

EVIDENCE  
FALL 2024  
Prof. S. Lizardo

### 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 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.



*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 he 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 if this evidence under FRE 404(b) for a non-propensity purpose (such as motive, opportunity, intent, preparation, plan, knowledge, identity of 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.

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TESTIMONY OF DASHLOGICAL RELEVANCE (TENDENCY TEST)

Evidence is logically relevant if it has the tendency to prove or disprove a material disputed fact of consequence.

Here, Dash would argue that his testimony about riding his scooter, falling, his pain, and his statements to Walker are logically relevant because they have the tendency to prove that he was injured by Quick Silver Company's negligence for their defective product. Dash would argue that the testimony is logically relevant to prove the elements of negligence, as well as to disprove Quick Silver Company's assertion that Dash misused the scooter, which are material disputed facts in consequence. Quick Silver Company would argue otherwise. *such as . . . what?* *very good*

The court would find that Dash's testimony about riding his scooter, falling, his pain, and his statements to Walker are all logically relevant.

LEGAL RELEVANCE (BALANCING TEST)

Evidence is legally relevant if its probative value outweighs the dangers of unfair prejudice. Probative value includes direct evidence and circumstantial evidence. Unfair prejudice includes undue consumption of time, misleading the jury, and confusing the issues. The trial court has the discretion to exclude evidence if its dangers of unfair prejudice outweigh the evidence's probative value.

Here, Dash would argue that his testimony about riding his scooter, falling, his pain, and his statements to Walker are legally relevant because they hold substantial probative value

that is not outweighed by any dangers of unfair prejudice. On the other hand, Quick Silver Company would argue that the trial court should use its discretion to exclude Dash's testimony because it would constitute an undue consumption of time, confuse the issues, and mislead the jury.

The court would find that Dash's testimony about riding his scooter, falling, his pain, and his statements to Walker are all legally relevant.

### WITNESS COMPETENCE

All witnesses are generally deemed competent to testify unless circumstances indicate otherwise, such as incapacity due to being a minor or mental disability. All witnesses must swear under oath to tell the truth. Witnesses must be able to perceive, recollect, communicate, and tell the truth. *(The witness can "affirm")*

Here, Dash sustained physical injuries in the scooter accident but there is no indication that he suffered any disabilities that would render him incompetent to testify.

Thus, Dash is a competent witness.

### HEARSAY

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

Here, even though Dash was the original declarant of his own statements, his statements to Walker are hearsay because they were made out of court. Thus, his statements are inadmissible unless an exception applies.

### THEN-EXISTING MENTAL AND PHYSICAL STATE



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Statements are admissible under this exception if the statement describes the declarant's then-existing state of mind or physical condition while the declarant was making the statement.

Here, Dash would argue that his statements are admissible under this exception because his statement describes his physical state of a throbbing ankle pain and his state of mind that he believed his ankle was fractured. Quick Silver Company would argue otherwise. *like what? - good*

### CONTEMPORANEOUS STATEMENT

Statements are admissible under this exception if the statement was made describing an act, event, or condition while it was transpiring or immediately thereafter.

Here, Dash would argue that his statement that his ankle is throbbing and is fractured is a contemporaneous statement because he was describing his injured condition while he was experiencing the pain. On the other hand, Quick Silver Company would argue that his statements were not made at or near the time of the fall.

Dash's statements are contemporaneous statements and therefore admissible under this exception.

### SPONTANEOUS STATEMENT

Statements are admissible under this exception if the statement was made in response to a startling event while under the stress of the startling event.

Here, Dash would argue that the scooter crash was a startling event, his statements about his ankle pain were made in response to the startling event, and his statements were made while he was still under the stress of the scooter crash. Quick Silver Company would argue otherwise.

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Therefore, Dash's statements are admissible as spontaneous statements.

CONCLUSION RE: TESTIMONY OF DASH

The court would admit Dash's testimony about riding his scooter, falling, his pain, and his statements to Walker

(2) TESTIMONY OF WALKER

LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.

Here, Dash would argue that Walker's testimony is logically relevant because it has the tendency to prove that Quick Silver Company's scooter had a defect, which forms the basis of Dash's negligent products liability suit. Quick Silver Company would argue otherwise.

The court would likely find that Walker's testimony about the scooter locking up is logically relevant.

LEGAL RELEVANCE (BALANCING TEST)

See rules above.

Here, Dash would argue that Walker's testimony about the scooter locking up is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, Quick Silver Company would argue that the trial

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court should use its discretion to exclude Walker's testimony because it would constitute an undue consumption of time, confuse the issues, and mislead the jury.

The court would likely find that Walker's testimony about the scooter locking up is legally relevant.

### WITNESS COMPETENCE

See rules above.

There is no indication that Walker is incompetent to testify. Thus, Walker is a competent witness

### HEARSAY

See rules above.

Here, Walker's testimony about the scooter locking up is hearsay because it was a statement made from Walker to Dash outside of court. Thus, it is inadmissible unless an exception applies.

### CONTEMPORANEOUS STATEMENT

See rules above.

Here, Dash would argue that Walker's statement that the scooter suddenly locked up is a contemporaneous statement because it was a statement that described the circumstances of the collision immediately after the crash happened, which is sufficient to be characterized as a spontaneous statement. On the other hand, Quick Silver Company would argue that the statement was not made until too much time had passed after the

*Did you mean contemp. stat here?*



incident and it cannot be considered "contemporaneous" or "immediately after" the incident for this exception to apply.

The court would likely agree with Dash that Walker's statement that the scooter suddenly locked up is a contemporaneous statement, and this exception applies.

### SPONTANEOUS STATEMENT

See rules above.

Here, Dash would argue that Walker's statement that the scooter suddenly locked up is a spontaneous statement because the scooter crash was a startling event that Walker had just witnessed and Walker's statement was in a direct response to it. Quick Silver Company would argue that Walker witnessing the incident should not have startled Walker or caused him stress simply for witnessing someone falling off of their scooter. *good point*

The court would likely agree with Dash that Walker's statement that the scooter suddenly locked up is a spontaneous statement, and this exception applies.

### CONCLUSION RE: TESTIMONY OF WALKER

The court would likely allow Walker's testimony about the scooter suddenly locking up.

### (3.) TESTIMONY OF BOOKER

#### LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.

Here, Dash would argue that Booker's testimony about the company's common use of old or damaged components for repairs and that the company had records of 325 prior complaints regarding the scooter's sudden stops is logically relevant because it has the tendency to prove that Quick Silver Company's scooter had a defect, which forms the basis of Dash's negligent products liability suit. Further, Dash would argue that Booker's testimony has the tendency to prove that Dash's version of the story, that he lost control due to a loose handlebar, is more persuasive than Quick Silver Company's claim that Dash misused the electric scooter. Quick Silver Company would argue otherwise. *very good*

The court would likely find that Booker's testimony about the company's common use of old or damaged components for repairs and that the company had records of 325 prior complaints regarding the scooter's sudden stops are both logically relevant.

### LEGAL RELEVANCE (BALANCING TEST)

See rules above.

Here, Dash would argue that Booker's testimony about the company's common use of old or damaged components for repairs and that the company had records of 325 prior complaints regarding the scooter's sudden stops are both legally relevant because they hold substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, Quick Silver Company would argue that the trial court should use its discretion to exclude Booker's testimony because it would constitute an undue consumption of time, confuse the issues, and mislead the jury.

The court would likely find that Booker's testimony is legally relevant.

### WITNESS COMPETENCE

See rules above.

Here, there are no facts to indicate that Booker is incompetent to testify. Thus, Booker is a competent witness.

### HEARSAY

See rules above.

Here, assuming that Dash seeks to admit the 325 prior complaints regarding the scooter's sudden stops into evidence, the records of the prior complaints are hearsay as writings created out of court. If Dash only seeks Booker's testimony that the complaints were made, that testimony is not hearsay.

### BUSINESS RECORDS

Records are admissible under this exception if (1) the records were made in the regular course of business (2) the records were made at or near the time of the act, event, or condition (3) there is a custodian of records or other qualified witness to testify as to the identity of the record and its mode of preparation, and (4) the record is trustworthy.

Here, Dash would argue that the records of the prior complaints are admissible as business records because the records were made in the regular course of Quick Silver Company's business, the records were made at or near the time of each complaint, Booker is the custodian of records who is qualified to testify as to the identity and mode of the records' preparation, and the records are trustworthy. Quick Silver Company would argue otherwise.

The records of the prior complaints are admissible as business records.

### NON-TOMA

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Dash may also argue that the records of the prior complaints are admissible because they are not admitted for the truth of the matter asserted. Rather, the records of the prior complaints are admitted to prove that Quick Silver Company had knowledge and notice of 300+ prior incidents resulting from their defective products.

### **SPECIAL RELEVANCE**

Under rules of special relevance, some evidence may be inadmissible as against public policy.

### **PRIOR SIMILAR HAPPENINGS**

Evidence of similar happenings or other incidents are generally inadmissible as against public policy to prove a defendant's liability or fault. However, evidence of prior similar happenings are admissible to show that the defendant had notice or knowledge of defects or dangerous conditions if the other incidents happened prior to the incident in the subject litigation, and if the issues between the prior incident and the subject litigation are substantially similar.

Here, Dash would argue that the 325 prior complaints regarding the scooter's sudden stops are admissible because all of the complaints were prior to Dash's fall and the circumstances and issues are substantially similar. On the other hand, Quick Silver company would argue that the evidence should not be admissible because there is no indication that any or all of the 325 prior complaints resulted in crashes or injuries. Rather, the complaints may have been reported as merely inconveniences or some other minor issue.

The court would likely admit the evidence of the 325 prior complaints to prove that Quick Silver Company had knowledge or notice of the scooter's sudden stops.

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### LIMITED ADMISSIBILITY/LIMITING INSTRUCTION

In some circumstances, the court may allow evidence for only one purpose. The court would provide the jury with a limiting instruction that the evidence is only to be admitted and interpreted for that limited purpose, and the jury should not speculate or interpret the evidence for any other reason. *good*

Here, the court may admit the evidence of the prior similar happenings and provide the jury with a limiting instruction, advising the members of the jury that the evidence is admitted for the limited purpose of proving knowledge or notice of the scooter's sudden stops.

### CONCLUSION RE: TESTIMONY OF BOOKER

The court would likely allow Booker's testimony.

### (4) EVIDENCE OF SURVEILLANCE VIDEO

#### LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.

Here, Quick Silver Company would argue that the surveillance video is logically relevant because it has the tendency to prove that Dash's accident was caused by dodging a dog, not losing control from a loose handlebar. Quick Silver Company would argue that the cause of the fall and the various versions of the story constitute disputed facts of consequence, and evidence of what transpired immediately before the fall is logically relevant to prove that Dash's version is incorrect. Dash would argue that the video is not logically relevant because it does not prove anything about the fall; rather, it only

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evidences something that occurred prior to the fall, which is not a disputed fact of consequence.

The court would likely find that the video is logically relevant.

### **LEGAL RELEVANCE (BALANCING TEST)**

See rules above.

Here, Quick Silver Company would argue that the surveillance video is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, Dash would argue that the trial court should use its discretion to exclude the surveillance video because it would confuse the issues and mislead the jury as to the facts alleged and the cause of the fall.

On balance, the court would likely find that the surveillance video is legally relevant.

### **HEARSAY**

See rules above.

Here, the surveillance video is probably not hearsay because it is not testimonial, and because it is a machine generated piece of evidence that does not contain any statements attributed to any party. Thus, the video is admissible.

In the event that the court finds the video to be testimonial, perhaps because the video captured statements made by people appearing in the video, it would be hearsay and thus inadmissible unless an exception applies.

### **BUSINESS RECORDS**

See rules above.

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Here, the video would be admissible as a business record because it was made in the course and scope of the store's regular course of business, the video was made at or near the time of the crash, there is likely a custodian of records or other qualified witness from the store to testify about the video's identity and mode of preparation, and it is trustworthy. *very good*

CONCLUSION RE: EVIDENCE OF SURVEILLANCE VIDEO

The surveillance video is likely admissible.

*outstanding overall*  
*- well reasoned, well organized*  
*- Discussed main issues with clarity*

2)

GB

### TESTIMONY OF THUMPER

#### LOGICAL RELEVANCE (TENDENCY TEST)

Evidence is logically relevant if it has the tendency to prove or disprove a material disputed fact of consequence.

Here, the prosecution would argue that Thumper's testimony that he ousted Asher and Crosby from the bar and that neither of them replied to his statement that he saw the winks and what they did, is logically relevant because it has the tendency to prove that Asher and Crosby committed the charged crimes of conspiracy to commit assault and assault with a deadly weapon on Buzz. As will be discussed further, the prosecution would argue that Asher and Crosby's lack of response to Thumper's statement that he saw the winks and what they did is logically relevant to prove that they knew they were caught for committing the charged crimes. The defense would argue otherwise. - *like what argument?*

The court would find that Thumper's testimony is logically relevant.

#### LEGAL RELEVANCE (BALANCING TEST)

Evidence is legally relevant if its probative value outweighs the dangers of unfair prejudice. Probative value includes direct evidence and circumstantial evidence. Unfair prejudice includes undue consumption of time, misleading the jury, and confusing the issues. The trial court has the discretion to exclude evidence if its dangers of unfair prejudice outweigh the evidence's probative value.

Here, the prosecution would argue that Thumper's testimony is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair



prejudice. On the other hand, the defense would argue that the trial court should use its discretion to exclude Thumper's testimony because it would confuse the issues and mislead the jury by admitting evidence that Crosby and Asher were silent, which is unfairly prejudicial to Asher and Crosby.

The court would find that Thumper's testimony is legally relevant.

### **WITNESS COMPETENCE**

All witnesses are generally deemed competent to testify unless circumstances indicate otherwise, such as incapacity due to being a minor or mental disability. All witnesses must swear under oath to tell the truth. Witnesses must be able to perceive, recollect, communicate, and tell the truth.

Here, there is no indication that Thumper is incompetent to testify for any reason.

Thus, Thumper is a competent witness.

### **HEARSAY**

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. Statements include assertions or assertive conduct.

Here, Thumper's testimony that Asher and Crosby did not reply to his statement, "I saw the winks and what you did" is hearsay because the statement was made out of court from Thumper to Asher and Crosby. Further, the winks between Asher and Crosby are hearsay because the winks are assertive conduct that falls under the rules of hearsay. Finally, as will be discussed further below, Asher and Crosby's silence and hanging their heads in response to Thumper's statement is likely hearsay requires a detailed analysis.

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~~ADMISSIONS BY A PARTY OPPONENT / VICARIOUS ADMISSIONS / CO-CONSPIRATOR ADMISSIONS~~ — This is Co-Conspiracy HS except i  
Both organization —

Admissions or statements made by a party are admissible if the statements are offered by the party's opponent. Such admissions or statements include vicarious admissions, which are admissions or statements made by others on behalf of the parties. An example of vicarious admissions include admissions by co-conspirators. ✕

Here, the prosecution would argue that evidence of the winks exchanged between Asher and Crosby immediately prior to the altercation with Buzz constitute co-conspirator admissions because they formed a conspiracy to commit assault and immediately after the winks, they proceeded to commit assault with a deadly weapon on Buzz. The defense would argue, again, that no statement or admission was made at all, and further, winks between two friends cannot be demonstrative of statements between co-conspirators.

The court would likely find that the wink exchange between Asher and Crosby is admissible as admissions by co-conspirators, offered by Asher's and Crosby's party opponent, the prosecution. ✕ must include: — in further + deadly conspiracy

ADOPTIVE ADMISSIONS ( This is indeed part of Admissions )

Another form of party admissions includes adoptive admissions. Adoptive admissions are when another person makes a statement or admission, the party hears the statement, has personal knowledge of the statement such that the party understands what is being conveyed in the statement, and based on that knowledge and understanding, the party would be expected to respond; however, the party remains silent. In this scenario, the party is deemed to have adopted the statement as their own. Adoptive admissions may be adopted explicitly, implicitly, or by tacit agreement.

Here, the prosecution would argue that Asher and Crosby adopted Thumper's statement "I saw the winks and what you did" because they heard the statement, understood what was being conveyed and had personal knowledge of what was being discussed, and would have been expected to refute the statement, but instead, they hung their heads down and did not reply. In other words, the prosecution would argue that because Asher and Crosby remained silent and did not dispute Thumper's statement, they are deemed to have adopted Thumper's statement. On the other hand, the defense would argue that Asher and Crosby did not adopt Thumper's statement because there was no expectation for them to respond to his statement. The defense would argue that there is simply no reason to expect Asher and Crosby to engage in discussion with Thumper, who had just thrown them out of the bar. Thumper is not an officer, not a victim, or some other person that Asher and Crosby could potentially be expected to respond to. Simply put, Asher and Crosby's decision to ignore Thumper is not equivalent with an adoptive admission.

It is a close call, but the court would likely find that Asher and Crosby adopted Thumper's statement.

### CONCLUSION RE: TESTIMONY OF THUMPER

Thumper's testimony is likely admissible.

missed  
Soot start  
Contemp start

### TESTIMONY OF TIPSYP RE: BUZZ'S WHISPER

### LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.



Here, the prosecution would argue that Topsy's testimony about Buzz's whisper "I think I am dying" is logically relevant because it has the tendency to prove that Asher and Crosby were the individuals who committed the charged crimes of conspiracy to commit assault and assault with a deadly weapon on Buzz. The defense would argue otherwise. *like what?*

The court would find that Topsy's testimony is logically relevant.

### LEGAL RELEVANCE (BALANCING TEST)

See rules above.

Here, the prosecution would argue that Topsy's testimony is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, the defense would argue that the trial court should use its discretion to exclude Topsy's testimony because it would confuse the issues and mislead the jury.

The court would find that Topsy's testimony is legally relevant.

### WITNESS COMPETENCE

See rules above.

Here, there is no indication that Topsy is incompetent to testify for any reason.

Thus, returned is a competent witness.

### HEARSAY

See rules above.

Here, Buzz's whisper "I think I am dying" is hearsay because it was a statement made by Buzz to Topsy out of court and is offered for the truth of the matter asserted. Thus, his statement is inadmissible unless an exception applies.

### **UNAVAILABILITY OF THE ORIGINAL DECLARANT**

A declarant may be unavailable for a variety of reasons, including if the declarant is dead, lacks capacity to testify, is beyond the court's subpoena power, etc.

Here, Buzz slipped into a coma and could not testify at trial. Thus, he is unavailable.

### **DYING DECLARATION**

A statement may be admissible as a dying declaration if the original declarant is unavailable, the statement was made under the belief of impending or imminent death, the statement is about the circumstances of the impending or imminent death, and the statement is factual in nature. Most importantly, in California, the declarant must actually die in order for the statement to be admissible as a dying declaration.

Here, the prosecution would argue that Buzz's whisper "I think I am dying" is a dying declaration because it was made by Buzz, who is now unavailable to testify, while he was under the belief of imminent and impending death, the statement concerned the circumstances of his death, and the statement was factual in nature. However, as the defense would highlight, Buzz did not die, and this exception therefore should not apply.

The court would agree with the defense that because Buzz did not die, the statement is not admissible as a dying declaration.

### **THEN-EXISTING STATE OF MIND**

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Statements are admissible under this exception if the statement describes the declarant's then-existing state of mind or physical condition while the declarant was making the statement.

Here, the prosecution would argue that Buzz's whispered statement "I think I am dying" is admissible under this exception because the statement described his state of mind that he believed he was dying while he was making the statement. Further, the statement was made while he was experiencing severe pain, immediately after he was hit over the head with a cue stick and slammed in the jaw with an 8 ball. The defense would argue otherwise. *like what argument?*

Buzz's statement was a statement of his then-existing state of mind and is therefore admissible under this exception.

### CONTEMPORANEOUS STATEMENT

*on narrating* . Statements are admissible under this exception if the statement was made describing an act, event, or condition while it was transpiring or immediately thereafter.

Here, the prosecution would argue that Buzz's whispered statement "I think I am dying" is admissible under this exception because the statement was describing Buzz's severely injured condition while he was experiencing the pain, immediately after he was hit over the head with a cue stick and slammed in the jaw with an 8 ball. In other words, Buzz was describing his condition while he was experiencing it, immediately after the altercation. The defense would argue otherwise. *-like what?*

Buzz's statement is a contemporaneous statement and therefore admissible under this exception.

### SPONTANEOUS STATEMENT



Statements are admissible under this exception if the statement was made in response to a startling event while under the stress of the startling event.

Here, the prosecution would argue that being hit over the head with a cue stick and slammed in the jaw with an 8 ball is a startling event, Buzz's statements about his condition and belief that he was dying were made in response to the startling event, and his statements were made while he was still under the stress of the startling event. The defense would argue otherwise. - again - what counter arg?

Therefore, Buzz's statements are admissible as spontaneous statements.

### CONCLUSION RE: TESTIMONY OF TIPSYP RE: WHISPER

The court would allow Tipsy's testimony about Buzz's whisper "I think I am dying."

### TESTIMONY OF TIPSYP RE: DIGITAL IMAGE

### LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.

Here, the prosecution would argue that Tipsy's testimony about the digital image he took on his phone of Buzz's bloody writing "Asher - Crosby" is logically relevant because it has the tendency to prove that Asher and Crosby were the individuals who committed the charged crimes of conspiracy to commit assault and assault with a deadly weapon on Buzz. The defense would argue otherwise.

The court would find that Tipsy's testimony is logically relevant.

### LEGAL RELEVANCE (BALANCING TEST)

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See rules above.

Here, the prosecution would argue that Topsy's testimony is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, the defense would argue that the trial court should use its discretion to exclude Topsy's testimony because it would confuse the issues and mislead the jury.

The court would find that Topsy's testimony is legally relevant.

### **WITNESS COMPETENCE**

See rules above.

Here, there is no indication that Topsy is incompetent to testify for any reason.

Thus, Topsy is a competent witness.

### **HEARSAY**

See rules above.

Here, Topsy's testimony about the digital image he took on his phone of Buzz's bloody writing "Asher - Crosby" is hearsay because it is a writing that contains a statement that was made out of court and is offered for the truth of the matter asserted. Thus, the digital image is inadmissible unless an exception applies. *good*

### **UNAVAILABILITY OF THE ORIGINAL DECLARANT**

A declarant may be unavailable for a variety of reasons, including if the declarant is dead, lacks capacity to testify, is beyond the court's subpoena power, etc.

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Here, Buzz slipped into a coma and could not testify at trial. Thus, he is unavailable to testify about his writing of "Asher - Crosby" in blood.

### CONTEMPORANEOUS STATEMENT

Statements are admissible under this exception if the statement was made describing an act, event, or condition while it was transpiring or immediately thereafter.

Here, the prosecution would argue that the digital image Topsy took on his phone of Buzz's bloody writing "Asher - Crosby" is admissible under this exception because the statement described the perpetrators of the event, the altercation, immediately after it occurred. Further, the digital image was taken contemporaneously with Buzz's bloody writing. The defense would argue otherwise. *— like what?*

Buzz's handwriting was a contemporaneous statement and therefore admissible under this exception.

### SPONTANEOUS STATEMENT

Statements are admissible under this exception if the statement was made in response to a startling event while under the stress of the startling event.

Here, the prosecution would argue that the digital image Topsy took on his phone of Buzz's bloody writing "Asher - Crosby" is admissible under this exception because being hit over the head with a cue stick and slammed in the jaw with an 8 ball is a startling event, the handwriting described the perpetrators of the startling event, the handwriting was made in direct response to the startling event, and the handwriting was done while Buzz was still under the stress of the startling event. Further, Topsy captured a photograph in response to the startling event of rendering aid to Buzz. The defense would argue otherwise. *like what?*



Therefore, Buzz's handwriting in the photograph is admissible as a spontaneous statement.

### THEN-EXISTING STATE OF MIND

Statements are admissible under this exception if the statement describes the declarant's then-existing state of mind or physical condition while the declarant was making the statement.

Here, the prosecution would argue that the digital image Tipsy took on his phone of Buzz's bloody writing "Asher - Crosby" is admissible under this exception because the statement described Buzz's state of mind that he believed Asher and Crosby were responsible for his injuries. The defense would argue otherwise.

Buzz's handwriting was a statement of his then-existing state of mind and is therefore admissible under this exception.

### CONCLUSION RE: TESTIMONY OF TIPSY

Tipsy's testimony about the digital image Tipsy took on his phone of Buzz's bloody writing "Asher - Crosby"

### TESTIMONY OF OFFICER OTIS

### LOGICAL RELEVANCE (TENDENCY TEST)

See rules above.

Here, the prosecution would argue that Officer Otis's testimony that Buzz did not recall the incident initially but recalled weeks later, and his subsequent identification is Asher

and Crosby is logically relevant because it has the tendency to prove that Asher and Crosby committed the charged crimes of conspiracy to commit assault and assault with a deadly weapon on Buzz. The defense would argue otherwise.

The court would find that Officer Otis's testimony is logically relevant.

### **LEGAL RELEVANCE (BALANCING TEST)**

See rules above.

Here, the prosecution would argue that Officer Otis's testimony is legally relevant because it holds substantial probative value that is not outweighed by any dangers of unfair prejudice. On the other hand, the defense would argue that the trial court should use its discretion to exclude Officer Otis's testimony because it would confuse the issues and mislead the jury.

The court would find that Officer Otis's testimony is legally relevant.

### **WITNESS COMPETENCE**

See rules above.

Here, there is no indication that Officer Otis is incompetent to testify for any reason.

Thus, Thumper is a competent witness.

### **HEARSAY**

See rules above.

Here, Officer Otis's testimony is hearsay because he is testifying about Buzz's out of court statements that he did not recall the incident initially but recalled weeks later and

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identified Archer and Crosby. Further, Buzz's statement to Officer Otis that he wrote "Asher-Crosby" in blood is hearsay because it is an out of court statement made by Buzz to Officer Otis.

## PRIOR IDENTIFICATION

A witness's prior identification may be admissible as an exception to the hearsay rule.

Here, Officer Otis may be able to testify that Buzz previously identified Asher and Crosby as the perpetrators.

Thus, Officer Otis can probably testify about Buzz's previous identification.

## ~~FORMER TESTIMONY~~

*NO (The first stat was not testimony - only a statement)*

Evidence of a party's former testimony may be admissible if the testimony was under oath, the issues are the same, and the opposing party had the opportunity to cross-examine.

Here, Officer Otis's conversation with Buzz does not constitute former testimony because it was not testimony under oath.

Thus, this would not apply.

## CRAWFORD DOCTRINE

Under the Confrontation Clause of the Sixth Amendment, statements may be inadmissible if they were obtained by a declarant who is now unavailable, the statement was testimonial in nature, the opposing party did not have the opportunity to cross-examine the declarant. Statements are testimonial under the primary purpose test if they were obtained in anticipation of future litigation or prosecution.



Here, Officer Otis's statement from Buzz was obtained as part of the investigation of the charged crimes. However, the defense never got the opportunity to cross-examine Buzz about the identification, and they will never get that opportunity because Buzz has slipped into a coma and cannot testify.

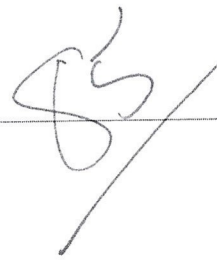
Therefore, evidence of Buzz's prior identification through Officer Otis's testimony is probably barred by the Crawford doctrine/Confrontation Clause of the Sixth Amendment.

CONCLUSION RE: TESTIMONY OF OFFICER OTIS

The court would likely not allow Officer Otis's testimony.

*Past Recollection  
Recorded —*

*overall - very good*



3)

## QUESTION 3

**(1) Prosecution's evidence of marital discord and physical assaults****Logical Relevancy (Tendency Test)**

Evidence is logically relevant if it has any tendency to prove or disprove a disputed fact of consequence.

Here, the prosecution's evidence of marital discord and physical assaults is logically relevant because it tends to prove Darlene's violent disposition and her regular abuse of Victor that eventually led to homicide.

Therefore, the trial court will likely admit the evidence as logically relevant.

**Legal Relevancy (Balancing Test)**

Evidence is legally relevant if its probative value substantially outweighs the risks of jury prejudice, jury confusion, or waste of court time. The trial court has the discretion to exclude evidence that is not legally relevant.

Here, the prosecution's evidence's probative value substantially outweighs the risks of jury prejudice because the evidence also implicates Victor (e.g., Victor was involved in the quarrels and thus may not have been passively receiving Darlene's alleged abuse). That Victor obtained a restraining order and sustained physical injuries, while compelling, may not alone cause the jury to rule against Darlene. However, the defense will argue persuasively that such evidence will unduly influence the jury to consider Darlene an abusive spouse whose final act of violence was murder. The trial court will have to carefully balance the scales of probative value and undue influence. However, the

prosecution will argue that the evidence alone is insufficient to compel a jury to rule on that evidence alone.

Therefore, the trial court will deem the evidence legally relevant and thus admissible.

### **Character Evidence**

Generally, Character Evidence (CE) is inadmissible to prove conduct in conformity. There are three types of character evidence: (1) opinion; (2) reputation; and (3) specific instances. In criminal cases, however, the prosecution (and only the prosecution) may use evidence of relevant misconduct to prove motive, intent, lack of mistake, identity, and common scheme or plan (i.e., MIMIC). Importantly, such evidence is not CE when offered to prove relevant misconduct.

Here, the prosecution in its case-in-chief is offering evidence of quarrels between Darlene and Victor, domestic violence restraining orders, and records of Victor's injuries to prove Darlene acted in accordance with her past violence and murdered Victor. In other words, the prosecution is attempting to show that Darlene is a violent person and acted in accordance with this character trait.

Therefore, the prosecution's evidence is inadmissible unless an exception applies.

### ***Relevant Misconduct***

The prosecution may offer evidence of a defendant's relevant misconduct to establish motive, intent, lack of mistake, identity, and/or common scheme or plan (i.e., MIMIC). Such evidence in this context is not considered Character Evidence.

Here, the prosecution could argue that the evidence of Darlene's past quarrels and violence indicate motive to murder Victor because he filed a restraining order against her.

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Additionally, the prosecution could argue lack of mistake since Darlene is asserting self-defense. Furthermore, the prosecution could argue the evidence indicates Darlene's intent to murder Victor after a tumultuous marriage.

Therefore, the prosecution's evidence could be admitted as relevant misconduct.

### **Hearsay**

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

Here, the prosecution is offering documents showing Victor's restraining order against Darlene and the injuries Victor sustained from Darlene's beatings.

Therefore, the documents are inadmissible unless an exception applies.

### ***Medical Treatment***

Statements made for the purpose of or reasonably related to receiving medical treatment are admissible under the medical treatment exception.

Here, the documents relating to Victor's physical injuries may be admissible so far as they relate to treating Victor's maladies.

Therefore, the evidence about Victor's physical injuries are admissible.

### ***Business Records***

Records kept in the regular course of business where the recorder had a duty to record that were recorded at or near the event are admissible under the business records exception to hearsay. *needs custodian of records*

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Here, medical records fall under the business records exception because doctors keep notes and records involving patient's symptoms and treatments. The restraining order will also be admitted under this exception because such reports are kept in the usual course of business for police officers, who have a duty to keep such records.

Therefore, the medical records and restraining order are admissible under the business records exception. *most likely the restraining order is an official record*  
*not Bus. rec.*

### Conclusion

The prosecution's evidence will all likely be admitted.

### (2) Prosecution: Roger's testimony about Victor's statements

#### Logical Relevancy

See rule above.

Here, Roger's testimony about Victor's statements (specifically, "I am afraid of Darlene" and "Darlene threatened to kill me" are relevant because they tend to prove Darlene's violence and culpability, and Victor's fear of his wife and his own safety. Darlene's culpability is a fact in dispute, and Roger's testimony will shed light on the matter.

Therefore, the trial court will rule the evidence logically relevant and thus admissible.

#### Legal Relevancy

See rule above.

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Here, the probative value of Roger's testimony substantially outweighs the risk of jury bias, jury confusion, and waste of court time. Though provocative, the testimony sheds light into Victor's state of mind and also his fear of his wife, which alone is unlikely to sway a jury to convict. Additionally, because the evidence is directly relevant to the case at hand and the parties to it, jury confusion and waste of court time are non-issues.

Therefore, the court will admit the evidence as legally relevant.

### Hearsay

See rule above.

Here, Roger's testimony involves two hearsay statements by Victor: "I am afraid of Darlene" and "Darlene threatened to kill me."

Therefore, Roger's testimony is inadmissible unless an exception or exemption applies.

### *Present State of Mind*

The present state of mind exception encompasses statements relating to the then-existing state of mind (e.g., ~~motive, intent, plan~~ <sup>NO — This is relevant under conduct terms</sup>) and emotional, sensory, and physical condition.

Here, Roger's testimony sheds light on Victor's then-existing state of mind: his fear of his own wife, particularly since Darlene threatened his life.

Therefore, Roger's testimony may be admissible under the present state of mind exception.

### Conclusion

Roger's testimony about Victor's statements are admissible.

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**(3) Prosecution: Roger's testimony about Victor's reputation for peacefulness and Roger's own opinion about Victor's peacefulness**

**Logical Relevance**

See rule above.

Here, Roger's testimony about Victor's reputation for peacefulness is logically relevant because it tends to prove Darlene was the initial aggressor (damaging Darlene's self-defense claim) and Victor was not likely to cause fights or injuries. Roger's testimony about his own opinion about Victor's peacefulness is similarly logically relevant for the same reason.

Therefore, the trial court will rule the evidence logically relevant.

**Legal Relevance**

See rule above.

Here, Roger's testimony about Victor's reputation for peacefulness is legally relevant because its probative value substantially outweighs the risk of jury prejudice, jury confusion, or waste of court time. Roger's testimony about his own opinion on Victor's peacefulness is similarly legally relevant.

Therefore, the court will rule the evidence legally relevant and thus admissible.

**Character Evidence**

See rule above. Importantly, the prosecution may not introduce CE against the defendant in their case-in-chief. However, if the defendant opens the door by taking the stand to

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claim a trait in issue or provides witnesses to give opinion or reputation evidence about the defendant, the prosecution may use character evidence in their cross-examination or rebuttal, and may even introduce the prosecution's own witnesses in doing so.

Here, because Darlene is claiming self-defense (thus claiming Victor's trait for violence), the prosecution may introduce the trait of peacefulness for the victim in their case-in-chief. In this context, the prosecution does not have to wait for the defendant to open the door. So, Roger may testify as to Victor's reputation for peacefulness, as well as Roger's own opinion regarding Victor's peacefulness.

Therefore, Roger's testimony about Victor's reputation for peacefulness is admissible.

## Conclusion

Roger's testimony about Victor's reputation for peacefulness and Roger's own opinion about Victor's peacefulness is admissible.

**(4) Defense: Peter's testimony re opinion for Darlene's peacefulness;  
Prosecution's cross-examination and rebuttal re Amy**

*NOTE: the question uses "Peter" and "Paul" interchangeably, but I will refer to him as "Peter."*

## Logical Relevance

See rule above.

Here, Peter's testimony is logically relevant because it tends to establish Darlene's peacefulness, suggesting Darlene was not the initial aggressor and thus acted in self-defense.

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Therefore, the trial court will rule Peter's testimony logically relevant.

### Legal Relevance

See rule above.

Here, Peter's testimony is legally relevant because its probative value substantially outweighs the dangers of undue jury prejudice, jury confusion, or waste of court time.

Therefore, the court will rule the evidence legally relevant and thus admissible.

### Character Evidence

See rule above. Importantly, the defense may use character evidence in their case-in-chief. However, doing so opens the door for the prosecution to cross-examine the defense's witnesses and for the prosecution to bring its own witnesses to rebut the defense's case. The prosecution may use "did you know" and "have you heard" questions to challenge the credibility of the defense's witnesses.

Here, Peter's testimony regarding his opinion of Darlene's peacefulness is admissible. However, in doing so, the prosecution is also allowed to cross-examine Peter asking "have you heard" questions to challenge credibility. The prosecution did just that, asking if Peter had "heard that Darlene attacked a former co-worker after a work dispute." This question is permissible because Darlene opened the door. Peter's credibility is damaged because "he did not," possibly meaning he does not have a full understanding of Darlene's character. The prosecution also called Amy to rebut Peter's testimony; this is also permissible because -- again -- Darlene opened the door to character evidence. Amy's testimony about Darlene's attack on a former co-worker is thus admissible in the rebuttal (the facts do not clarify if Amy was the one Darlene attacked or if Amy merely witnessed

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the attack; in either case, Amy can effectively offer character evidence regarding Darlene's trait of violence).

Therefore, Peter's testimony is admissible, but then so is the prosecution's cross-examination and rebuttal.

### Conclusion

All evidence introduced here is admissible.

END OF EXAM

*overall — very well organized*