Kern County College of Law

Evidence Examination

Fall 2023

Profs. N. Roth & E. Schlaerth

Instructions:

Answer Three (3) Essay Questions

Time Allotted: Three (3) Hours.

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Question 1

Harvey is being prosecuted for sexual assault and rape. The charges arose after the victim, Vicky, called police and reported a sexual assault. While on the phone with 911, she told operators that a man (who she described over the phone as approximately six foot two and 250 pounds, wearing a white T-shirt, blue jeans, and with a barbed-wire style tattoo around his right bicep) raped her and then fled as soon as she pulled out her phone to call 911. She said that she was horrified and traumatized, and wanted police to respond immediately.

Police arrived and circled the area, attempting to locate anyone matching the description. While police were circling, Vicky spoke to other officers on scene and gave a more detailed statement. She reiterated her description, and said that while she was walking home from a friend's house, an unknown man approached her from behind, struck her over the head from behind with an unknown object, causing her to fall. He then forcibly dragged her to a nearby empty building, assaulted her, and then fled as soon as she pulled out her phone to dial 911. Officers asked Vicky if she needed an ambulance, and she said that she didn't know, but that her head was still incredibly sore and that she had an intense migraine headache. Police called for an ambulance. Before the ambulance arrived, other officers arrived at Vicky's location, with Harvey in the backseat of their patrol vehicle. Vicky saw Harvey through the window of the patrol car, and without any prompting, shouted "that's the man who raped me!" as she pointed at Harvey.

Vicky testified at a preliminary hearing in the case. But due to scheduling issues, the case did not proceed to trial for two years. Once trial finally began, prosecutors contacted Vicky over the phone, but learned that she had moved to another town about 50 miles away. She told prosecutors that she was not interested in testifying and would refuse to testify if asked, because she just wanted to put this whole ordeal behind her and not think about it. Ultimately, she did not testify at trial.

Assume that the prosecution is occurring in the Kern County Superior Court (a court within the jurisdiction of the state of California).

1. A trial, the prosecutor seeks to introduce the following: a) The recording of Vicky's statement to the 911 operator; b) Vicky's initial statement to the police on scene (through the testimony of Officer Lopez, who heard the statement); c) Vicky's statement pointing to Harvey and shouting that he raped her (also through the testimony of Officer Lopez, who heard the statement); d) Vicky's statement to police about her headaches (also through the testimony of Officer

Lopez, who heard the statement); and e) Vicky's prior testimony at the preliminary hearing (via a certified transcript). The defense objects to each statement on hearsay and Confrontation Clause grounds. What responses should the prosecutor give for each statement? What result for each?

2. During their investigation of the case, the defense team subpoenas Vicky's past medical records. Those records reveal that when Vicky was 5 years old, her uncle molested her, and while doing so, he shook Vicky violently. They also reveal that for over 20 years afterwards through present day, Vicky was in and out of the hospital with complaints of debilitating migraines. The records also include a narrative written by Dr. Carter, who writes that, in his medical opinion, Vicky suffers from shaken baby syndrome, which is responsible for the lifelong headache symptoms. The prosecution objects to the admissibility of these records. Please discuss any evidentiary issues that arise from the prosecution's objection to the admissibility of the medical records, what objections if any the prosecutor could make, and what result for each objection.

3. The prosecution team, during their investigation, discovers that Harvey was convicted of indecent exposure (a misdemeanor) when he was 20 years old. He is 35 at the time of trial. The prosecution also discovers that when Harvey was 30, another county charged Harvey with domestic violence as a felony, but the charge did not result in a conviction. The prosecution seeks to introduce evidence of both using certified court documents. What objections can the defense attorney make to each? For each objection, what result? When answering, assume that the defendant did not end up testifying.

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Question 2

Mike is being prosecuted for robbery. It is alleged that he went into a Target store, grabbed several pairs of headphones, and walked out of the store with them hidden under his jacket. A loss prevention officer (Paul) noticed this and approached Mike. He grabbed Mike on the arm, but when Mike turned, he punched Paul in the shoulder, and then ran away before an arrest could occur. The entire incident was caught on video surveillance, and Mike was later apprehended by police officers who recognized him. Several witnesses observed part of the incident. A five-year-old child (Tyler) saw Mike in Target on the day in question, and saw him put something in his pocket. Tyler doesn't know, however, what Mike put in his pocket.

Another Target customer and witness (Bob, 57 years old) remembers hearing Mike muttering the following statements to himself: 1) "Damn Target stole my job, this whole place should be lit on fire," 2) "I need some headphones to cancel out all of the government's hidden microchips and bugs, they're everywhere," and 3) this is just like the last time I did this, the only guard here is that fat old guy." Bob is also prepared to testify that he thought Mike was acting very bizarrely, like he was either mentally ill or on drugs.

The prosecution also has a witness (Frank) who is the manager of another Target store. Frank is prepared to testify that, about two years before the current robbery in question, he was working at another Target location in Bakersfield. An employee (Susan) came up and told him that she caught Mike attempting to conceal random computer products (including chargers, adapters, USB sticks, etc.) in his coat. Frank came out and confronted Mike before Mike had a chance to run out of the store, and Mike put the items back. No charges resulted.

Assume the trial takes place in the U.S. District Court for the Eastern District of California (a court within the federal jurisdiction of the United States of America).

1. The prosecution seeks to call Tyler to the stand. What objections, if any, should the defense make? What result for each?

2. The prosecution seeks to call Bob to the stand. The prosecution seeks to introduce only the third statement that Bob heard, referenced above (about this being "just like last time"). What objections, if any, should the defense make? What result?

3. The defense also seeks to call Bob to the stand. The defense seeks to introduce the first and second statements that Bob heard, to help establish that Mike was mentally ill at the time and did not harbor the specific intent necessary for robbery. The defense also seeks to ask Bob questions about Bob's observations of Mike. What objections and/or other requests should you make if you are the prosecutor? What result for each?

4. The prosecution seeks to call Frank to testify about what Susan told him, and about what he observed and did in the scope of his duties as a Target manager that day. What objections should make if you are defense counsel? What result?

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Question 3

Dallas was celebrating her 22nd birthday. Her best friend Jordan planned to throw a large house party in honor of the occasion. On the day of the party, Dallas and Jordan exchanged a series of text messages discussing their plans to drink alcohol and use controlled substances at the party. As the time for the party drew near, Dallas was running late because her preparations were taking longer than expected. By the time she left her home, it was already 9:00 pm and raining. She continued to exchange text messages with Jordan, even as Dallas drove 70 mph in a 45 mph zone.

Meanwhile, Parker was cruising around town on his motorcycle. The brake lights of his motorcycle were not operative. He approached an intersection and came to a full stop at a red light. When the light changed to green, he entered the intersection to make a left turn and was struck by Dallas's vehicle, as she ran a red light (driving 70 mph in a 45 mph zone). Parker was thrown from his motorcycle and suffered permanent and debilitating injuries. Parker sued Dallas for negligence.

Parker seeks to admit the following evidence at trial:

1. Parker offers certified DMV records of Dallas's driving history which reflects that she had received three speeding tickets in the last five months. Dallas paid the fines and attended and completed traffic school for the tickets.

2. Parker also offers a police report and citation that shows that Dallas had a collision a year earlier, where she was found at fault for driving at unsafe speeds for the road conditions.

3. Parker offers the text messages sent between Jordan and Dallas discussing their plans to engage in alcohol and controlled substance use at the party.

4. Parker offers Dallas's statements after the collision where she stated, "I know I caused the accident. I'll pay for your medical expenses and repair costs in cash if we can settle this without getting my insurance involved."

Address the admissibility of the evidence according to the Federal Rules of Evidence and indicate how the court should rule. Limit your responses to application of the law of evidence.

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Question 1 Suggested Answers

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a. It is hearsay, but spontaneous statement exception applies (C.E.C. 1240). Second part would also fall under state of mind exception (C.E.C. 1250). No Confrontation issue, as statement is not testimonial under *Davis*.

b. It is hearsay, and no exception likely applies. Confrontation issue is debatable because the perpetrator has not been caught yet, but given that police are on scene, it is likely testimonial and there would be an issue.

c. It is hearsay, but spontaneous statement exception likely applies (C.E.C. 1240). Likely no Confrontation issue, since the statement was not testimonial.

d. Hearsay, but state of mind exception (C.E.C. 1250) applies, as does statement made for medical treatment (C.E.C. 1253). Likely no Confrontation issue, as the statement was made for purposes of treatment rather than to preserve testimony.

e. Hearsay, and unavailability exception (C.E.C. 1291) possibly applies, but probably not, as the facts are not sufficient to establish legitimate unavailability. Confrontation Clause likely applies as well, since the witness did not testify at trial and there is insufficient justification to establish unavailability.

2. The rape shield law applies – defense would have to follow requirements of C.E.C. 782, including notice, proper affidavit, surviving E.C. 352 analysis, etc. Evidence is relevant because it could explain a reason for the headaches that does not involve Harvey's alleged actions. Evidence is hearsay – business records exception applies to the records generally, but it would not capture Dr. Ouch's diagnosis, so that would have to be redacted.

3. For the misdemeanor, defense could object for improper character evidence (C.E.C. 1101(a)), but this would not apply under C.E.C. 1108. Defense could still object on C.E.C. 352 which would likely be granted, given the difference in the offenses and the gap in time. Defense could object for hearsay 0 C.E.C. 1300 would not apply because it is not a felony conviction. But, the public records and business records exceptions would likely apply. For the domestic violence arrest, defense could object for improper character (1101(a)), and that should be sustained. No 1101(b) purpose likely applies – showing animus towards women is not specific enough to establish either a habit or a modus operandi. C.E.C. 1109 does not apply, because the present case is not a domestic violence allegation.

4. Defense can object for lack of foundation and speculation as to Becky's opinion that Vicky is permanently traumatized (probably overruled, it could be an appropriate lay opinion based on Becky's personal observations), and it would have to survive the procedures of the rape shield law, C.E.C. 782. Under federal law, Becky's opinion may arguably be inadmissible since it could be categorized as improper reputation or opinion evidence, but California does not have the same prohibition.

Question 2 Suggested Answers

1. Defense should object for competency. Could also object for relevancy and FRE 402, which should be overruled, since the testimony corroborates that Mike took something.

2. Defense cannot object for hearsay (it's the statement of a party opponent), but defense should object for improper character evidence. The statement suggests that Mike robbed the Target before, and would be inadmissible to establish that Mike had a character or propensity to commit crime. The nature of the prior incident is not specific enough to establish a habit or custom. It could possibly be relevant to establish an overarching plan by defendant, but the evidence is likely not specific enough to warrant admissibility under this theory.

3. Object to hearsay for each – not a statement of a party opponent since its being offered by the defense. For statement 1, defense is seeking to admit not for its truth but as circumstantial evidence of Mike's state of mind, but the statement is not bizarre enough to establish mental illness, so it may be irrelevant for that purpose. But, if admitted for its truth, it could also be admissible under FRE 803(3) (then-existing statement of intent, state of mind, or plan). For statement 1, it is not offered for its truth and does go to defendant's state of mind, so not hearsay. Prosecution could object on FRE 403 grounds, and if overruled, ask for a limiting instruction. For Bob's observations, no objection to Mike acting bizarrely, but could object for speculation and lack of foundation as to Mike acting like he was crazy or on drugs, unless Bob can establish his experience with those topics.

4. Defense can object on hearsay grounds to what Susan told Frank, but this may be admissible for the non-hearsay purpose of explaining Frank's future actions. Defense can object to the remainder as improper character evidence. No charges resulted, but bad acts still qualify as inadmissible under FRE 404(b). May be relevant to prove a unified plan/lack of mistake on behalf of Mike – this is a little weak but would be bolstered if the statement about needing to "get electronics to cancel out the microchips" is admitted.

Q3

Evidence 1: Certified DMV Records (25 points)

- Relevance

- If offered to show that Dallas was speeding on the day of the incident, not relevant.
- If offered to show that Dallas had knowledge that speeding
  - Court will examine the surrounding circumstances of the previous incidents and compare them with the alleged facts of the incident that is the subject of the trial.
  - If the earlier events took place under conditions with characteristics that were similar to the conditions preset at the tie of the event that is the basis of the suit, the information about then will be considered relevant.

- Probative v. Prejudicial
  - Simon v. Kennebunkport: where proponent can show that the other accidents occurred under similar circumstances substantially similar to those prevailing at the time of the injury in question such evidence admissible subject to exclusion by the trial court when the probative value of the evidence on the issues of defect, notice, or causation is substantially outweighed by the danger of unfair prejudice or confusion of the issues or by the consideration of undue delay
  - The tickets are more prejudicial than probative. Speeding alone is not a similar circumstance to the current case.

Evidence 2: Police Report of prior incident (25 points)

- Relevance
  - If offered to show that Dallas was speeding on the day of the incident, not relevant.
  - If offered to show that Dallas had knowledge that speeding
    - Court will examine the surrounding circumstances of the previous incidents and compare them with the alleged facts of the incident that is the subject of the trial.
    - If the earlier events took place under conditions with characteristics that were similar to the conditions preset at the tie of the event that is the basis of the suit, the information about then will be considered relevant.
- Probative v. Prejudicial
  - Simon v. Kennebunkport: where proponent can show that the other accidents occurred under similar circumstances substantially similar to those prevailing at the time of the injury in question such evidence admissible subject to exclusion by the trial court when the probative value of the evidence on the issues of defect, notice, or causation is substantially outweighed by the danger of unfair prejudice or confusion of the issues or by the consideration of undue delay
  - The evidence of the prior collision is similar in circumstances and the prior incident is not remote in time.
  - Similar Accidents of Injuries
    - Where similar accidents or injuries were caused by the same event or condition, evidence of those prior accidents or injuries is admissible to prove:
      - The a defect or dangerous condition existed
      - That a defendant had knowledge of the defect or dangerous condition; and
      - That the defect or dangerous condition was the cause of the present injury
    - Notice – least similarity because the prior act is only relevant to show that the defendant knew of the dangerous condition

- Causation or Negligence – a high degree of similarity between the plaintiff's incident and the prior incidents are required
- Prior bad acts are not admissible (FRE 404(b))
  - Unless offered to prove motive, identity, absence of mistake or accident, intent, common plan or scheme, opportunity, knowledge, or any relevant fact other than the accused general bad character or criminal disposition
  - Knowledge of speeding is a failure to comply with duty to drive safely and repercussions when driving in that manner results in a collision
- Public Records Exception

Evidence 3: Text Messages (25 points)

- Relevance
  - Offered to show that Dallas was distracted while driving on the date of the incident and therefore driving unsafely.
- Probative v. Prejudicial
  - Probative value needs to substantially outweigh the prejudicial value
    - Substantial danger of undue prejudice
    - Substantial danger of confusing the issues
    - Substantial danger of misleading the jury
  - Prejudicial because will confuse the issue when collision was due to Dallas speeding and being distracted while driving
  - Alcohol and controlled substance use would confuse the issue, raise prejudices of the jury
  - Showing that Dallas was using her phone would be more probative and not as prejudicial but the actual text messages would be too prejudicial
- Therefore should be excluded.

Evidence 4: Dallas's Statement (25 points)

- Relevance – admission of culpability and knowledge
- Not hearsay - Admission by party opponent
- Offer to Compromise (FRE 408)
  - Must be a claim to exclude – filing is not needed but there must be some indication, express or implied, that a party is going to make some kind of claim.
    - Party's volunteered admission of fact accompanying an offer to settle immediately following the incident is usually admissible because there has not been time for the other party to indicate an intent to make a claim.
  - Claim must be disputed as to liability or amount to be excluded
- Offer to pay medical expenses (FRE 409)
  - Evidence that a party offered to pay the injured party's medical expenses is not admissible to prove liability for the injury (humanitarian motives)
  - However, admissions of fact that accompany the offers to pay medical expenses are admissible.

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1. **Vicky's statement to the 911 operator is admissible hearsay.**

Evidence is not admissible unless it is relevant (Cal. Evid. Code 350.) Evidence is relevant if it is logically relevant - that is, it tends to prove or disprove a material fact at issue, and legally relevant if it is not excluded by statute.

The statement to the 911 operator is logically relevant.

The identity of the perpetrator of any crime is always an element for the prosecution to prove. Here, Harvey is being prosecuted for sexual assault and rape - and the identity of Harvey is at issue, because identity is an element of these charges. Other elements of the charges can be proven up through the 911 call as well - Vicky told the 911 operator that harvey raped her and fled as soon as she pulled out her phone. Vicky's description of the perpetrator to the 911 operator gives the operator a physical description of the perpetrator. She described his appearance, distinctive markings, and the clothing he was wearing. Each of these descriptions are logically relevant because they are useful to prove the identity of the perpetrator. She also described the defendant's conduct - that he raped her, and then fled (which is not an element of the charges, but evidence of flight is admissible evidence of consciousness of guilt, which may properly be considered by the jury.) Therefore, Vicky's statement to the 911 operator is logically relevant.

The statement to the 911 operator is legally relevant.

Relevant evidence may be excluded by the court for several reasons. Relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect, if its admission would result in an undue consumption of time, if its admission would confuse or mislead the jury, or if the evidence is cumulative.

As previously stated, the 911 call is highly probative to prove the identity of the perpetrator of the crimes in this case. The admission of the 911 call would not result in undue consumption of time - the time consumed in court would be a short examination of the 911 operator to authenticate the recording, and the time it takes to play the recording. The admission would not confuse or mislead the jury. The 911 call is very strong evidence of the identity of the perpetrator, which is a fact in issue in this case. There is also no danger of misleading the jury, since the defendant who was arrested matched the description given over the phone. The evidence could be cumulative, but for reasons discussed below, the actual identification of the defendant in the field may not be admitted.

Even if it were, though, the cumulative nature of this evidence is slight and does not substantially outweigh its probative value. Therefore, the 911 call made by Vicky would not be excluded pursuant to Evidence Code section 352.

Vicky's statement about the defendant's appearance is not hearsay.

A statement is only hearsay if it is admitted to prove the truth of the matter asserted. Out of court statements offered for another purpose (such as identity, effect on the listener, common scheme or plan) are not hearsay. The first portion of Vicky's statement to the 911 operator is not hearsay, since it is being offered to prove the identity of her assailant. The portion of her statement to the 911 operator will likely be admitted as non-hearsay to prove identity. The jury must specifically be instructed that that portion of the 911 call describing the defendant's appearance is admitted for the limited purpose of proving the identity of the defendant.

The statement to the 911 operator about the rape and Harvey's flight is hearsay within an exception.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. (Evid. Code section 1200.) The 911 call is being offered by the prosecution to prove that each of the things Vicky said in the 911 call happened - that the defendant raped her, and that he fled after she pulled out her phone. Hearsay is not admissible unless it falls within an exception to the hearsay rule.

Present Sense Impression

The present sense impression exception to the hearsay rule allows evidence that is ordinarily excluded by the hearsay rule to be admitted if the statement made was made to explain, narrate, or describe events while they are happening, and the declarant is currently perceiving them. The public policy ground for this exception is that these statements tend to be truthful and accurate, because there is no time for the declarant to fabricate their statement. The statement is made while the event is ongoing, and is inherently trustworthy. This is why this exception has been codified. However, the present sense impression exception is not a good fit for this fact pattern - Vicky was not on the phone with 911 while she was being raped or in the room with her assailant, so her statement to the 911 operator is not admissible via the present sense impression.

Excited Utterance

A similar, but distinguishable, exception to the hearsay rule is the excited utterance exception. If the declarant is under the stress or excitement of an exciting event or occurence when they make the

statement, even if they make the statement after the conclusion of the event, the statement is admissible. This is more appropriate to this fact pattern. Immediately after the rape, Vicky called 911. She told the operator she was horrified and traumatized and needed a police response immediately. It is clear from her words that Vicky was definitely under the excitment and stress of being assaulted, and because of the short lapse of time between the event and her narration, it is likely that her account given to the 911 operator was trustworthy. Because Vicky's statement to the 911 operator was an excited utterance, it is hearsay within an exception and will be admitted.

Vicky's statement to the 911 operator was non-testimonial and therefore not subject to exclusion under *Crawford*.

Even if a hearsay statement is admissible pursuant to an exception (as Vicky's statement to the 911 operator is) it may still be excluded due to constitutional considerations. *Crawford v. Washington* requires the court to analyze the contents of a hearsay statement to determine if the right to confront and cross examine the declarant is present. A defendant has the right to confront and cross-examine the declarant if their statement is *testimonial.* A statement is testimonial if it was given under circumstances where the declarant specifically knew or had reason to know the statement would later be used to prove something in a court case. The judge, in deciding whether a statement is testimonial, is how close in time to the event the statement was made, the circumstances under which it was made, and to whom the statement was made. Here, Vicky made the statement to a 911 operator. Her primary purpose in giving the statement to the operator was to get a quick police response for her own safety. The statement did not describe anything other than the event, her injuries, and the description of the perpetrator who was at large at the time the 911 call was made. Further, she did not have an opportunity to reflect on her statement or fabricate her story prior to making the call to 911. The court would likely find that the statement was non-testimonial in nature, and the admission of the statement would not violate the defendant's right to confront her. The statement, therefore, does not violate the rule in *Crawford* and will be admitted.

Because all portions of the 911 call are relevant, probative, there is an appropriate exception to the hearsay rule, and the defendant's right to confront her is not violated by its admission, Vicky's call to 911 will be admitted in its entirety, subject to a limiting instruction as described above.

Vicky's statement to police is hearsay within an exception.

Vicky's entire statement to the police is hearsay if admitted to prove the truth of each of the matters asserted. She narrated the entire offense to the police, and her narration of the events is offered to prove that each of the events happened the way she described. The only portion of her statement

that is not inadmissible absent an exception is her description of the defendant, which again goes to prove the identity of the defendant.

Excited Utterance

The entirety of the statement Vicky made to police was made while she was still under the stress and excitement of the offense committed against her. Even though it took them some time to respond, she was still suffering the effects of the assault. The excited utterance exception to the hearsay rule applies to this entire statement as well.

Present Bodily Condition

The description of her head injury to police is also admissible under a separate exception to the hearsay rule. Vicky tells the officers that her head is still sore and she has an excruciating migraine headache. This evidence is admissible under the present bodily condition exception. A declarant making a statement about pain or injuries they are currently experiencing are admissible, even if they are not made to a medical practitioner. Here, she made a statement to the police that her head was still sore. This statement is admissible under this exception, as well as the excited utterance exception above.

Vicky's statement to police is not subject to exclusion under 352.

The statement Vicky made to police is extremely probative, since her statement encompasses all of the elements of the offense and provides a thorough narration of the details. The admission of this evidence is not unduly prejudicial, since it is the same information which would be elicited by the prosecution in their case in chief. All evidence against a defendant is prejudicial - but this evidence is not unduly so. Further, it does not confuse the issues or mislead the jury since the statement is directly on point to the issue the jury is tasked with deciding, and its admission would not be unduly time consuming or cumulative.

Vicky's statement to police violates the defendant's right to confront her and will be excluded under constitutional grounds.

As stated above, testimonial statements are excluded in criminal prosecutions if they are otherwise admissible hearsay if their admission violates the defendant's right to confront and cross-examine witnesses against him. Here, Vicky made a statement to police officers after they arrived on scene. Although portions of her statement are duplicative of the 911 call discussed above, Vicky was making them to an officer who was (presumably) making a report of a crime during an investigation.

The statement was made during the course of an officer's investigation and Vicky was sure to know that her statements would later be used as evidence against the defendant later if he was apprehended. Because of their testimonial nature, these statements to police will not be admissible at trial because their admission would result in a violation of Harvey's right to confrontation.

Even though the statement made by Vicky to the officers is hearsay within an exception, it is inadmissible because its admission would violate the Defendant's constitutional rights.

Vicky's identification of Harvey is hearsay within an exception.

An out of court identification is hearsay within an exception. Here, Vicky identified Harvey as her assailant when she was in the field. This identification may be used at trial, as long as Vicky testifies and is subject to cross examination. In this case, however, Vicky is not available to testify at trial. She is not, therefore, subject to cross-examination and her out of court identification would not be admissible. However, Vicky testified at a prior proceeding under oath, and the defendant had a full opportunity to cross-examine her at that time. As long as the prosecutor introduced her out-of-court identification of Harvey at the preliminary hearing, and the defendant had the opportunity to cross-examine her about it, then her identification of Harvey in the field will be admissible at trial. However, if the prosecution did not introduce the out-of-court identification at the preliminary hearing, the defense did not have the opportunity to test her memory and perception. The out of court identifcation would not be admissible under these circumstances, because an out of court identification is not admissible if the declarant is unavailable to be cross-examined at trial.

The prosecutor may also argue that Vicky's identification of the defendant is admissible as an excited utterance. The prosecutor may argue that Vicky was startled and stressed by seeing her attacker again, but this is unlikely to be startling or stressful enough to prompt a true spontaneous statement within the meaning of the hearsay exception. It is possible that the court may allow the statement in under this ground, but it is unlikely for the reasons stated above.

Vicky's prior testimony is admissible because Vicky is unavailable as a witness.

Prior testimony of a witness, given under oath at a court proceeding involving the same parties, is admissible hearsay if the declarant is unavailable. *Unavailable* means that the declarant has died, is physically unable to testify, or has left the jurisdiction of the court. Assuming the town that Vicky moved to was outside Kern County, then she is not under the jurisdiction of the court and is unavailable to testify.

Vicky testified under oath at the preliminary hearing in this case. The same prosecuting agency and the same defendant were present in court, and the defense had a full opportunity to cross-examine Vicky when she testified at the preliminary hearing. Because the defendant's right to cross-examine her was preserved and the prior testimony of unavailable witness exception to the hearsay rule applies under these facts, Vicky's testimony at the preliminary examination will be admissible in full. The testimony can be presented to the jury in the form of a certified transcript, or it can be read into the record by the prosecutor. If, however, Vicky were to change her mind and decide to testify at trial, her preliminary hearing testimony would not be admissible except to impeach her with prior inconsistent statements, or rehabilitate her with prior consistent statements. As it stands, though, Vicky is not willing to testify and is outside the jurisdiction of the court, so her preliminary hearing testimony comes in.

2. Medical Records are generally admissible as business records if they are relevant.

Medical records are hearsay, because they are admitted to prove the truth of the matter contained in them, however they usually fall within the business records exception. Records compiled during the normal course of business by an employee with knowledge of the facts recorded who is under a duty to record the facts they contain are admissible hearsay, if they are properly authenticated by a custodian of records or the person who prepared the records. Here, all the medical records proffered by the defense would be admissible under this exception, if they are relevant and not otherwise excluded under a different section of the evidence code.

Rape Shield Law

California Evidence Code section 1103 is commonly cited as the rape shield law. This prevents otherwise admissible evidence from being admitted to prove past sexual conduct of the victim. The information being offered by the defendant is about the victim's medical condition, not about her prior sexual history, so the rape shield law is not applicable in this case.

Relevance of the Records

The records sought to be admitted by the defense must be relevant. Evidence that casts doubt on either the credibility of the victim or their ability to accurately perceive or remember events is relevant. Here, the records sought to be introduced by the defense are about shaken baby syndrome and the victim's headaches. It is possible that the evidence could have some bearing on the victim's ability to perceive or accurately remember the details about the things which she testified to (or made prior statements about) but this evidence is marginally probative at best.

Expert Testimony of Dr. Carter

Dr. Carter (presumably a medical doctor) is offered by the defense as an expert. Ordinarily, a witness must have personal knowledge of the things they testify to. However, an expert is not subject to this requirement. An expert witness (which is any witness which has special training or experience, whose expertise may aid the trier of fact) is not required to have personal knowledge about the things on which they opine. They are allowed to form opinions based on other evidence, as long as the other evidence is properly admissible. See *People v. Sanchez.* This includes hearsay evidence, but the expert may not relate hearsay evidence to the jury unless the evidence is otherwise admissible. Here, Dr. Carter opines that Vicky has shaken baby syndrome. This testimony is permissible, since he has formed his opinion based on medical records which are admissible via a hearsay exception. He further opines that the shaken baby syndrome is the cause of the victim's headaches. This could lead the jury to believe that Harvey was not responsible for all of Vicky's injuries.

The records, and the testimony of Dr. Carter, will likely be excluded under 352.

The records, and the opinion of Dr. Carter which is based on the records, are only marginally probative in this case. They offer an alternate explanation of the head injury suffered by Vicky. The injury to Vicky's head is not relevant to the charges of rape and sexual assault - injury is not an element of either offense. They may be relevant to the issue of Vicky's memory or ability to perceive, but this is unlikely since the majority of the prosecution's evidence is hearsay statements made by Vicky to the 911 operator and police officers, which was made at or near the time of the incident. Further, Vicky is no longer available as a witness, so the prosecution is prejudiced by not having the opportunity to present rebuttal evidence from Vicky about her medical history or the effects of her shaken baby syndrome. Finally, the presentation of this evidence would likely confuse the jury. The jury would be tasked with wading through a large amount of barely-relevant evidence to determine if Vicky even had shaken baby syndrome - which again is not relevant to the charges against Harvey. For all of these reasons, the Court would exclude the evidence under 352, even if the evidence was relevant and otherwise admissible.

3. Harvey's prior bad acts are admissible as character evidence under sections 1108 and 1109.

Evidence Code section 1100 makes evidence of a defendant's character inadmissible if it is offered to prove the defendant's conduct at the time of this offense. There are, however, two important exceptions to this rule: prior sexual offenses are admissible under evidence code 1108 to prove that

the defendant has a propensity for sexual crimes, and evidence code section 1109 makes prior domestic violence offenses admissible to prove that the defendant has a propensity to commit those types of crimes. That evidence is not, however, automatically admissible. The trial court still must evaluate the evidence under evidence code 352 and exclude evidence which is unduly prejudicial, confusing, inflammatory, or would result in an undue consumption of time.

Harvey's misemeanor conviction of indecent exposure is inadmissible because of its remoteness and prejudicial effect.

Harvey was convicted of misdemeanor indecent exposure 13 years prior to the date of the incident in this case (and 15 years prior to trial.) Remoteness is a factor to be considered when the court is weighing the prejudicial effect of prior sexual offense evidence against a defendant. Here, the incident is quite remote. It can be assumed that the defendant did not suffer any subsequent convictions for sexual offenses. The remoteness weighs very heavily in favor of the defendant and it would likely be excluded. Further, it is unlikely that the defendant would be able to raise any evidence whatsoever to defend himself against that crime - the conviction was 15 years ago at the time of trial, and if there were any witnesses to it, they are probably not accessible to the defendant. The prosecution can prove the offense very easily - the computerized record of conviction of the court is admissible as a public record and admissible to prove the offense charged. Finally, the jury is likely to be biased against the defendant and punish him for his prior bad act. All of these weigh in favor of the defendant, and the court will likely exclude this evidence under evidence code 352.

Harvey's prior domestic violence incident is inadmissible because there is no certified record of conviction, and the prosecution is not offering any other evidence to prove it occured.

It is not necessary for a defendant to have actually been convicted of an offense for it to be admissible under section 1109. The prosecution may bring in percipient witnesses who can testify to the offense and the facts of the case. Because there are no witnesses being offered to testify to the event, and the only evidence available are certified court documents showing the defendant has been charged with its commission, the certainty of the commission is very low. The jury could very easily be misled to believe that because the defendant was charged, he was guilty - but this is, of course, not true. The defendant may also not be able to defend against the charge, since any witnesses favorable to him would be difficult to locate 5 years after the incident. Finally, the issue of whether or not the defendant actually comitted felony domestic violence would result in a "trial within a trial" and the undue consumption of time that would necessitate favor exclusion. For each of these reasons, the court should exclude the felony domestic violence under 352.

2)

1. Tyler may testify if his testimony is relevant and he is competent as a witness.

Tyler's testimony in this case is probative - his testimony would prove the identity of Mike, the presence of Mike in the target store, and the actions of Mike once he was in the store. All of these facts go to prove the charges against Mike, so they are logically relevant to this case.

Tyler will testify to his observations. He has personal knoweldge of what he saw, and is not expected to testify to any hearsay statements made by anyone. Because he has personal knowledge of the events, and was an eyewitness to each of the things he is expected to testify to, there are no legal relevance objections to be made.

However, the Defense's best objection to Tyler's testimony is that he is incompetent as a witness. A witness may only testify if they are capable of taking an oath, understand the difference between a truth and a lie, and understand the importance of telling the truth. There is no rule in the federal rules of evidence which disqualifies a witness based solely on age. The court is, however, required to conduct voir dire on the witness to determine whether or not he understands the difference between a truth and a lie, and whether he understands the importance of telling the truth in court. Under certain circumstances, the oath administered by the clerk or the court can be modified to impress the gravity of the situation upon a child witness - for instance, simply making a child witness "promise to tell the truth" is often enough to satisfy the oath requirement

As long as Tyler can distinguish between a truth and a lie, and understands the importance of his promise to tell the truth in court, the defense objection to Tyler's testimony based on incompetence as a witness will be overruled. There are no other reasonable objections the defense can make to his testimony.

2. The defense will object to Bob's testimony based on hearsay, improper character evidence, and prejudicial under 403. Each objection will be overruled.

Bob's testimony that he heard the defendant say "this is just like the last time I did this, the only guard here is that fat old guy" may be admitted for numerous purposes. Depending on what the testimony is being admitted to prove, it may or may not be hearsay within an exception, and it may be impermissible character evidence.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. If the prosecution is using Mike's utterance to prove that Bob committed a prior theft, it is (according to the

federal rules of evidence) *not* hearsay. The federal rules exclude statements against interest. If a party to an action makes a statement against their own interest (it would either subject them to civil liability, or evidence against them in a criminal proceeding) then it is admissible. Here, Mike made a statement against his own interest that Bob overheard and is now testifying to. The statement could be used against Mike to prove a civil case for conversion, or a criminal case for theft. The contents of Mike's statement that Bob overheard would be admissible, since they are being elicited by the prosecution and against Bob.

But even though this would be a non-hearsay statement if the prosecution were using it to prove Bob committed a prior theft, this evidence is inadmissible under Federal Rule 404. Rule 404 prohibits the prosecution from introducing evidence of a defendant's criminal history in their case in chief. This statement would certainly fall within the meaning of 404 and be excluded, because the jury could use the statement Bob heard Mike say to convict him of a theft that wasn't at issue in this case.

If, however, the prosecution was *not* using the statement to prove Mike committed a prior theft from Target, and was instead using the statement for another allowable purpose (identity, common scheme, etc.) then it would not be excluded by Rule 404. The court would need to give the jury a limiting instruction, however. The jury would not be allowed to consider the statement for any other reason than proving the identity of the person who committed the crime charged, or if it were admitted to show a common plan or scheme, that the events were so similar that Mike was the one who committed it.

The court would also need to analyze the statement under rule 403 to determine if its probative effect were substantially outweighted by the prejudicial effect on the defendant. Here, the probative effect is dificult to gauge without knowing exactly why the prosecution was offering the statement and if other, less prejudicial evidence were available. If the statement were simply being offered to prove Mike was in the store, the court would likely exclude the evidence under 403 because Tyler's statement of identification would be sufficient to prove this. Bob could also simply testify that he saw Mike in the store. However, if the evidence were being offered to prove a common scheme or plan, or that he intended to steal the merchandise in question, then the evidence is extremely probative and would not be subject to exclusion under 403. It would also not be impermissible character evidence and would be allowed under 404.

Ultimately, there are a variety of permissible purposes for this evidence. A defense objection for improper character evidence would be sustained if the only purpose for which it was offered was to

prove Mike had a propensity for stealing; otherwise, an objection under 403 or hearsay would be overruled.

3. The prosecution would object to Bob's testimony as hearsay and improper opinion, and should be excluded under 403.

The other two statements made by Mike - that Target stole his job and should be lit on fire, and that he needs some headphones to cancel the hidden microchips - are both not hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. It might be true that Mike was fired by Target, but this isn't the point the defense is making. The defense is offering Mike's statements to prove his state of mind. The contents of both statements are both very probative of the defendant's state of mind. They suggest delusional thinking. This evidence is very relevant to Mike's state of mind. Because they are being offered to prove Mike's state of mind, and not the truth of the contents of his statements, the prosecution's hearsay objection will be overruled.

If, for some reason, the defense was offering the statements to prove that Target *did* fire Mike, and he *did* have microchips in his head, then the statements are hearsay without an exception. A defendant may not elicit his own hearsay statements, since they are not statements of a party opponent (explained above.)

Bob also opined that Mike was acting "bizarrely" and like he was "mentally ill" or "on drugs." Each of these statements is an opinion, but must be analyzed separately.

Opinion Testimony of Bob

Bob may testify to his own observations, and the federal rules of evidence do not prevent him from offering a lay-opinion. Lay-witnesses give their opinions all the time, and juries may give those opinions whatever weight they think they are worth. A lay-witness may testify to distance, or their perception of the weather outside, and these are not improper opinions because they generally have sufficient experience to lay a foundation for these types of opinions. Here, Bob testified that Mike was acting "bizarrely." This is not an expert opinion - there is no medical diagnosis for "bizarre." The prosecution is free to cross-examine Bob on what he means by "bizarre" and test the opinion and discredit it. It is within Bob's experience to testify to someone acting "bizarrely" since this is in the common experience of lay persons. The objection to the use of the word "bizarre" will be overruled - it is not an improper opinion.

The prosecution will also object when Bob testifies that Mike was acting "mentally ill." Although not specific like "schizophrenic", the testimony that Mike was "mentally ill" is an improper opinion. It is

not stated in the facts that Bob is a psychiatrist, nurse, physician, or other medical provider. He is not qualified to give a diagnosis to Mike. Because "mentally ill" is an improper opinion that lacks proper foundation, his testimony that Mike was "mentally ill" will not be permitted. An objection for improper opinion will be sustained.

Finally, Bob will testify that Mike was "on drugs." The prosecutor will also object to this as an improper opinion. This is a marginal case - if Bob attempted to opine to exactly *which* drug Mike was on, that would be an improper opinion. Bob is not a drug recognition expert and did not conduct a drug recognition examination on Mike. Bob would not be able to testify that Mike was "on meth" or "smoking crack." But it is within a lay person's common experience to identify someone they believe to be under the influence of a non-specific substance, and an objection to an improper opinion on this basis would likely be overruled.

Objection to Bob's testimony under 403

If the court overruled any of the previous objections, it may still sustain an objection under rule 403. The testimony is probative: defendant's mental state and specific intent are both necessary things to prove for a conviction, and the defense may bring forth testimony that speak to either of those two elements. However, the testimony of Bob as a lay witness has a tendency to mislead the jury. They may believe he is an expert when he is not. Overall, though, the probative value is not substantially outweighed by the prejudicial effect of the testimony and an objection under 403 will likely be overruled.

4. The defense will object to Frank's testimony on hearsay, impermissible character evidence, and 403 grounds.

Frank's testimony comes in two parts: the statement Susan made to him, and his observations after Susan made her statement. Susan's statement will be addressed first.

Susan's testimony is hearsay within an exception.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. If the prosecution is offering Susan's statement through Frank to prove that Mike stole from Target two years ago, then her statement is hearsay within an exception. The present sense impression exception applies to Susan's statement. She observed Frank putting merchandise in his coat and ran to tell Frank. Susan directly perceived an incident, and reported it to Frank immediately after it happened. There is no reason to believe Susan's statement was unreliable or that she had the time

to fabricate it. Because its truthfulness is not in doubt, it comes within the exception to the hearsay rule and is admissible.

Further, Susan's statement to Frank was non-testimonial and does not violate *Crawford.* The statement was made at the time Susan perceived the events. The statement was made to her manager and not law enforcement, and Susan had no reason to believe that the statement would be used in any court proceedings. Because her statement was not testimonial, it does not violate Mike's right to confrontation, and her statement will be admissible because it falls within an exception to the hearsay rule.

But, if the statement is being made to prove Mike committed a theft two years ago, it is impermissible character evidence prohibited by rule 404. Evidence of prior bad acts is not admissible to prove that the defendant acted in conformity with his propensity to steal and would be excluded on that ground. However, it is admissible to prove a common scheme or plan - the common scheme being Mike placing merchandise into his coat and walking out with it. It is also admissible to prove identity, if Susan gave an adequate description of Mike to Frank during her statement. There is reason to believe she did, as Frank was able to immediately apprehend Mike while he was leaving the store.

403 Analysis as to Susan's Statement to Frank

Even though Susan's statement to Frank is hearsay which falls within an exception, and may not be excluded under 404, it is still highly prejudicial. If it is admitted for the permissible purpose of providing identity or common scheme, then the probative value is slight: the crime is not distinctive enough to show a clear "signature". Plenty of people steal things from Target by sticking it in their clothes and walking out the door. Further, there is other available evidence to prove these elements: the testimony of Bob and the testimony of Tyler both place Mike at the scene, and Mike was discovered with stolen merchandise. To add the evidence from two years ago would be unduly prejudicial to the defendant and the evidence would be excluded under 403, even if it were otherwise admissible under 404.

Frank's observations of Mike two years ago is admissible and relevant, but an objection under 403 would be sustained.

After Frank confronted Mike, his testimony is that he found stolen merchandise in Mike's jacket. Frank directly observed Mike with the merchandise, and Frank may testify to his direct observations. There are no hearsay issues with this portion of Frank's testimony. But this is still impermissible

character evidence: evidence that Mike committed theft 2 years ago is not admissible to prove he committed theft on this occasion. The evidence may still be offered by the prosecution to prove identity or common scheme, but is still excludable under 403 for the same reason as Susan's statement to Frank. The statement is unduly prejudicial, and the probative value is substantially outweighed by its prejudicial effect.

3)

1. The certified DMV records are hearsay that fall within an exception, but are inadmissible character evidence against Dallas if offered to prove negligence.

The DMV records are logically relevant: they can prove that Dallas has a propensity to drive fast, and this propensity evidence would go to prove negligence in this case.

Hearsay is an out of court statement (written or oral) offered to prove the truth of the matter asserted. It is inadmissible, absent an exception. The DMV records are hearsay: they are being offered by Parker to prove that Dallas suffered three convictions for speeding within the last five months. The records fall within an exception: the public records exception to the hearsay rule makes the records admissible. The records document an official act or event (Dallas's convictions for speeding) and were made in the normal course of a public agency's duty. There is nothing to indicate that they are unreliable, so they fall squarely within the hearsay exception for public record and are admissible on that ground.

The records are inadmissible, however, because they are impermissible character evidence. Evidence of prior bad acts of a defendant are inadmissible in a civil trial to prove the defendant acted with negligence during the incident in question. They may, however, be admissible for other reasons. Dallas attended traffic school for each of the tickets she received. It is likely that at traffic school, Dallas was put on notice that speeding was dangerous and could cause harm to persons or property. The records of Dallas's convictions and subsequent attendance at traffic school are admissible to prove her knowledge of the dangerousness of her acts (or her duty of care to others - an element of negligence) but inadmissible to prove she was negligent on the date in question.

As long as Parker is offering the records to show Dallas's knowledge of her duty of care, the evidence is both logically relevant and legally relevant. It may be admitted, subject to a limiting instruction by the court.

2. The police report and citation are hearsay that fall within an exception, but are inadmissible for the same reason as her DMV records.

Police reports and citations are also hearsay evidence, subject to the same exception above. A police report is hearsay evidence and is *inadmissible* in a criminal prosecution. There is no such rule prohibiting its admission in a civil trial. But the court must tread with caution: police reports are not just the observations of the officers. They often contain other hearsay statements, which may or may not be admissible. If the officer who wrote the report interviewed witnesses and documented their

responses, and those responses did not come within other recognized exceptions to the hearsay rule (present sense impression, excited utterance, etc.) then the statements contained in the police reports would be inadmissible as double-hearsay, not within an exception.

But if the officers report contains only the officers observations and conclusions, then it is likely to fall within the public records exception of the hearsay rule as explained above. The citation, likewise, was issued by the officer and may be admitted into evidence under the public records exception.

Both the offense report and the citation are still excludable based on the prohibition of improper character evidence. If the report and citation are being offered to prove the defendant's negligence on the date in question, then the reports are not admissible. They would be improper character evidence under 404: the report and citation would be evidence of prior events offered to prove fault on the date in question. But they may be admitted for a permissible purpose. The report and citation could be admitted to show that Dallas knew she could cause injury or property damage by driving at an unsafe speed for the road condition. The report and citation would be admissible for this purpose, subject to a limiting instruction.

3a.The *contents* of the text messages between Jordan and Dallas are hearsay not subject to an exception, and even if they were, they are irrelevant, and highly prejudicial under 403.

Hearsay statements are admissible to prove that the declarant planned an action. If a declarant makes an out of court statement that they planned to do something, then that statement is admissible to prove they did the thing they planned to do. As an example, if on May 1, someone said "I am going to Portland on the 5th" and the issue to be proved was whether the declarant as actually in Portland on May 5th, the statement made on the 1st would be admissible.

Here, Dallas and Jordan planned to use drugs and alcohol at a party. If the statements were being used to prove that Dallas and Jordan actually *did* use alcohol and drugs at the party, then the statements would be admissible. However, Dallas was running late to the party and got in an accident on her way there. She is not accused of driving under the influence, and the accident occurred prior to any drug or alcohol use, if there was any. Her planned use of alcohol or drugs is therefore not relevant to prove that she was negligent - she did not actually use alcohol or drugs. The fact that she planned to do so is not probative of any element of the negligence charge and is inadmissible as irrelevant. There is also no hearsay exception, since there is no past conduct to prove. The contents of the text messages, therefore, is hearsay without an exception and should be excluded.

Even if the court found the contents of the text messages relevant, it should still exclude them under 403. There is little to no probative value to the proffered evidence: the fact that Dallas planned to use alcohol and drugs in the future is not relevant to her negligence on the way to use alcohol and drugs. But evidence that she planned to use alcohol and drugs is extremely prejudicial. It would make the jury inclined to find her negligent, even though there is no actual evidence of alcohol or drug use. For this reason, the court should exclude the contents of the text messages under 403.

3b.The *existence* of the text messages is both relevant and probative and should be admitted.

The fact that Dallas was texting with Jordan while she drove is extremely probative and relevant to an element of negligence. One element that the plaintiff needs to prove is that Dallas failed to use the care and caution of an ordinary person, thus breaching her duty of care to Parker. This can be clearly demonstrated by the existence of text messages sent and received by Dallas during the time of driving. The evidence is therefore logically relevant because it goes to prove an element of the claim.

The existence of the text messages themselves can be proven in a variety of ways. The most obvious way is that the plaintiff can offer Dallas's cell phone as a piece of real evidence, showing that text messages were sent and received at the time in question. The jury could examine the cell phone. As real evidence, the cell phone would not be hearsay. However, it would be difficult to show the existence of the text messages on the cell phone directly while redacting them to exclude the *contents* of the messages. The plaintiff could show phone records showing that text messages were sent and received between Dallas and Jordan, and those records could easily be redacted.

Those records, of course, would be hearsay since they are offered to prove the truth of the matter asserted. They would be offered to show that text messages were sent and received. However, these records would be subject to the business records exception to the hearsay rule. The records would be computer-generated printouts, and if they were properly authenticated by a custodian's affidavit, they would be admissible pursuant to an exception to the hearsay rule.

The court would not exclude this evidence based on 403, because the evidence is highly probative. It is prejudicial to the defendant, since it is evidence against her, but not unduly so. It would not necessitate an undue consumption of time, and the evidence would be easily understood by a jury. Therefore, redacted text messages between Jordan and Dallas would be admissible.

4. Part of Dallas's statement to Parker is admissible as a party admission, but the balance is excludable based on public policy grounds.

Statement against interest are not hearsay under the federal rules of evidence. A statement against interest is a statement made by a party to the litigation that is unequivocally against their pecuniary interest when the statement was made. Here, Dallas said "I know I caused the accident." This is an admission of fault and is admissible at trial as a statement against interest. Dallas will argue that the statement was made during settlement negotiations. This is true: the balance of her statement can be construed as settlement negotiations, which are generally inadmissible. But the initial statement of fault is a party admission, and admissible at trial.

Statements made during negotations are inadmissible because the courts do not wish to discourage people from engaging in frank settlement negotiations to avoid litigation. For a statement to be excluded as a statement made during negotations, there must be a claim or controversy at issue between the two parties. Here, it is unclear when Dallas made the statement. It is possible that Dallas made the statement to parker immediately after the accident. If this is so, then there was no prospect of litigation and it was not a true settlement negotiation. The entire statement would thus be admissible.

More likely, though, is that the statement was made after the possibility of litigation between the parties became apparent. This is bolstered by the last portion of her statement that she didn't want to get her insurance involved. But there was nothing said about a court case, so it is likely the entire statement will be regarded as a party admission. So the statement that she would pay for medical and repair expenses would be inadmissible as statements made during negotations.

Finally, the statement that she did not want to get insurance involved is also excludable. Evidence of insurance is only admissible to prove control and dominion over property and evidence of insurance is inadmissible for all other purposes. Therefore, the statement about having insurance is inadmissible.

END OF EXAM