

**Monterey College of Law**

**EVIDENCE**

Mid Term Examination

FALL 2024

Prof. J. O'Keefe

**General Instructions:**

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

EVIDENCE  
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### QUESTION #1

On a clear sunny day, Dash was riding an electric scooter from the Quick Silver Company. He was traveling at a safe speed when the scooter's wheels or the throttle locked suddenly. Dash lost control due to a loose handlebar and fell off the electric scooter.

Walker saw the fall and ran to assist Dash. Walker said to Dash, "That scooter suddenly locked up!" Dash replied, "My ankle is throbbing. It's fractured!" Walker said, "I am calling an ambulance."

Dash filed a products liability lawsuit against the Quick Silver Company based on based on negligence. The company asserted Dash misused the electric scooter.

Dash discovered that the company uses geo-fencing, (a location awareness device) which may have caused the scooter to automatically slow down or stop. This was not disclosed in the scooter user agreement. During the past year, Quick Silver Company has come under scrutiny for using old or damaged components to repair scooters in operation.

Assume that in each instance, all appropriate objections were made. Discuss all evidentiary issues that would likely arise in each section below and the likely trial court ruling on admissibility. Answer according to the California Evidence Code.

1. During Dash's case, he testified about riding on the electronic scooter, his fall, the pain and his statements to Walker.
2. Next, Dash offered Walker's testimony about the scooter locking up.
3. Then Dash offered the testimony from Booker, the custodian of records, of the Quick Silver Company. Booker testified regarding the company's use of old or damaged components for repairs was common. Also, Booker testified that the company had records of 325 prior complaints regarding the scooter's sudden stops.
4. During the Quick Silver Company's defense, the court allowed in a store a surveillance video of Dash on the scooter. It showed Dash dodging a dog right before his fall. The video was authenticated by the proper store owner.

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## Question 2

Asher and Crosby are on trial for conspiracy to assault and assault with a deadly weapon on Buzz.

At the Stumbles Bar, Asher and Crosby were playing pool. Buzz was waiting his turn and finally says, "Stop hogging the pool table." Both Asher and Crosby wink at each other and replied, "You asked for this!" Then Asher hits Buzz over the head with a cue stick which breaks in two. Crosby grabs the 8 -ball and slams it into Buzz's jaw. Buzz falls on the floor bleeding.

Thumper, the bouncer grabbed Asher and Crosby and ousted them from the bar. He said to both, "I saw the winks and the beating! You're done here!" Asher and Crosby hang their heads down and do not reply.

Tipsy, the bartender, tried to help Buzz who whispered, "I think I am dying." However, Buzz cannot talk anymore. Instead, Buzz used his finger to write in his own blood, "Asher - Crosby." Tipsy called an ambulance and the police. Tipsy used his cell phone camera to take a digital image of the bloody names. He gave the digital image to Officer Otis who proceeded to the hospital.

Officer Otis tried to interview Buzz, but the head injury is too severe. Buzz cannot recall the incident. However, one month later, Officer Otis returns, and Buzz now recalls the attack by Asher and Crosby. Also, Buzz identifies the cell phone digital image Tipsy took. Buzz slips into a coma and does not testify at the jury trial.

Assuming all appropriate objections and motions were timely made. How should the trial court rule on the admissibility of the following evidence? Answer according to the California Evidence Code.

1. During the prosecution's case, Thumper testified that he ousted the Asher and Crosby from the bar. Further, he testified that Asher and Crosby did not reply to his statement, "I saw the winks and what you did." After this, there was no reply.
2. Next, the prosecution presented Tipsy. Tipsy testified about Buzz's whisper and the digital image he took on his cell phone.

3. Finally, Officer Otis testified that Buzz did not recall the incident initially, but recalled weeks later, identifying Archer and Crosby. Also, Buzz told the officer that he wrote Asher -Crosby in blood and then identified the digital image.

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## EVIDENCE

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### Question 3

Defendant Darlene is charged with the first-degree premeditated murder of her husband, Victor. Darlene is claiming self-defense.

Discuss all evidentiary issues that would likely arise in each section and the likely trial court ruling on admissibility. Answer according to the Federal Rules of Evidence.

- 1 In its case in chief, the prosecution seeks to introduce evidence of marital discord and physical assaults that occurred prior to the homicide. Among the evidence the prosecution wishes to introduce are the following: quarrels between Darlene and Victor; domestic violence restraining order obtained by Victor against Darlene; and physical injuries to Victor from having been beaten by Darlene before the date of the homicide.
- 2 Next, the prosecution calls Roger, a close friend of Victor's. Rodger testifies that Victor told him shortly before Victor's murder, "I am afraid of Darlene." Rodger then testifies that Victor told him, "Darlene threatened to kill me."
- 3 Roger testifies that Victor had a reputation in the community for being peaceful and that in his (Roger's) opinion, Victor would never hurt a fly.
- 4 In the defense case in chief, the defense calls Peter. Darlene met in an inmate pen pal program while she was in custody pending trial. Peter will testify that he has known Darlene through the pen pal program for five months and in his opinion she is a peaceful and gentle person. On cross examination, the Prosecutor asks Paul if he heard that Darlene attacked a former co-worker after a work dispute. Paul states that he did not. The Prosecutor seeks to call Amy, Darlene's former co-worker to testify about the attack.

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*ANSWER OUTLINE*

*EVIDENCE – SLO & MCL*

*FALL EXAMINATION*

*FALL 2024*

*Profs. Lizardo & O'Keefe*

*ANSWER OUTLINE Q1 -DASH - (Prof. Lizardo)*

*Caution:* Summary or listing of issues outline only. Not intended to be considered a full analysis or discussion. Highlights only. For Hearsay issues, students should incorporate in the statement, then analyze if there are exceptions, then conclude in each issue what the court ruling on the issue would be.

**1. Dash's Testimony**

*LOGICAL RELEVANCY/CEC 250* Tendency Test- evidence is logically relevant if there is a tendency to prove or disprove any disputed fact of consequence.

*The plaintiff will argue that his observations of riding on the electric scooter when the wheels or throttle suddenly locked directly caused his ankle fracture is logically relevant to prove his injuries and damages because it tends to establish the scooter was defective. His eyewitness testimony is relevant because it is based on personal knowledge of how his ankle was fractured.*

*Defense, the Quick Silver Company will argue that D was at fault.*

*The trial court will rule that Dash's testimony is logically relevant.*

*LEGAL RELEVANCY/CEC 352* Balancing Test- the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that Dash's testimony as an eyewitness to his fall would waste judicial time, confuse or otherwise mislead or prejudice the jury.

*The trial court will rule Dash's testimony is legally relevant.*

*COMPETENCY-* for a witness to be competent to testify, CEC 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. Witnesses must have the capacity to observe, recollect, communicate and be truthful.

*Nothing in the facts suggests that Dash is impaired or lacking competency. His testimony on his observations will be admitted.*

*HEARSAY* – Out of court statement offered to prove the truth of the matter asserted. It is inadmissible unless there are exceptions. Dash's statement to Walker, "My ankle is throbbing; I think it is fractured!" is likely hearsay if offered to prove the personal injury.

*Some exceptions may be:*

- *CEC Spontaneous Statements – define - especially stressful event, analyze, conclude*
- *Contemporaneous Statements -define, do not include stressful events. More narrative.*
- *State of Mind (Physical Pain) – define, throbbing pain, Dash thought it was a fracture. Ok to discuss lay opinion, but not main issue.*

*Must reach a conclusion on each hearsay exception.*

## ***2. Walkers' Testimony***

*Logical Relevancy*

*Legal Relevancy*

*Hearsay*

*Statement #1 "That scooter suddenly accelerated!" "Hearsay Exceptions- Spontaneous Statement, Contemporaneous statement.*

*Statement #2 "I am calling an ambulance!"- Hearsay Exceptions- Spontaneous Statement, contemporaneous statement."*

*Must reach conclusions on each doctrine and rule.*

## ***3. Booker's Testimony***

*Logical Relevancy*

*Tends to establish product defect by company using old or damaged parts to repair*

*Legal Relevancy*

*Hearsay*

*Exceptions*

*Business Records-* *custodian or records, (Booker is) Duty to record, etc.*

*-Old or Damaged parts used- Records*

*Similar Happenings-* *Notice (375 prior complaints)*

*It should be admissible to prove the company knew due to the 375 prior complaints.*

## ***4. Video Surveillance***

*Logical Relevancy- Tendency Test*

*Defense: Tends to show comparative negligence since Dash is dodging a dog and was at fault. An Operator mistake and not a products liability issue.*

*Plaintiff Argument- not logically relevant since the dog may have contributed but scooter still defective by old or used parts and loose handlebar.*

Legal Relevance- Balancing test

*Balance probative value v unfair prejudice*

Writing

*Authentication- by store owner- foundation laid the video is fair and accurate.*

Hearsay- defined above

Exception

## ANSWER OUTLINE Q2 -Asher- Crosby (Prof. Lizardo)

*Caution: Summary or listing of issues outline only. Not intended to be considered a full analysis or discussion. Highlights only. For Hearsay issues, students should incorporate in the statement, then analyze if there are exceptions, then conclude in each issue what the court ruling on the issue would be.*

### **5. Thumper's Testimony**

LOGICAL RELEVANCY/CEC 250 Tendency Test- evidence is logically relevant if there is a tendency to prove or disprove any disputed fact of consequence.

*Prosecution will argue that Thumper, the bouncer's observations, of Asher and Crosby's conduct towards Buzz, including the winks tends to establish both defendants were involved in conspiracy to assault Buzz and the actual assault with a deadly weapon (pool cue and 8 – ball) The eyewitness testimony is relevant because it is based on personal knowledge of how Buzz was attacked and by whom.*

*Defense will argue that Buzz started the argument by telling Asher and Crosby to stop hogging the pool table. So, Buzz was the aggressor.*

*The trial court will rule Thumper's testimony is logically relevant.*

LEGAL RELEVANCY/CEC 352 Balancing Test- the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that Thumper's testimony as an ear witness to the whisper by Buzz would waste judicial time, confuse or otherwise mislead or prejudice the jury.

*The trial court will rule Thumpers' testimony is legally relevant.*

COMPETENCY- for a witness to be competent to testify, CEC 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. Witnesses must have the capacity to observe, recollect, communicate and be truthful. Nothing indicates that Thumper cannot testify.

HEARSAY – Out of court statement offered to prove the truth of the matter asserted. It is inadmissible unless there are exceptions. Here, if Thumper's statements are offered to prove that both Asher and Crosby agreed (by the winking) and the reply to Buzz, "You asked for this?" are parts of an agreement to conspire against Buzz = Hearsay

*Some exceptions may be:*

- *Adoptive Admissions- (by Thumper) "I saw the winks and the beating!" by both Asher and Crosby (hanging head down and not responding to Thumper's accusation)*
- *Co-conspiracy Exception- include "during the conspiracy and in furtherance of" The winking – as assertive conduct for an agreement*
- *CEC Spontaneous Statements – define - especially stressful event, analyze, conclude*
- *Contemporaneous Statements -define, do not include stressful events. More narrative.*

*Must reach a conclusion on each hearsay exception.*

### **6. Topsy's Testimony**



Logical Relevancy- defined above

The logical relevancy of Topsy, the bar tender, assisting Buzz and hearing Buzz whisper, "I think I am dying," has the tendency to establish an assault with a deadly weapon and a possible death.

Further, Topsy sees Buzz write in blood, "Asher-Crosby" which tends to identify his attackers. Although Buzz cannot talk, his use of his finger to write out who attacked him is assertive conduct. Prosecution will argue the blood writing by declarant

The trial court will rule Topsy's testimony as logically relevant.

Legal Relevancy – defined above

Hearsay – Buzz's Statement to Topsy

Defined above.

The issue with Topsy's testimony is that he is not the original declarant, Buzz is. However, there are certain hearsay exceptions that may apply.

Some Hearsay Exceptions

- Dying Declaration. "I think I am dying and the blood writing- Should be discussed, but under CEC, there is a requirement of death. Buzz is in a coma and does not die. Not admissible.
- Spontaneous Statement- stressful event in being hit with cue stick and 8- ball by Asher and Crosby
- Contemporaneous Statement
- State of Mind

Must state elements, analyze and reach conclusions on each doctrine or rule.

## 7. Officer Otis's Testimony

Logical Relevancy – Tendency Test

Tends to establish later identification of Buzz's attackers as Asher and Crosby in the conspiracy and assault with deadly weapons.

Legal Relevancy -Balancing Test

Competency- initially Buzz could not ID due to injuries. Later ID is admissible

Hearsay – Exceptions

Prior ID – Blood Writing by Buzz

Witness (here Buzz) wrote in blood the names of his attackers as Asher-Crosby while fresh in his mind because it was right after the pool cue and 8-ball were used as deadly weapons. Then, the witness must confirm that this was a true reflection. May be argued that the prior ID was the blood writing later confirmed by Buzz when Officer Otis followed up at the hospital weeks later.

This was verified by Buzz that the digital image was his prior ID of the attackers.

Past Recollection Recorded- ok if argued that the blood writing was a writing.

*All must be defined, fully discussed and conclusions given.*

*Question 3 – (Prof. O’Keefe)*

*Defendant Darlene is charged with the first-degree premeditated murder of her husband, Victor. Darlene is claiming self-defense.*

*Discuss all evidentiary issues that would likely arise in each section and the likely trial court ruling on admissibility. Answer according to the Federal Rules of Evidence.*

- 1 In its case in chief, the prosecution seeks to introduce evidence of marital discord and physical assaults that occurred prior to the homicide. Among the evidence the prosecution wishes to introduce are the following: quarrels between Darlene and Victor; domestic violence restraining order obtained by Victor against Darlene; and physical injuries to Victor from having been beaten by Darlene before the date of the homicide.*

**Relevance:** Evidence is relevant if it has some tendency to prove or disprove a material fact. Here, the prosecution is seeking to introduce evidence of prior physical assaults between Darlene and Victor to show Darlene’s motive and intent to kill Victor.

**Character Evidence 404(a):** The general rule under FRE 404(a) is that character evidence is not admissible to prove that a person acted in accordance with that character on a particular occasion. In criminal cases, the defendant may introduce evidence of his or her good character to support an inference that they did not commit the crime. The prosecution cannot introduce evidence of the defendant’s bad character to prove guilt unless the defendant first opens the door by introducing evidence of character.

Here, the prosecution seeks to introduce evidence of marital discord and physical assaults in its case in chief. The testimony would not be permissible character evidence as the defendant has not opened the door to character evidence at this point. Also, character evidence must take the form of reputation or opinion rather than specific instances of conduct.

**FRE 404(b):** The prosecution may seek admission of this evidence under FRE 404(b) for a non-propensity purpose (such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake). Here, the evidence is relevant on the issue of intent—to show Darlene’s ill will toward Victor and her intent to injure and kill him. Intent requires the least amount of similarity between the uncharged and charged offenses. Darlene’s behavior toward Victor in both the charged and uncharged offenses was similar enough to show intent.

- 2 Next, the prosecution calls Roger, a close friend of Victor’s. Rodger testifies that Victor told him shortly before Victor’s murder, “I am afraid of Darlene.” Rodger then testifies that Victor told him, “Darlene threatened to kill me.”*

**Relevance:** Evidence is relevant if it has some tendency to prove or disprove a material fact. Rodger's testimony is relevant because it shows that Victor was afraid of Darlene and that she had threatened to kill him, thereby rebutting Darlene's claim of self defense.

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

**"I'm afraid of Darlene"** – This statement is hearsay. The prosecution is offering Victor's out of court statement for its truth.

**State of Mind Hearsay Exception:** This exception covers statements about What a person is feeling at the time he or she speaks. It includes physical and emotional feelings. This exception does not cover statements about memory or belief.

*Analyzing the State of Mind Exception When State of Mind is at Issue:*

1. The declarant's state of mind is at issue in the case
2. A statement was made by the declarant that relates to the declarant's then existing state of mind;
3. The declarant made the statement at or near the pivotal time under the substantive law

Here, Victor's state of mind is at issue as a self defense claim as been raised. The statement directly refers to Victor's state of mind. He is afraid of Darlene. The statement was made shortly before his murder. Thus, the statement will be admissible under this exception.

**"Darlene threatened to kill me."** – This statement would not fall under the state of mind exception as it is not relating the declarant's then existing state of mind. Thus, if offered for its truth, it would not be admissible. However, if the prosecution wished to offer the statement as circumstantial evidence of Victor's state of mind – that he was fearful, the evidence would be admissible as non-hearsay as circumstantial evidence of the declarant's state of mind.

- 3 Roger testifies that Victor had a reputation in the community for being peaceful and that in his (Roger's) opinion, Victor would never hurt a fly.

**Relevance:** Evidence is relevant if it has some tendency to prove or disprove a material fact. The prosecution is seeking to introduce evidence of Victor's peaceful character to rebut Darlene's claim of self-defense.

**Character Evidence 404(a):** The general rule under FRE 404(a) is that character evidence is not admissible to prove that a person acted in accordance with that character on a particular occasion. In criminal cases, the defendant may introduce evidence of their good character to support an inference that they did not commit the crime. The prosecution cannot introduce evidence of the defendant's bad character to prove guilt unless the defendant first opens the door by introducing evidence of character.

*The prosecution is also generally prohibited from introducing evidence of the victim's good character unless it is raised by the defendant.*

*There is one exception to this rule under the FRE. The prosecution may introduce evidence of the victim's character for peacefulness in a homicide case whether or not the defendant raises the issue of the victim's character to rebut a claim of self-defense. Under this exception, simply saying that the victim was the aggressor is enough. The evidence must be introduced in the form of reputation or opinion. This does not open the door to evidence about the defendant's character.*

**Analysis:** *Here, Darlene is being prosecuted for murder. She is claiming self-defense. Rodger's proposed testimony is about Victor's character for peacefulness and is in the form of reputation and opinion testimony. The testimony will be admissible.*

4. *In the defense case in chief, the defense calls Peter. Darlene met in an inmate pen pal program while she was in custody pending trial. Peter will testify that he has known Darlene through the pen pal program for five months and in his opinion she is a peaceful and gentle person. On cross examination, the Prosecutor asks Paul if he heard that Darlene attacked a former co-worker after a work dispute. Paul states that he did not. The Prosecutor seeks to call Amy, Darlene's former co-worker to testify about the attack.*

**Relevance:** *Evidence is relevant if it has some tendency to prove or disprove a material fact. Here, Darlene is calling Peter as a character witness to support her claim of self-defense. The prosecutor's question is relevant to show that Paul doesn't know Darlene well and thus, his opinion about her peacefulness should be discounted. The prosecutor's proposed testimony from Amy is an attempt to bolster the prosecution's position that Paul's opinion of Darlene is unsupported.*

**Character Evidence:** *The general rule is that information about a person's character may not be introduced to suggest that the person did something because he or she has a propensity to do such things.*

### ***The Defendant May Initiate Character Evidence***

*Despite the general rule that propensity evidence is not admissible, both the FRE and CEC allow a criminal defendant to introduce character evidence. Character evidence to prove a person's actions in conformity with that character is allowed in the case of a criminal defendant who introduces evidence about his or her own good character to support an inference that he or she did not commit a charged crime. If the defendant first introduces such evidence, the prosecutor is entitled to rebut that evidence to suggest that he or she is guilty. In a criminal case the defendant may also show that the victim was the aggressor by introducing evidence of the victim's character for violence. The prosecutor can also rebut this evidence*

### ***The Prosecution May Not Initiate Character Evidence***

*Character evidence is **inadmissible** in a criminal trial if first offered by the prosecution as circumstantial evidence to show that a defendant is likely to have committed the crime with which he or she is charged—the prosecution may not, in other words, initiate character evidence that shows **defendant's***

**propensity** to commit a crime. If the defendant initiates character evidence, the prosecutor can respond in the ways discussed below.

### **Character evidence offered by the defendant**

Character evidence is **admissible** in a criminal trial if offered by a defendant as circumstantial evidence—through **reputation or opinion evidence**—to show his or her own character, as long as the character evidence the defendant seeks to introduce is relevant to the crime with which the defendant is charged.

**Analysis:** Here, Darlene may call a character witness to discuss a relevant character trait – her peacefulness. Darlene’s witness may not be the most compelling witness because Paul has only known her for a few months, but that would go to the weight of the opinion rather than its admissibility.

### **Prosecutor’s Rebuttal**

The prosecutor may rebut the defendant’s character evidence through cross examination. Here, the prosecutor asks Paul if he knows of a prior act of violence committed by Darlene. This is permissible cross examination of the character witness as the cross examiner can ask about specific prior acts to challenge the witness’ knowledge of the defendant. In order to ask about a specific act, the prosecutor must have a good faith basis to believe the act occurred and it must be relevant to the pertinent character trait. Thus, the question is admissible.

Paul denied knowing of the prior assault. The prosecutor is prohibited from introducing extrinsic evidence if the character witness denies knowing of the alleged prior act. Thus, the prosecution cannot call Amy to testify about the assault.

The prosecutor could call Amy to testify as to her opinion of Darlene’s character for violence or Darlene’s reputation for violence. The prosecutor would be limited to this type of information under the Federal Rules. Thus, the details of the assault, which would be considered to be a specific act, would be excluded.

1)

1. Dash's Testimony

Excellent Work!

**Dash's Fall and Pain**

Logical Relevance

Good

A piece of evidence is logically relevant if it has the tendency to make a disputed fact in a case more or less probable with its inclusion. Relevant evidence must be material, probative, and competent.

Good

Here, Dash's case in chief is that the scooter was defective. Introducing the fact that he fell and injured himself on the scooter when it "suddenly locked up" is necessary to prove that the injury occurred because of the scooter's defect. As such, evidence of Dash's testimony about his fall is relevant. (also establishes damages + defective product)

Legal Relevance

Good!

Courts may make relevant evidence inadmissible if the the probative value of that evidence is substantially outweighed by the prejudicial affect of its inclusion. When evidence has a strong tendency to mislead the jury, confuse the issues, lead to undue delay, needlessly present unnecessary circumstantial evidence, and these factors are so significant that they outweigh the probative value, a court may rule that the evidence is inadmissible. Evidence that causes a jury to come to a decision based on emotion rather than logical legal fact is often excluded.

Great!

Here, no facts suggest that the probative value of Dash's testimony would be substantially outweighed by the prejudicial affect of its inclusion. The court will likely introduce Dash's testimony unless another issue arises.

## Hearsay

*Great!*

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

*Great!*

Here, Dash's statements were made at the time of his fall, outside of court, and may be offered for the truth of the matter asserted and thus are hearsay.

## Contemporaneous Statement/Excited Utterance

*Excellent!*

An exception to the hearsay rule exists when an event occurs, a declarant witnesses that event, that event is startling or exciting, and the declarant makes a statement about that event while under the nervous excitement caused by the event. Courts have found that statements made under nervous excitement are often more trustworthy because the declarant would not think to lie under those circumstances.

*Great analysis*

Here, Dash lost control of the scooter and allegedly fractured his ankle. When Dash said "My ankle is throbbing. It's fractured!" he said it loudly and immediately after he fell from the scooter. As such, the defense will likely argue that Dash, after witnessing an event that was startling or exciting, made a statement about that event while under the nervous excitement caused by that event because Dash was likely in an immense amount of pain if he shouted to Walker that his ankle was throbbing after he felt his shattered ankle. Dash's statement to Walker here may be admissible even though it is offered to prove the truth of the matter asserted because of the startling circumstances in which the statement was made.

## Present Sense Impression

A present sense impression is an exception to the hearsay rule that makes evidence admissible when an event occurs, the declarant has personal knowledge of that event, and makes a statement qualifying or explaining their conduct during the event at the time or near after the events occurrence.

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Here, Dash's statement to Walker is likely a present sense impression and admissible as an exception to the hearsay rule because Dash had personal knowledge of the fall of the scooter, as he was driving. Additionally, Dash made a statement to Walker likely right after the fall because Walker rushed to help Dash. Walker would not have been rushing to Dash if the accident had not just happened, so the facts suggest Dash's explanation of the fall occurred right after the event's occurrence.

### State of Mind - Present Bodily Condition

Great! Statements or conduct that are offered to prove the state of mind of the declarant are exceptions to the hearsay rule. More specifically, statements by a declarant about their present mental, emotional, or physical state, made while in that state, are admissible as an exception to the hearsay rule.

Here, Dash was describing the condition his body was in after he fell off the scooter. This is likely admissible under the state of mind hearsay exception because he was describing the current state of his ankle at the time he made the statement.

### Statement made in Furtherance of Medical Diagnosis or Treatment

Statements made in furtherance of medical diagnosis or treatment are exceptions to the hearsay rule and thus admissible. These statements do not need to be made to a medical professional and may include statements describing medical history, symptoms, or pain.

Here, Dash's statement about his ankle being fractured and it throbbing may fall under the medical diagnosis or treatment exception because if he can prove that he made this statement in order to receive help. Upon informing Walker of his injuries, Walker called an ambulance, and in doing so responded to Dash's statements by providing medical treatment/assistance. Dash's statement will likely fall under this exception.

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## 2. Walker's Testimony about the Scooter Locking Up

### Logical Relevance

See Supra.

Walker's testimony about the scooter locking up is logically relevant because it has a tendency to prove Quick Silver's scooter may not have acted as intended.

### Contemporaneous Statement/Excited Utterance

Good Job  
An exception to the hearsay rule exists when an event occurs, a declarant witnesses that event, that event is startling or exciting, and the declarant makes a statement about that event while under the nervous excitement caused by the event. Courts have found that statements made under nervous excitement are often more trustworthy because the declarant would not think to lie under those circumstances.

Walker witnessed Dash fall off the scooter after either the scooter's wheels or throttle locked suddenly. After witnessing the likely jarring event, he went to assist Dash he had fallen. Walker likely wouldnt have assisted Dash if he felt that the fall was minor or the scooter did not behave improperly, so it is likely that Dash was in a state of nervous excitement at this time. When Walker told Dash that the "scooter suddenly locked up!" he did so loudly, further evidence that he was still in a state of nervous excitement. Walker's statement will likely be admitted under the contemporaneous statement exception due to the startling circumstances in which he made the statement to Dash.

## 3. Booker's Testimony


### Logical Relevance

See Supra.

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Good!  
Booker's testimony that Quicksilver commonly used damaged or old parts for repairs is highly probative in proving that the electric scooter had a defect or Quicksilver acted negligently by using those parts, so this testimony is relevant. Booker's testimony that Quicksilver had records of 325 prior complaints regarding the scooter's sudden stops is also highly probative in proving Dash's claim that Quicksilver acted negligently by refusing to ignore previous similar occurrences.

### Similar Occurrences

 Evidence of similar occurrences is highly prejudicial and is inadmissible to prove negligence, product defects, lack of warnings, or other liability. Similar occurrences evidence may be admissible however to prove causation, identity, control, causation, notice, or past injuries. When similar occurrences evidence is introduced, courts often issue a limiting instruction to the jury informing them that they may only consider the evidence under the proper exceptions.

Here, Booker's testimony that the company uses old or damaged components in the repairs for its scooters, and his testimony regarding the hundreds of prior complaints may not be admissible for the purposes of proving negligence. However, Dash may seek to introduce Booker's testimony for the purposes of proving both causation and notice. Dash may likely introduce evidence of Quicksilver's use of damaged components to circumstantially prove that his fall, and the fall of others, was caused by Quicksilver's shoddy repairs. Dash may also introduce Booker's testimony regarding the prior complaints to prove circumstantially that Quicksilver had knowledge of issues with their scooters that could have resulted in injury. Due to the immense number of complaints and the highly prejudicial nature of similar occurrences evidence, the judge, if they admit this evidence, will provide a limiting instruction to the jury.

### Business Records



Business records are admissible as an exception to the hearsay rule. For evidence to qualify as a business record, The record must be recorded by an employee at the business who makes these records in the course of regular business activity, and who has personal knowledge of the facts. The record must be recorded at the time or nearly after the event recorded takes place and must be authenticated to certify its trustworthiness. In contrast with federal law, California allows a business record to be prepared solely for the purposes of providing a record during litigation.

Here, Booker's testimony regarding the records of the 325 prior complaints may qualify as a business record exception and may be admissible in this case. Booker is the custodian of records as thus is able to authenticate the Quicksilver's records. As the custodian of records, Booker may have been responsible for making record of the previous 325 prior complaints and thus would have had personal knowledge of each of the records. No facts suggest this however, and no facts suggest that these records were compiled at the time each incident occurred or if they were made in the course of regular business activity. Quicksilver will likely object to the introduction of these records as they do not meet all the elements necessary to be deemed business records.

#### **4. The Surveillance Video**

##### Logical Relevance

See Supra.

God Evidence that Dash dodged a dog right before his fall had a tendency to make the disputed fact that Quicksilver's scooter did not work as intended less probable. As such, it is relevant to Quicksilver's defense.

2)

### 1. Testimony of Thumper

#### Logical Relevance

Evidence is relevant if it has a tendency to prove or disprove a disputed fact in the case.

Evidence must be material (goes to a substantive legal issue) and probative (tends to prove or disprove a material fact)

Here, Thumpers testimony is highly relevant as it would show that Asher and Crosby were in a conspiracy to assault. By winking at each other and not replying when Thumper confronted them, this would tend to show there was a common plan or scheme to commit the assault.

#### Legal Relevance (FRE 403)

Evidence is legally relevant if its probative value substantially outweighs its prejudicial effect.

In this case, the testimony is highly probative as it goes towards proving the existence of a conspiracy between the parties and not very prejudicial as it would be unlikely to elicit an overly emotional response from the jury.

#### Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. As Thumper's statement and the defendant's lack of a reply were both uttered out of court and will be used to prove the truth of the matter asserted, they are hearsay (as statement of a party opponent statements are hearsay under the California Evidence Code).

#### Excited Utterance / Spontaneous Statement (CEC)

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outstanding job!

A spontaneous statement is admissible when an exciting or stressful event occurs, the declarant has first hand knowledge of the event, and makes a statement while under a state of nervous excitement.

Great!  
Here, Thumper had just witnessed both defendants attack and seriously wound Buzz. The fact pattern indicates Thumper grabbed the defendants and ousted them before saying "I saw the winks and what you did. Witnessing these events and physically ousting the defendants would have left Thumper in a state of nervous excitement which would not have dissipated by the time he made this statement.

Therefore, the statement from Thumper regarding noticing the defendants winking falls under the spontaneous statement exception to hearsay.

#### Statement of a party opponent

Great!  
A statement of a party opponent is admissible as the declaring is available in court to refute it if he so wishes. A statement may be actual, adoptive, or vicarious, and an adoptive statement may be made through silence when a reasonable person would have normally objected to it, and the declarant both heard and understood it.

In this case, the defendants hear Thumper's statement but choose not to reply. It is arguable that a reasonable innocent person would have denied winking and refuted Thumper, as this was a serious offense involving multiple attackers and a deadly weapon, however they chose to remain silent.

Therefore, as the parties remained silent even though a reasonable person would have responded, their adoptive statement (silence) of a party opponent would be admissible.

## 2. Topsy's testimony

### Logical Relevance / Legal Relevance

supra

Good  
This evidence is highly relevant as the whisper and digital image would show that Buzz was gravely wounded and identified his assailants. Additionally, the evidence is highly probative as it is direct testimony from Buzz and is unlikely to elicit a highly emotional response from the jury. Therefore, the evidence is relevant.

### Hearsay

supra

As there is an out of court statement used to prove the truth of the matter asserted, both the whisper and writings are hearsay. There could be an argument made that the message written in blood could be overly prejudicial and both sides may have needed to come to a compromise such as showing only a rendition of the message.

### Dying Declaration

Great!  
A dying declaration is admissible when the declarant is unavailable and makes a statement relating to their impending death while under the belief their death is imminent. In California, the declarant must actually die for the statement to be admissible.

Great!  
Here, although Buzz believed his death was imminent, he did not succumb to his wounds and was in a coma at the trial. Therefore, the evidence would not be admissible under a dying declaration hearsay exemption. As Buzz had just been severely beaten, his statement would likely have come in under a spontaneous statement theory (supra) as he experienced a traumatic event and made the statement while under the state of nervous excitement (he believed he was going to die).

### Business Records (photograph)

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Business records are admissible when they are made by a person with firsthand knowledge, with a business duty to report, the record was made in the regular course of business, and the declarant can testify to their accuracy and authenticity.

Here, Topsy took a digital image of the message which Buzz scrawled in his own blood. This record is a business record as Topsy (a bartender) has a business duty to record and respond to events at the bar. Additionally under the CEC there is an exception which allows for records to come in which are not made in the regular course of business (incident reports).

Therefore, as this was a photograph taken while under a duty to report but out of course of regular business, assuming Topsy would be willing to authenticate and verify the trustworthiness of the message, it would be admissible.

### 3. Officer Otis' Testimony

#### Logical Relevance / Legal Relevance

supra

This evidence is more probative than prejudicial as it is in regards to an identification made by Buzz. Because Buzz identifies his attackers, it is highly relevant.

#### Hearsay

supra

As there is an out of court statement used to prove the truth of the matter asserted, this statement is hearsay.

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### Prior Identification

Great! Prior identification is allowed if the party identifies someone they previously perceived. In California, it is required that the declarant testify that their identification was true and accurate and was done while their memory was fresh.

Here, Officer Otis will testify that Buzz identified the defendants as the individuals who committed the crimes. As long as Otis ensured that he asked Buzz if the identification was made while his identification was true and accurate and was done while his memory was fresh, this identification would be allowed. The defense would then have a strong case to refute this evidence as it is highly suspect and Buzz initially told the officer that he could not make an identification. However, Buzz's statement about the message he wrote in blood would be inadmissible as it is hearsay that does not fall under an exception.

\* Must testify in court

~~Admitted spontaneous~~

3)

### 1. Prosecution Case In Chief

#### Logical Relevance

Good! Evidence is relevant if it has a tendency to prove or disprove a disputed fact in the case.

Evidence must be material (goes to a substantive legal issue) and probative (tends to prove or disprove a material fact)

Great! Here, the character evidence the prosecution seeks to introduce against Darlene is highly probative as Darlene is claiming self defense. The prosecution is seeking to prove premeditated murder and will therefore seek to include evidence which calls Darlene's motives into question. Prior quarrels, domestic violence restraining orders, and prior injuries are all highly relevant in proving that Victor's murder was premeditated and was not self defense as she is claiming.

#### Legal Relevance (FRE 403)

Evidence is legally relevant if its probative value substantially outweighs its prejudicial effect.

Great! In this case, the evidence is all substantially more probative than prejudicial as all the claims will go towards showing Darlene did not commit self defense. As these statements, while potentially disturbing, will still not elicit an overly emotional response from the jury, they are legally relevant.

#### Prior Bad Acts

Great! Prior bad acts are typically inadmissible when utilized to prove propensity. Prior bad acts are usable to show something other than propensity such as motive, intent, lack of

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mistake, identification, or opportunity. The previous fights, domestic violence restraining order, and physical injuries to Victor are all examples of prior bad acts.

Here, the prosecution will argue that they are not introducing the evidence to show propensity but are instead seeking to introduce the evidence to show that Darlene was the primary dominating figure in the household. If the prosecution can show that Victor was frequently injured by Darlene and actually obtained a domestic violence restraining order against her, it would cause reasonable doubt as to her claim that she was defending herself when she murdered Victor. The physical injuries to Victor would have been particularly convincing evidence that Darlene's claim of self defense was highly unlikely. Prior bad act evidence should always be accompanied by a limiting instruction telling the jury that such evidence should not be used to show propensity but only for the alternative purpose of showing that Darlene was the dominating figure in the household.

Good  
Job

## 2. Testimony of Roger

### Logical Relevance / Legal Relevance

supra

Here, Rodger's statement is highly relevant as it will go to show that Darlene was the more assertive party in the relationship. This would defeat her claim of self defense if successfully proved.

### State of Mind Hearsay Exemption

A statement is not hearsay if it is being offered to prove something other than the truth of the matter. Victor's first statement to Roger, "I am afraid of Darlene," is not hearsay because Victor's fear of Darlene is not at issue in the case. This statement instead is being

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used to show that Victor was afraid of Darlene, which makes Darlene's claim of self-defense unlikely. As the statement is not being used to show the truth of the matter asserted, it is not hearsay and is therefore admissible.

*It is hearsay but comes within the state of mind hearsay exception*

### Victor's second statement

Victor then allegedly told Roger, "Darlene threatened to kill me." This statement is hearsay as it is an out of court statement offered to prove the truth of the matter asserted which does not fall under any hearsay exception.

*↳ circumstantial evidence of state of mind*

### Residual Hearsay

Residual hearsay is a catch-all used to potentially incorporate hearsay evidence which does not fall under a permitted exemption. Residual hearsay must be trustworthy, necessary, and notice must be given to the adversary in the case. The near miss doctrine allows a party to argue that a type of hearsay should be allowed when it is only missing a portion, or one key element that would otherwise allow it to be admitted.

Here, this statement is not trustworthy as there is no circumstantial evidence which would prove that it was uttered to Roger. Additionally, it is not necessary as Victor's statement that he was afraid of Darlene would be permitted under the state of mind hearsay exception. Therefore, this statement would likely not be allowed under a theory of residual hearsay.

### 3. Victor's character evidence

### Logical Relevance / Legal Relevance

supra

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Here, this character evidence is relevant as evidence of Victor's peaceful character would defeat Darlene's assertion that his murder was committed in self-defense.

### Character Evidence of the Victim in a Homicide Case

Great!

Character evidence in a homicide case is allowable to be introduced by the prosecution under a very limited circumstance. In a homicide case, the prosecution is allowed to introduce evidence of the victim's peaceful character **before** the defendant has opened the door by introducing character evidence of her own. The prosecution in this case may utilize reputation and opinion evidence only for this limited purpose. As Roger is using reputation evidence for the limited purpose of showing Victor's peaceful character, this evidence is allowed even though Darlene has not yet opened the door to character evidence.

#### 4. Defense case in chief

### Logical Relevance / Legal Relevance

supra

Here, this evidence would be relevant for Darlene as she is seeking to show that she is a peaceful person and therefore it would be more credible that she would have to defend herself against Victor.

### Character Evidence of the Defendant

The defendant may use reputation and opinion evidence only to discuss their own good character. However, this opens the door for the prosecution to cross examine the witness using specific instances of the defendants bad character. The prosecution may also call

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witnesses of their own to discuss the defendants bad character using reputation or opinion only.

Here, Peter testifies using opinion evidence that Darlene was a peaceful person. The prosecution then properly cross-examined the witness and discussed a specific act. Because this testimony followed the federal rules of evidence, this interaction was permissible.

### The Prosecution Calls Amy

Great!

The prosecution then called Amy to discuss an attack unrelated to this case. This line of questioning is not permitted as the prosecution is only allowed question additional witnesses using reputation or opinion evidence only. Therefore, this line of questioning would not be permitted.

Additionally, this evidence would also not come in under prior bad acts (supra) as the only reasonable justification to introduce this unrelated incident would be to show propensity towards violence.

**END OF EXAM**