it is a reproduction of the original writing.

Here, the receipt is original document. There has been compliance with the rule and the receipt is admissible.

The Knife

Since Detective Dodd lawfully seized the knife from the driveway, he can lay the foundation for chain of custody. Once the foundation is properly laid, the knife may be admitted into evidence. May need to tie up chain of custody with the manager.

3. Quinn's Testimony- *Slasher's statement, "I stabbed Von and his blood is all over my clothes!" and statement, "It was self-defense! He had a gun!"*

Logical Relevancy- *defined above.*

Legal Relevancy- defined above

Hearsay - rule above. State of Mind exception, Admission and Spontaneous Statement, See above exceptions under call #1.

Admission on second statement: “He (Von) had a gun- it was self-defense.” This statement may be very probative to a defense theory of self-defense. The detective’s locating the gun in Von’s car may be corroboration.

Attorney- Client Privilege: Jury Consultant

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

Here, Ashton is Slasher’s attorney, and the call may be confidential client communication with her client. Slasher is the holder of the privilege.

However, the attorney tells Slasher that Quinn, her jury consultant is on the speaker phone, so it may be argued that there was a waiver unless the jury consultant is considered a reasonably necessary party.

Reasonably Necessary”- Jury Consultant- Third Party’s Presence

Slasher’s admission about stabbing Von and having blood on his clothes may not be a confidential legal communication since someone else is present, the jury consultant.

Ashton advising Slasher to come over and asking Quinn to take the bloody clothes and get Slasher new clothes may be argued as being part of a cover up of the crime. Furthermore, the statements by Slasher to Ashton may be argued as “consciousness of guilt.”

The third- party presence of Quinn, the jury may defeat the privilege unless he is termed an **eavesdropper or reasonably necessary** to Ashton’s meeting with Slasher. This eavesdropper argument is not likely to prevail.

Exception to Privilege: Crime/Fraud

Under CEC, an attorney may not be assisting in a crime or fraud. Quinn’s compliance with Ashton’s request, serves as actively assisting in the cover up of an attempted murder and may involve accomplice liability. Since Quinn may be part of the attorney’s team, he is covered by the privilege, however, since there may be a cover-up, this will not be protected.

(Note: OK if students argue otherwise, so long as logical. Also, there is no Fifth Amendment violation since Slasher did not testify)

4. Manager’s Testimony (outline only)

- Logical Relevance
- Legal Relevance
- Percipient Witness: to the receipt and selling of the knife.
- Expert Testimony-

Qualify first for special knowledge, training, and experience. Also needed- helpful to jury.

Manager is US Army retired and familiar with special knives. He had the expertise from the military.

Ok on knowledge of knives since he served in the military and was a weapons expert. Ok to describe the knife and the blade length at 5.8.” and a fixed blade.

Not allowed- expert opining on guilt.

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Answer Q2 (O’Keefe)

Relevance: Evidence is relevant if it has some tendency to prove or disprove a fact at issue.

Pete’s testimony is relevant because it helps establish his claim of negligence against RWAP. RWAP’s question regarding Pete’s termination for stealing is relevant for impeachment.

Competence: Under the Federal Rules all witnesses are presumed to be competent unless otherwise stated by the rules. Competence requires that the witness have firsthand knowledge and the witness must declare he will testify truthfully.

Pete is testifying from his personal knowledge. There is nothing to indicate that he is not a competent witness.

Impeachment: Impeachment is the casting of an adverse reflection on the veracity of a witness.

Impeachment with Prior Bad Acts. Witnesses may be impeached by prior bad acts that have not resulted in a conviction. A prior bad act that has not resulted in conviction must be probative of untruthfulness or deceit to be admissible as impeachment. Counsel must inquire in good faith, cannot reference any consequences of the bad act (such as being fired for theft), and is limited to the witness’s answer (cannot introduce extrinsic evidence).

Analysis: Pete may be asked on cross-examination about stealing from his former employer. RWAP cannot reference his termination due to the theft. Extrinsic evidence in the form of Pete’s termination documentation is not permitted.

- 1. Pete next calls Edgar Mountain. Mountain will testify that after he graduated high school, he spent the next 30 years traveling the world mountain climbing. He has personally used the harness used by RWAP hundreds of times and has seen hundreds of other people use the harness. In his experience, the harness will only slip if not secured properly. Additionally, he spoke to Wanda, another RWAP patron, who was present the day Pete fell. Wanda told Mountain that the RWAP employee who put Pete’s harness on did not secure it properly. Mountain’s opinion is that RWAPs failure to secure the harness resulted in Pete’s fall.*

Relevance: Pete is calling Mountain as an expert witness to help establish his negligence claim.

Expert Witnesses: A witness may testify as an expert if the subject matter of their testimony is beyond the common knowledge of a lay witness, the witness must be qualified as an expert, the expert possesses reasonable probability regarding his opinion, and the opinion is supported by the proper factual basis. The opinion may embrace the ultimate factual issue except for the defendant’s mental state in a criminal case.

Analysis:

The subject matter is appropriate for expert testimony as the issue of whether such a harness could slip is beyond the common knowledge of a lay witness.

Mountain is qualified to be an expert. What qualifications an expert needs depends on the issue on which the witness is presented. Here, Mountain has extensive experience mountain climbing with the type of harness that is at issue in this case. He has also seen numerous other individuals use the harness. Although he does not have advanced degrees, this is not required in this situation.

The expert possesses a reasonable probability regarding his opinion.

The opinion must be supported by the proper factual basis. This can include personal observation, facts made known to the expert at trial, and facts made known to the expert outside of court. Mountain's opinion is based on his own personal experience with the harness as well as the statement of Wanda.

Personal experience – this is an appropriate basis for Mountain's testimony as long as other experts in the field reasonably rely upon this type of personal knowledge and its probative value is not substantially outweighed by its prejudicial effect. This would be permissible.

Wanda's Statement – Under the Federal Rules, case-related statements (hearsay) can be related by the expert to the jury, not for their truth, but for the basis of the expert's opinion. The opposing party may object if it is not the type of information upon which other experts in the field reasonably rely or if the statement's probative value is substantially outweighed by its prejudicial effect. Students can argue either way as long as they discuss whether other experts in the field would rely on such statements and whether its probative value substantially outweighs its prejudicial effect. Dan should ask for a limiting instruction indicating that the statement is not offered for its truth, but rather for the basis of the expert's opinion.

The expert's opinion may embrace the ultimate factual (not legal) issue except in a criminal case where mental state constitutes an element of the crime or defense. Mountain's opinion that the harness would not slip unless it wasn't properly secured is appropriate even though that is the ultimate factual issue in the case.

3. *In the defense case in chief, the defense introduces the incident report of Matt, the manager of RWAP. The incident report says the following:*

I (Matt) did not personally see Pete's fall. Five minutes after the accident, I interviewed Bob, another patron at RWAP. Bob said he "saw the whole thing and that Pete unsecured the top part of the safety harness so that he could take a selfie." A day later, I interviewed Ted, the employee who secured the harness. He said he secured it properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie.

Relevance. The defendant seeks to introduce Matt's report to establish a complete defense or contributory negligence.

Hearsay: Out-of-court statement offered for the truth of the matter asserted

Business Records: RWAP will introduce the report through the business record exception. To do so, the RWAP must establish

1. The declarant 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.*

Analysis: Matt had a business duty to report the information as the Manager of RWAP. The report was written close in time to the events contained in the report. Students should address whether the report was made in the regular course of business or made in anticipation of litigation. Reports made in the ordinary course of business qualify as business records. Reports made in anticipation of litigation are excluded. Students can argue this either way.

Multiple levels of hearsay: Matt's report includes statements made by Bob and Ted.

Bob: Bob's words would be hearsay if introduced to support the idea that Pete had unsecured the harness prior to his fall. (OOC statement offered for TOMS).

Present sense impression exception: For the present sense impression exception to the hearsay rule to apply, the statement must describe or explain an event or condition and be made while or immediately after the declarant perceives it. Here, Bob's statement occurred five minutes after the initial incident, so the issue is one of timing. Students may argue it either way.

Ted: Ted is an employee of RWAP so he has a business duty to report to RWAP. Because he has a business duty and personal knowledge, his statement would come within the business record exception if all other elements are met.

4. *RWAP calls Matt, the RWAP supervisor, to the stand. Matt testifies that he saw Pete on the date of the fall and Pete had a very distinctive tattoo of a dinosaur skateboarding on his neck and was wearing a hot-pink T-shirt that said, "I'm with Stupid." Matt then seeks to introduce a Snapshot he took from a Facebook page entitled "Crazy Fails." Matt often looks at that Facebook page because he finds it humorous as it shows people getting hurt doing stupid things. The Snapshot depicts the torso of someone falling from a rock-climbing wall. You cannot see the person's face, but the person has a very distinctive neck tattoo of dinosaur skateboarding and a hot-pink T-shirt that says, "I'm with stupid." Matt testifies the tattoo and T-shirt are identical to Pete's. The photo does not have a date or time stamp and Matt testifies on cross-examination that Facebook was not contacted to directly provide the image to RWAP. Pete objects.*

Relevance: To bolster RWAP's claim that Pete unsecured his harness to take a selfie.

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. The rule applies to documents, records, or other physical things described in testimony or offered into evidence. It also applies to references to human beings as having been seen by a witness or having spoken to a witness.

RWAP is seeking to authenticate the Facebook photo by showing that Pete had a very distinctive tattoo and was wearing the same T-shirt in the photo as he was wearing during the fall. Pete argues that there is insufficient evidence to authenticate the photo as it is unknown when the photo was taken, by whom the photo was taken, and who is in the photo.

ANSWER - Q3 (O'Keefe)

*Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. 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. Use the **Federal Rules of Evidence**.*

- 1. The prosecution seeks to call Tom's attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.*

Relevance: Evidence is relevant if it has some tendency to prove or disprove a fact of consequence. The evidence is relevant because the defendant is confessing to the crime.

Offer of Proof: An offer of Proof is an explanation made by an attorney to a judge during trial to show why a question which has been objected to as immaterial or irrelevant will lead to evidence of value to proving the case of the lawyer's client.

Hearsay: Out of court statement offered for the truth of the matter asserted. Tom and Alex's statement's, if offered for their truth, would be hearsay.

Tom's Statement: Statement of a Party Opponent: This exemption from the hearsay definition permits the proponent to introduce a statement when "the statement is offered against a party and is ... the party's own statement, in either an individual or representative capacity ..." Tom is the party opponent of the Prosecution and the statement would be admissible.

Alex's Statement: Can be offered for a non-hearsay purpose, effect on the listener, to give context to Tom's statement.

Attorney-Client Privilege: The attorney-client privilege applies if the holder of the privilege is or sought to become a client, the person to whom the communication was made is a member of the bar (or their representative), the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing an opinion on law, legal services, or assistance in a legal proceeding and is not for the purpose of committing a crime or tort and has been claimed and not waived by the client.

Tom has hired Alex to be his attorney and he is discussing with Alex the crime with which he is charged for the purposes of legal representation.

Eavesdroppers: A privilege based on confidential communications is not abrogated because the communication is overheard by someone whose presence is unknown to the parties. The privilege

would still apply to the parties to the confidential communication. However, there is some question as to whether the eavesdropper can testify. The traditional view is that the eavesdropper may testify to what he has overheard. A significant number of modern cases assert that if the holder of the privilege was not negligent, there is no waiver of the privilege and the eavesdropper is prohibited from testifying.

Analysis: Alex could not be compelled to testify to the communication. There is a question as to whether Ivan could be called. I did not provide the students with much information about how the communication was overheard. They could argue it either way.

2. Tom's wife, Sarah, is called to testify as a witness for the prosecution. The prosecution seeks to elicit the following testimony from Sarah:

- Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry.
- Tom confided in Sarah about their financial struggles and his plans to commit the burglary.

The defense objects.

Relevance: The evidence is relevant to show that Tom committed the jewelry burglary based on his own admissions and Sara's observations of Tom which support the inference that he committed the crime.

Spousal Immunity Privilege: A defendant's spouse has a privilege to refuse to testify at the trial of his or her spouse.

Privilege belongs to witness spouse. Only the witness-spouse may invoke the privilege against adverse spousal testimony. Thus, one spouse may testify against the other in criminal cases, with or without the consent of the party spouse, but the witness-spouse may not be compelled to testify, nor may she be foreclosed from testifying

Immunity may be asserted only during the marriage. It terminates upon divorce or annulment. If the marriage exists, the privilege can be asserted even as to matters that took place before the marriage.

Spousal Communication Privilege: In any civil or criminal case, either spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from

disclosing, a confidential communication made between the spouses while they were married. The rationale is to encourage open communication and trust and confidence between spouses.

Both spouses hold the privilege. Either can refuse to disclose the communication or prevent any other person from disclosing the confidential communication.

Elements of the privilege:

1. Marital relationship. The communication must be made during a valid marriage. Divorce will not terminate the privilege retroactively, but communications after divorce are not privileged.

2. Reliance on intimacy. Routine exchanges of a business nature, abusive language and misconduct directed to the spouse are not privileged. If the communication was made in the known presence of a stranger, it is not privileged. The confidential communication does not need to be spoken but may be made by conduct intended as a communication.

Nonapplicability of the privileges. *Neither the spousal immunity nor the confidential marital communications privilege applies in actions between the spouses or in cases involving crimes against the testifying spouse or in actions between the spouses' children (ex: assault and battery, incest, bigamy, child abuse, ect)*

Analysis: *Tom and Sara are validly married, so both privileges would potentially apply. If Sara does not invoke the spousal immunity privilege, she will be able to testify to non-confidential communications or observations made during the marriage.*

Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry. Assuming Sara does not invoke the spousal immunity privilege, she will be permitted to testify to her observations as they are not confidential communications within the meaning of the privilege.

Tom confided in Sara about their financial struggles and his plans to commit the burglary. There may be some question as to whether Sara can testify to conversations about financial struggles as routine discussions about business matters are not considered confidential communications. Tom would be able to prohibit Sara from testifying about his plans to commit the burglary if the conversation was confidential and relied upon the intimacy of their marriage.

Hearsay: *Out of court statement offered for the truth of the matter asserted.*

Statement of a Party Opponent: *Tom's statements to Sara are out of court statements offered for their truth. However, they would fall within the statement of a party opponent exemption from the hearsay definition as Tom is the party opponent of the prosecution.*

3. *On cross-examination, the defense asks Sarah:*

- *Isn't it true that you told Tom you are going to divorce him because you discovered he was cheating on you?*
- *Isn't it true that you have a misdemeanor conviction for embezzlement that occurred last year?*

Relevance: *The questions are relevant to impeach Sara by showing bias and prior conviction of a crime involving dishonesty.*

Impeachment by Bias: *Evidence that a witness is biased or has an interest in the outcome of a suit tends to show that the witness has a motive to lie. A witness may always be impeached by extrinsic evidence of bias or interest, provided a proper foundation is laid. Evidence that is substantively inadmissible may be admitted for impeachment purposes if relevant to show bias or interest.*

Here, Sarah may be biased against Tom if she believes he has cheated on her and thus, she may have a bias against him. This is a proper method of impeachment.

Impeachment for a Prior Crime Involving Dishonesty: *Under the Federal Rules, a witness' character for truthfulness may be attacked (or impeached) by any crime (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of dishonesty or false statement. Embezzlement would qualify as a crime involving dishonesty. The trial court has no discretion – not even under FRE 403 to disallow impeachment by such crimes. The only time when admission of this*

evidence is not automatic is when a ten-year period has elapsed since the date of conviction or the witness' release from confinement related to the conviction (whichever date is later). In that circumstance, the evidence is subject to a balancing test under Rule 609(b).

Sarah's conviction occurred last year, so it would be permissible to impeach her with this conviction. The court must allow the impeachment, as it has no discretion to exclude it.

1)

1. Nosey's Testimony

Logical Relevance

Evidence is logically relevant when it has a tendency to make a material fact of consequence more or less probable.

Here, the prosecution is calling Nosey to the stand as a percipient witness who will testify that he saw Slasher stab Von, and will be able to rebut Slasher's purported self-defense argument. He will also be called to testify as to the statement he heard Slasher make, "Thief, I know you took my money!", when he was stabbing Von. This testimony will have a tendency to disprove Slasher's self-defense argument and have a tendency to prove that Slasher was stabbing Von out of anger and not in response to his attack.

Legal Relevance

Evidence is legally relevant when its probative value is not substantially outweighed by its unfair prejudicial effect. It must not confuse or mislead the jury or cause an undue consumption of time.

Here, there are no facts to suggest that Nosey's testimony will have prejudicial effect that will substantially outweigh its probative value. It is not likely to mislead or confuse the jury or create an undue consumption of time.

Nosey's testimony will be relevant and will be admissible unless an exception applies.

Prop 8

Under Proposition 8, an amendment to California's constitution, in criminal cases, all relevant evidence will be admissible.

Witness Competence

Under the CEC, witnesses are presumed to be competent so long as they have personal knowledge about the subject matter they intend to testify about. Witnesses can be disqualified for sensory deficiency, bias or interest, an inability to understand the duty to tell the truth, or an inability to communicate or be relatable.

Here, Nosey will be a percipient witness who will be testifying as to what he saw and heard the day of the incident. Nosey is a 95 year old man, so he may have sensory deficiencies, although the facts don't expressly state that. The defense will surely question Nosey on this matter and ensure that he is competent to testify as to what he heard and saw that day.

Hearsay

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

Here, Nosey will be testifying as to Slasher's statement to Von on the day that he stabbed him. This statement was made out of court and is likely being offered to prove the truth of the matter asserted - that Slasher was stabbing Von out of anger for stealing his money, and not out of self-defense.

This statement will be considered hearsay and will be inadmissible unless an exception applies.

Spontaneous Statement

Statements that are made by declarant in response to an exciting or startling event, either while or during the event is occurring, but in either case without reflection, and concerning the event will be admissible as an exception to the hearsay rule.

Here, the prosecution will ask Nosey to introduce Slasher's statement made during the stabbing, "Thief, I know you took my money!" to show that Slasher was stabbing Von out of vengeance, rather than self defense. This statement by Slasher is made during a stress-inducing event, describing the event from Slasher's perspective.

This statement will be admissible as an exception to the hearsay rule.

Contemporaneous Statement

Statements made by declarants that relate to, and describe an event as they are perceiving it, or shortly after, but in either event without time for reflection, will be admissible as exceptions to the hearsay rule.

This will apply to Slasher's statement during the stabbing because it describes the event that took place.

other HE exceptions:
• admission
• state of mind

Crawford Doctrine

Under the Crawford Doctrine, in criminal cases, when the defendant is unavailable to testify, any testimonial statements that they made will be inadmissible as a conflict with the confrontation clause.

This doctrine does not apply because Slasher is making the statement in response to a physical altercation and not as testimony to the police.

2. Detective Dodd's Testimony

Logical Relevance

Supra.

Here, the prosecution will be calling Detective Dodd to lay foundation for the introduction and authentication of the knife and receipt. They may also ask him about what he found at the crime scene because Von's defense is that Von fired a weapon at him. Upon inspecting the crime scene, it does not appear that he discovered a gun.

Legal Relevance

Supra.

There are no facts to suggest that Dodd's testimony will have prejudicial effect that will substantially outweigh its probative value.

Writing

A writing is defined broadly and includes handwritten, typewritten, electronic notes, photos, videos or even graffiti. Before it can be introduced into evidence the proponent must prove, by a sufficiency standard, that it is what the proponent claims it to be.

Here, Detective Dodd will be able to authenticate the writing by chain of custody and through corroboration with the store Manager.

Secondary Evidence Rule

The secondary evidence rule applies when the contents of a writing are at issue. In those instances, the original or a carbon copy / photocopy of the original are preferred.

- authentication - need to fully discuss
Receipt is what it purports to be, etc.

Careful facts stated
"He (Von) had a gun"
Does not say "fired"

authenticate "receipt" -
that is the writing

Here, Dodd will be testifying as to the contents of the receipt, showing the item that was bought and the time of the purchase. Because it appears the original is being introduced, this rule will not apply.

Tangible Evidence (*Best to call this authenticating*)

Writings and other tangible evidence must be authenticated before being admitted at trial.

Here, officer Dodd will be able to authenticate the weapon and receipt by showing chain of custody and personal knowledge. (*Lay foundation*)

3. Quinn's Testimony

Logical Relevance

Supra.

Here, Quinn is likely to testify about Slasher's statements to Ashton, that he stabbed Von and has his blood all over his clothes. This will have a tendency to prove that Slasher did in fact stab Von. The defense may want to introduce it to bring veracity to Slasher's self-defense argument. The prosecution will want to introduce the portion of the statement where Slasher admits to stabbing Von, and will question Quinn about aiding the crime by getting rid of Slasher's clothes and the murder weapon.

Legal Relevance

Supra.

There is no evidence to suggest that the probative value of Quinn's testimony will be substantially outweighed by its probative value or mislead, confuse the jury or cause an undue consumption of time.

Here, Quinn's testimony will be relevant and admissible unless another rule excludes it.

Witness Competency

Supra.

Here, Quinn is a percipient witness and testifying about what he saw and heard that day. There are no facts to suggest that Quinn would not be a competent witness.

Hearsay

Supra.

Here, Quinn will likely be introducing Slasher's statement that he "Just stabbed Von and his blood is all over my clothes! He had a gun, it was self-defense!".

Admission by Party-Opponent

A statement made by a party to the case that is being introduced against them, will be admissible as an exception to the hearsay rule.

Here, Slasher's statement that "I just stabbed Von and his blood is all over my clothes! He had a gun, it was self-defense!" will be introduced by the prosecution against him to show that he admitted to stabbing Von. This statement will be admissible as an exception to the hearsay rule.

Slasher's statement will be admissible under this exception.

Spontaneous Statement

Supra.

Here, Slasher's statement to Ashton was made in response to just having stabbed Von. He seemingly makes this statement without any time to reflect, ignoring Ashton's comments that Quinn, his jury consultant, is also on the phone. Had Slasher had time to reflect, with a cooler mind, it's likely that he wouldn't have made these comments knowing that Quinn was on the phone. Additionally, stabbing someone is likely to induce stress and anxiety in someone to the point that they make un-reflected statements in response.

Slasher's statement will be admissible under this exception.

Contemporaneous Statement

Supra.

Here, similar to the discussion in **Spontaneous Statement** section, Slasher's statement was made in response to an event that he perceived, and concerning the event itself. And, for the same reasons noted above, it does not appear that Slasher had time to reflect.

Slasher's statement will be admissible under this exception.

Declaration Against Interest

Under the CEC, when a now unavailable declarant has previously made a statement that is so far against their pecuniary, penal, or financial interest, so as to subject them to hatred, ridicule or disgust of the public, that statement will be admissible as an exception to the hearsay rule.

Here, Slasher's statement to Ashton will be admissible under this exception because Slasher is unavailable to testify at trial, and because admitting to killing someone is against their penal interest and would subject them to ridicule, hatred, or disgust from the general public.

Slasher's statement will be admissible under this exception.

Attorney Client Privilege

The attorney client privilege will apply to all confidential communication made between the attorney and client for the purpose of obtaining legal advice or services. The client is the holder of the privilege and the attorney may assert it on their behalf. As an exception to this privilege, communication made to the attorney in furtherance of a crime or the commission of a crime are not covered and will not be privileged.

Here, Slasher will likely seek to assert this privilege and keep Quinn from testifying about what he heard in Ashton's office when Slasher called. Slasher will argue that the communication was intended to be confidential, and made to someone he knew was an attorney. The prosecution will be able to point to the fact that Quinn is an eavesdropper, wasn't necessary for the legal matter Slasher was calling about, and that the communication was in furtherance of a crime.

*If Slasher was aware
Quinn was on speakerphone -
How can he be an eavesdropper?*

Traditionally, eavesdroppers were permitted to testify, but modernly, they may only testify if the privilege holder made the statement out of negligence. By either standard, the prosecution will be successful in showing that Quinn wasn't necessary and therefore was an eavesdropper, and second that Slasher made the statement negligently. Before he made the statement Ashton told him that Quinn was in his office - it was negligent of him to blurt it out anyway.

Lastly, Quinn is not Slasher's attorney.

This privilege will not apply and Quinn will be able to testify.

4. Manager's Testimony

*The Key is
whether or not
Quinn, as a legal
consultant for Atty -
is this a 3rd party?
R'sle nec. 3rd party?
Then - Crime/Fraud
Exception*

Logical Relevance

Supra.

The prosecution will be introducing the manager to show that Slasher's attack on Von was premeditated. That it was not in self-defense as Slasher argues that it was. It will show that he purchased a particular type of military knife that is used in close hand combat, with a design that helps for stabbing attacks. He will also testify as a percipient witness that he sold the knife to Slasher just two hours before the crime.

Legal Relevance

Supra.

There is no evidence to suggest that the Manager's testimony will have prejudicial effect that will substantially outweigh the probative value. Additionally, although it is expert testimony, the subject matter is not novel or fringe, and is relatable to the certain degree to the general public. Therefore, it will not confuse or mislead the jury or cause an undue consumption of time.

The Manager's testimony will be relevant unless another rule excludes it.

Expert Witness

A witness that has specialized knowledge, education, training, or skills in the subject matter in which they intend to testify will be considered an expert. For an expert witnesses' testimony to be admissible it must help the trier of fact with information that is beyond common knowledge, they must testify with sufficient data or facts, they must base their testimony on reliable principles and methods, and they must rationally apply those

principles and methods to the facts of the case. The defense will have the opportunity to voir dire the witness to ensure they are qualified.

Here, the manager will be testifying as a retired US Army military knife expert who knows and understands knives beyond what the general public would. He will be testifying that this particular knife has a hilt (guard) that keeps the knife from slipping and is used for the purpose of stabbing someone or something. This testimony will be helpful to the jury who may not know that this specific knife is used for hand-to-hand combat and is designed for stabbing. It will bring credence to the prosecution's argument that Slasher premeditated the murder.

Expert's may opine on conclusions, but not on guilt (?)

Kelly Test

Under the CEC, when the expert seeks to testify about scientific evidence or other subject matter that is considered novel, new, or fringe, it must pass the Kelly test to apply.

The Manager's testimony does not appear to be novel, new, or fringe and will not require a Kelly test.

END OF EXAM

- very good overall
- missed some issues
- Good incorporation of facts & details
- Well organized

2)

85

1. Pete's Prior Termination

Logical Relevance

Evidence is logically relevant when it has a tendency to make a material fact of consequence more or less probable.

Here, the prosecution is seeking to introduce Pete's prior termination, for stealing, in an effort to impeach him and bring into question his veracity and character for truthfulness. In this case, there are questions about what happened, whether Pete was being negligent and unstrapped his safety harness to take a selfie or whether the safety harness was negligently installed. The prosecution is seeking to impeach Pete to show that he has a bad character for truthfulness and that their side of the story is more believable than his. The evidence of the prior termination letter showing that Pete was fired for stealing will have a tendency to show that Pete is not an honest person and can't be trusted.

Legal Relevance

Evidence is legally relevant when its probative value is not substantially outweighed by its unfair prejudicial effect. It must not confuse or mislead the jury or cause an undue consumption of time.

This evidence will be prejudicial to Pete, but it's probative value will not be substantially outweighed in this instance. *include court balance*

Impeachment

Any party can impeach any witness, even their own. Impeaching is bringing an adverse assertion as to the credibility or veracity of a witness. Witnesses can be impeached through prior inconsistent statements, reputation or opinion, criminal convictions, bias or interest, sensory deficiency, prior bad acts - specific instances, or contradictions.

Here, the defense is attempting to introduce Pete's prior bad acts, a prior theft and firing, to impeach him.

Prior Bad Acts

In certain instances, the party may introduce evidence of prior bad acts to impeach a witness and bring into question their character.

Here, the defense is seeking to introduce evidence of Pete's bad acts to show that he is an untrustworthy individual who is prone to lying. This would bring into question Pete's side of the story, that it was RWAP's negligence that lead to the accident, and not Pete's. Pete would come off as untrustworthy to the trier of fact and would be less believable.

. needs a conclusion

2. Mountain Testimony

A. Personal Knowledge

Logical Relevance

Supra.

Here, Mountain's testimony is being offered to prove that the harness could not have come undone unless it was not secured properly by a RWAP employee. This will have a tendency to show that it was RWAP's negligence in securing the harness that lead to Pete's injuries.

Legal Relevance

Supra.

There are no facts to suggest that this evidence has prejudicial effect that will substantially outweigh its probative value.

The evidence is relevant and will be admissible unless it is excluded by another rule.

Lay Witness Testimony

Any witness can testify so long as they have personal knowledge about the subject matter they intend to testify about, their testimony is rationally related to the facts of the case, is helpful to the trier of fact, and does not offer scientific, technical, or otherwise expert testimony.

Here, Pete may be introducing Edgar Mountain as a lay witness, to offer his own perceptions about what happened that day. But, because Edgar Mountain is not testifying about the facts of this case and his own perceptions of Pete's fall, and because his testimony offers technical understanding of the harness, his testimony would likely fall under that of an expert witness.

Expert Witness

A witness that has specialized knowledge, education, training, or skills in the subject matter in which they intend to testify will be considered an expert. For an expert witnesses' testimony to be admissible it must help the trier of fact with information that is beyond common knowledge, they must testify with sufficient data or facts, they must base their testimony on reliable principles and methods, and they must rationally apply those

principles and methods to the facts of the case. The defense will have the opportunity to voir dire the witness to ensure they are qualified.

Here, Edgar Mountain is being introduced as an expert on the type of harness worn by Pete during the accident to prove that the harness would not slip unless it was not secured properly. This will show that it was RWAP's negligence, not Pete's, that caused the accident. Although Mountain is only a high school graduate, his testimony will likely still be admissible as expert testimony because of the extensive experience he has. He has spent 30 years traveling the world and has immense mountain climbing experience. He also has personally used the RWAP hundreds of times and seen others use it hundreds of times.

very good

Mountain will be able to testify as an expert witness.

Daubert Test

Under the FRE, the Daubert test will apply if the expert witness is attempting to introduce novel, new, or fringe methods.

Here, this will not apply because Mountain is testifying about rock climbing harnesses, not a new or novel scientific breakthrough. — *so does not apply.*

B. Wanda's Statements

Logical Relevance

Supra.

The defense will introduce Wanda's statement, through Mountain's testimony, to show that it was RWAP's negligence, in not securing the harness properly, that was the cause of

Pete's fall. This statement from an eye witness will have a tendency to prove that the harness was not properly fastened and was likely the cause of Pete's fall.

Legal Relevance

Supra.

There are no facts to suggest that this evidence will have a prejudicial effect that will substantially outweigh its probative value.

Hearsay

Hearsay is a statement made out of court that is being offered to prove the truth of the matter asserted.

Here, the defense has called Mountain who will testify to a statement Wanda made to him on the day that Pete fell, who told Mountain that the harness was not secured properly. This statement, made by the declarant Wanda will be hearsay because it was made out of court and is being introduced to prove the truth of the matter asserted, that RWAP did not secure the harness, leading to Pete's fall.

Present Sense Impression

A statement made by a declarant, about an event they are perceiving, at the time they perceived it, and relating to that event, will be admissible as an exception to the hearsay rule.

Here, it's unclear when or where Wanda made this statement to Mountain. But, it does not seem that Mountain was present the day of Pete's fall so Wanda's statement had to have been made to Mountain at a later time, and without reflection. Because Wanda made

this statement so long after the event and with reflection, it will not be admissible under this exception.

FRE Residual Exception

If evidence that is material to the case would otherwise be excluded as hearsay, and, the party has a necessity to the evidence, without having any other way to introduce it, it will be admissible under the residual exception to the hearsay rule so long as the party provides notice to the other party.

Here, because there are no other exceptions to Wanda's hearsay, and because Wanda is not available to testify, if Pete has no other option to getting this evidence in, the court may, in its discretion, allow the evidence in under this exception. The court will weigh the probative value and assess the evidence's credibility.

3. Matt's Incident Report

Logical Relevance

Supra.

Bob's statement will bring an eyewitness account to show that Pete did unsecure the harness, which will have a tendency to prove that it was Pete's negligence, by unsecuring the harness, that lead to his fall, and not RWAP's negligence in securing it. Pete's statement will corroborate Bob's statement and also show that Pete was unsecuring the harness to take a selfie - causing him to fall.

Legal Relevance

Supra.

There is no evidence to suggest that the probative value of this evidence will be substantially outweighed by its prejudicial effect.

This evidence will be relevant and admissible unless another rule excludes it.

Writing

A writing is defined broadly and includes handwritten, typewritten, electronic notes, photos, videos or even graffiti. Before it can be introduced into evidence the proponent must prove, by a sufficiency standard, that it is what the proponent claims it to be.

Before Matt's report will be admissible, it must be shown, by the defense, that it is what the proponent claims it to be. If the report is authenticated and allowed under the best evidence rule, it contains statements by Bob and Ted that will need to be addressed.

Best Evidence Rule

Under the FRE, the best evidence rule requires that, in instances where the writing or other tangible evidence is at issue, the original must be offered, unless it has been destroyed or is otherwise unavailable at no fault of the proponent offering it.

Here, it seems that although the contents of the report are at issue, the original report is being introduced so this requirement will be satisfied.

Hearsay

Supra.

Bob's statement, made to Matt five minutes after the accident, is being introduced to show that Pete unsecured the harness while he was at the top, causing him to fall. This

statement was made out of court and is being offered to prove the truth of the matter asserted. Unless an exception applies, it will be inadmissible.

Business Record

A statement contained in a business record, made during the course of regular business, for a business purpose, which can be authenticated by a custodian who has personal knowledge about the event, will be admissible as an exception to the hearsay rule.

Here, this writing can be authenticated by Matt, its custodian, and was made during the course of regular business, and for a business purpose - to detail an accident. But, because the contents are statements by other parties, simply being transcribed here, the report will lack veracity needed for this exception to apply.

Neither Bob nor Ted's statements will be allowed through the report and it will be excluded, unless there are other parts of the report that are relevant. In that case, the court may issue a limiting instruction ^{define} determining which portion of the report is admissible, while excluding these two hearsay statements.

4. Matt's Testimony

A. Identification of Pete & Facebook Snapshot

Logical Relevance

Supra.

Here, Matt is testifying that he saw Pete on the day of the fall and that Pete's outfit match that of a person falling on the Facebook page "Crazy Fails." It's unclear exactly how this evidence is relevant to the case because everyone knows that Pete fell. There is no need to

identify Pete as the person who fell because the question in this case is, who was negligent for Pete's fall, Pete or RWAP?

The defense may be seeking to introduce character evidence to show that Pete is the type of person who like to perform stupid stunts, like the other people included on "Crazy Fails."

Legal Relevance

Supra.

Here, there are no facts to suggest that there is prejudicial effect that will substantially outweigh its probative value.

Character Evidence

Generally, character evidence is inadmissible to prove propensity. There are three types of character evidence, reputation, habit, or opinion.

It's possible that the defense is seeking to introduce evidence of Pete's reputation character evidence as someone who performs stupid stunts to gain internet notoriety. Showing that Pete is a reckless person who seeks internet fame would show that he has a propensity to be negligent, like in the current case.

Writing

A writing is defined broadly and includes handwritten, typewritten, electronic notes, photos, videos or even graffiti. Before it can be introduced into evidence the proponent must prove, by a sufficiency standard, that it is what the proponent claims it to be.

Here, the defense must prove, by a sufficiency standard, that the snapshot of "Crazy Fails" is what the purport it to be. Because Matt is testifying, and because he is the one who printed it off, he will be able to authenticate it for the jury will personal knowledge.

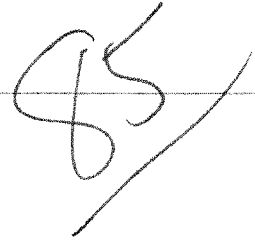
Best Evidence Rule

Under the FRE, the best evidence rule requires that, in instances where the writing or other tangible evidence is at issue, the original must be offered, unless it has been destroyed or is otherwise unavailable at no fault of the proponent offering it.

Here, the contents of the snapshot that the defense is seeking to introduce are at issue because Matt is seeking to testify about what it portrays. Pete is objecting because this evidence is not the original version of the Crazy Fails page, and the contents are at issue. In this case, because the FRE applies, the court may choose not to admit this evidence because it does not appear to satisfy the best evidence rule. However, if the facts exist independent of the video and the defense has someone to testify to them, they could seek to introduce the evidence in that way.

END OF EXAM

very good



3)

1. Alex's Testimony

Logical Relevance

Evidence is logically relevant when it has a tendency to make a material fact of consequence more or less probable.

Here, the prosecution wants to have Alex the attorney testify that Tom told him during lunch that he committed the burglary. This will corroborate the testimony of the investigator who overheard the statement made by Tom that he was involved in the burglary.

Legal Relevance

Evidence is legally relevant when its probative value is not substantially outweighed by its unfair prejudicial effect. It must not confuse or mislead the jury or cause an undue consumption of time. *Include court balances*

There is no facts to suggest that the probative value will be substantially outweighed by any prejudicial effect it may have.

This evidence will be relevant and admissible unless another rule applies that excludes it.

Hearsay

Hearsay is a statement made out of court that is being offered to prove the truth of the matter asserted.

Here, the prosecution has called Tom's attorney Alex to introduce statements that Tom made during lunch, admitting to the burglary. These statements were made out of court and are being introduced to prove the truth of the matter asserted, that Tom committed the crime.

Party-Opponent Admission

A statement that was made by a party to the case and is being offered against them will be admissible as an ^{exemption} ~~exception~~ to the hearsay rule.

Here, the prosecution is wanting Alex to introduce Tom's ^{non-} hearsay statement, made during lunch, admitting that he committed the burglary. Tom is the defendant of this case, and his statement admitted to being involved in the burglary of which he is on trial for.

Tom's statement will be admissible under this ^{non-} hearsay ^{exemption} ~~exception~~.

Statement Against Interest

A statement, made by a now unavailable declarant, that is so far against their pecuniary, penal, or financial interest, will be admissible as an exception to the hearsay rule.

Assuming that Tom invokes his right to privilege against self-incrimination and doesn't testify, he will be considered unavailable. As such, the prosecution could seek to introduce his statements under this exception to the hearsay rule. The statement that he made to Alex, that he was involved in the burglary is a statement that is against ^{declarant's} ~~anyone's~~ pecuniary or penal interest to the extent that they wouldn't have made it unless it were true.

Tom's statement will be admissible under this hearsay exception.

Witness Competency

Witnesses are presumed to be competent so long as they have personal knowledge about the subject matter they intend to testify about. Witnesses can be disqualified for sensory deficiency, bias or interest, an inability to understand the duty to tell the truth, or an inability to communicate or be relatable.

Alex will be considered a competent witness because he has personal knowledge about what is being asked to testify about.

Attorney Client Privilege

The attorney client privilege will apply to all confidential communication made between the attorney and client for the purpose of obtaining legal advice or services. The client is the holder of the privilege and the (attorney may assert it on their behalf). As an exception to this privilege, communication made to the attorney in furtherance of a crime or the commission of a crime are not covered and will not be privileged. Traditionally, eavesdroppers were permitted to testify, but modernly, they may only testify if the privilege holder made the statement ^{OK} ~~out of negligence~~.

Here, the prosecution will argue that although the communication was between Tom, the client, and Alex, the attorney, and for the purpose of seeking legal advice, that it will not be privileged because there's no way any rational person would expect communication in a restaurant at lunch to be confidential. Tom will argue that he did intend for the communication to be confidential and the investigator is simply an eavesdropper.

Under the traditional theory, the investigator would be allowed to testify regardless.

Under the modern theory, Tom will have to prove that he was not negligent in discussing his legal matter in an open restaurant at lunch.

It's unlikely that Tom will be able to invoke the attorney client privilege for his conversation with Alex at lunch.

2. Sarah's Direct Testimony

A. Tom Leaving with Tools

Logical Relevance

Supra.

Sarah's testimony will show that Tom left with tools, in order to commit burglary, and returned with jewelry a few hours later, after committing the burglary. The fact that Tom left with tools and returned with jewelry will have a tendency to show that Tom was a part of the burglary he is accused of.

Legal Relevance

Supra.

There are no facts to suggest that the evidence will not be legally relevant.

Sarah's testimony about Tom leaving with the tools and returning with jewelry will be relevant and admissible unless another rule excludes her testimony.

Confidential Marital Communication

Communications made between a married couple, that are intended to be confidential, and are made during the marriage, will be privileged. Both spouses hold the privilege, and either can assert it on the other's behalf. Because both spouses hold the privilege jointly, they can keep others from testifying about the confidential communication, including the other spouse, and the privilege may not be unilaterally waived. As an exception to this rule, the privilege does not apply to communication made in the furtherance of a crime.

Here, this rule will not apply because there was no communication between Tom and Sarah in this specific instance. Sarah will merely be testifying as to what she saw, Tom leaving and returning with jewelry. *OK*

Spousal Immunity

In criminal trials, the spouse of the defendant may seek to assert the spousal immunity privilege and refuse to testify at all. The spousal immunity privilege applies to parties who are married at the time of the trial, regardless of whether the events took place before they were married. The spouse of the defendant holds the privilege and can assert it or choose to waive it unilaterally.

Here, Sarah, as Tom's wife, can choose to invoke the spousal immunity privilege and refuse to testify or answer questions altogether. *OK*

*~~the spouse of the defendant~~
~~is not a party to the case~~
~~(Spousal Immunity)~~*

B. Financial Struggles and Burglary Plan

Logical Relevance

Supra.

Tom's statements to Sarah will have a tendency to prove that Tom had a motive for the burglary, their financial struggles, and intended to commit the burglary.

Legal Relevance

Supra.

There is no evidence to suggest that any prejudicial effect will substantially outweigh the probative value.

Hearsay

Supra.

Here, the prosecution has called Sarah to testify about what Tom told her. These statements were made out of court and are being introduced to prove the truth of the matter asserted, that Tom had a motive for the crime, their financial struggles, and had plans to commit the burglary.

This is a hearsay statement and will not be admissible unless an exception applies.

Admission by Party Opponent

Supra.

Here, Tom is admitting to Sarah that he has plans to commit the burglary because of their struggling financial situation. Tom is the defendant in this case and the prosecution will be introducing these statements against him.

This ^{exemption} ~~exception~~ to the hearsay rule will apply.

Admission by Co-Conspirator

Statements made by co-conspirators to a conspiracy, made during the conspiracy, and in furtherance of it, will be admissible as an exception to the hearsay rule.

Here, the prosecution to seek to introduce the statements under this exception, but they would need to prove, by a preponderance standard, that Sarah was a party to the conspiracy. In this case, it doesn't appear that Sarah played a part in the conspiracy and was only taking in communication from Tom regarding his plans to commit the burglary. The prosecution could argue that, by not turning Tom in, she was aiding and abetting him in his plans and therefore was part of the crime.

This exception to the hearsay rule will likely apply.

Statement Against Interest

Supra.

Here, like with Tom's statements to Alex, his statements to his wife Sarah are so far against his penal and pecuniary interest that no person would make the statement without believing it was true. If Tom invokes his right against self-incrimination and refuses to testify, he will be unavailable, and this exception will apply.

Confidential Marital Communication

Supra.

Here, the statement that Tom confided in Sarah, regarding his plans to carry out the burglary are very likely to have intended to be confidential. Additionally, they were made while Tom and Sarah were married. Tom, as a joint privilege holder, could attempt to assert this privilege and keep Sarah from testifying. But, because Tom's statements indicated an intent to commit a crime, burglary, this privilege will likely not apply.

^{Testimony}
Spousal Immunity
^

Supra.

Here, Sarah, as Tom's wife, can choose to invoke the spousal immunity privilege and refuse to testify or answer questions altogether.

3. Sarah's Cross-Examination

A. Cheating Allegation

Logical Relevance

Supra.

This evidence will show that Tom's criminal tendencies caused he and Sarah to have a rocky marriage. It may also bring into question the veracity of their marriage.

Legal Relevance

Supra.

The prejudicial effect of this testimony will not substantially outweigh its probative value.

Impeachment — *Bias*
needs full discussion

Supra.

Confidential Marital Communication

Communications made between a married couple, that are intended to be confidential, and are made during the marriage, will be privileged. Both spouses hold the privilege, and either can assert it on the other's behalf. Because both spouses hold the privilege jointly, they can keep others from testifying about the confidential communication, including the other spouse, and the privilege may not be unilaterally waived.

Here, because Tom and Sarah were married at the time that Sarah made these comments, and because they were made in confidence, then either Sarah and/or Tom could assert this privilege and keep Sarah from answering the question.

Spousal Immunity

In criminal trials, the spouse of the defendant may seek to assert the spousal immunity privilege and refuse to testify at all. The spousal immunity privilege applies to parties who are married at the time of the trial, regardless of whether the events took place before they were married. The spouse of the defendant holds the privilege and can assert it or choose to waive it unilaterally.

Here, Sarah, as Tom's wife, can choose to invoke the spousal immunity privilege and refuse to testify or answer questions altogether.

B. Embezzlement

Logical Relevance

Supra.

The crime of embezzlement brings Sarah's character and reputation for truthfulness into question. It has a tendency to make the jury not believe her prior testimony or question her veracity at all. Because her other testimony may be helpful to Tom, this will cast a shadow on that testimony and have a tendency to show that Sarah has a bad character for truthfulness.

Legal Relevance

Supra.

There are no facts to suggest that this evidence has prejudicial effect that will substantially outweigh its probative value.

Impeachment / by misd. conviction ~~(the evidence is inadmissible)~~ ~~because~~

Any party can impeach any witness, even their own. Impeaching is bringing an adverse assertion as to the credibility or veracity of a witness. Witnesses can be impeached through prior inconsistent statements, reputation or opinion, criminal convictions, bias or interest, sensory deficiency, prior bad acts - specific instances, or contradictions.

Criminal Convictions

Prior criminal convictions, (1) either federal crimes or misdemeanor crimes that are *crimen falsi* (showing dishonesty, deceit, etc.), such as embezzlement, may be introduced to impeach a witness, so long as they have occurred within the past 10 years. Other federal crimes may be introduced at the discretion of the court.

Here, the prosecution is attempting to impeach Sarah and bring her credibility into question. They are doing this by attempting to introduce her past crime of embezzlement. Because this crime is included in the *crimen falsi* category and includes elements of dishonesty, fraudulence, or deceit, it will be admissible as impeachable evidence. After showing a good faith effort, the prosecution can introduce extrinsic evidence should Sarah deny it.

END OF EXAM

• overall - very good
• good organization