

Question # 1

Dan worked at a church. One day a woman came to the church, told Dan she wanted to donate some property to the church, and handed him an old book and a handgun.

Dan had originally intended to deliver both the book and the gun to the church's administrators, but he changed his mind and delivered only the book. He put the gun on the front seat of his car.

The next day, as he was driving, Dan was stopped by a police officer at a sobriety checkpoint at which officers stopped all cars and asked their drivers to exit briefly before going on their way. The police officer explained the procedure and asked, "Would you please exit the vehicle?" Believing he had no choice, Dan said, "Okay."

After Dan got out of his car, the police officer observed the gun on the front seat and asked Dan if he was the owner. Dan answered, "No. I stole the gun. But I was planning to give it back." The police officer arrested Dan.

Police officer read Dan his Miranda warnings. Dan invoked his rights to remain silent and to counsel. Police officer then searched Dan's car and discovered a bag of marijuana in the trunk of the car. The officer showed Dan the marijuana and told Dan he was in big trouble. Dan told the police officer that the marijuana was not his and that he had found it earlier that day in Lyon park.

Dan is charged with theft, unlawful possession of a handgun, possession with intent to distribute marijuana and moves to suppress the gun, the marijuana found in the trunk of his car, and his statements to the police under the United States Constitution

1. Is Dan likely to prevail on his motions? Discuss.

2. If Dan does not prevail on his motions, what theft crime can Dan be convicted of and why?

Criminal Procedure Model Answer Question # 1

State v. Dan

1. Is Dan likely to prevail on his motions? Discuss.

A. motion to suppress the gun?

Fourth Amendment - Stopping of Car

The Fourth Amendment is applicable to the states through the Fourteenth Amendment, and protects against unreasonable searches and seizures by government intrusion upon one's reasonable expectation of privacy.

Dan was stopped by a police officer at a sobriety checkpoint. Thus, a government intrusion exists. The police officer stopped all cars and asked the drivers to exit briefly before they went on their way. The officer stopped Dan's car and asked Dan to exit his car in order for him to determine if Dan was sober. Thus, Dan had an expectation of privacy with his car and the contents therein.

The law does allow the police to set up fixed checkpoints on the roadway in order to test for drunkenness. Although the stop of a car may be seen as a seizure, the law allows all stops for a sobriety checkpoint even without any suspicion that the driver may have been drinking.

Based on the facts police officer stopped all cars. Therefore, there was not a search at this point.

Therefore, there was no Fourth Amendment violation.

Fourth Amendment- Finding the Gun

Defined supra.

When the police officer stopped Dan's car and asked him to exit, he observed a gun on the front seat. The stopping of the car was without a warrant. The officer observed the gun and arrested Dan. Police officer observed the gun once he stopped Dan's car. Thus, there is government intrusion.

The gun was taken from Dan's car. An individual normally has a reasonable expectation of privacy in his car and any objects contained therein. Hence, Dan has a reasonable expectation of privacy with the objects contained within his car.

Therefore, the search falls within the Fourth Amendment. Since it was conducted without a warrant, it is presumed unreasonable and invalid unless the state can show an applicable exception.

Exceptions to Warrantless Search

Consent

Consent to a search is a valid exception if the consent is voluntary and knowingly made.

When Dan was stopped by the police officer, the officer explained to Dan the procedure and asked Dan to step out of his car. Dan said okay and exited the car. Dan will argue that he believed he had no choice but to exit the car, and only said okay based on his belief that he had no choice.

However, the police do not need to inform the party that they have a right not to consent. Although Dan did not know he could say no, the fact that he agreed based on his statement of “okay,” and exiting the car evidences that he voluntarily gave knowing consent to the officer. The consent is limited to determine if Dan is sober. The consent is not for the officer to search Dan’s car. Thus, the consent is limited to Dan and his sobriety.

Therefore, the consent is a valid exception.

Plain View Doctrine

The “plain view doctrine” states that where a police officer who is lawfully on the premises and observes obviously incriminating evidence the search will be found to be valid.

Police officer lawfully stopped Dan’s car at a sobriety checkpoint and he saw a gun on Dan’s front seat. Therefore, the police officer was lawfully on the premises.

The police officer saw the gun on Dan’s front seat and asked Dan if he was the owner of the gun. Dan stated “No, I stole the gun.” Based on Dan’s statement and the observation of the gun on the front seat, the gun is obviously incriminating.

Therefore, the plain view doctrine will be an exception to the warrantless search rule.

Fourth Amendment - Marijuana

Defined supra.

When the police officer stopped Dan's car and asked him to exit, he observed a gun on the front seat. The stopping of the car was without a warrant. The officer observed the gun and Dan admitted he stole the gun and Dan was arrested. Thus, there is government intrusion.

The gun was taken from Dan's car. Dan has a reasonable expectation of privacy in his car and any objects contained therein. Hence, Dan has a reasonable expectation of privacy with the objects contained within his car.

Therefore, the search falls within the Fourth Amendment.

Since it was conducted without a warrant, it is presumed unreasonable and invalid unless the state can show an applicable exception.

Automobile Search

In order for a search of a car to be valid the officer must have probable cause to search and the officer may search the entire car based upon the mobility of the vehicle.

The police officer stopped Dan at a sobriety checkpoint. He saw a gun on the front seat of Dan's car. Upon asking him if he owned the gun, Dan admitted that he had stolen the gun and he was arrested. The fact that Dan admitted to stealing the gun gave the officer probable cause. When the police officer searched the rest of the car and found marijuana in the trunk of the car he did so with the requisite probable cause. Therefore, he had the right to look into the trunk of Dan's car.

Therefore, the automobile exception is valid and the marijuana is admissible under this exception to the Fourth Amendment.

Search Incident to an Arrest.

In order for a search incident to a lawful arrest to be valid, you must have a valid arrest and the search must be done contemporaneous with the arrest.

As discussed *infra*, the police officer lawfully arrested Dan. Therefore, the officer may conduct a search of anything within the defendant's lunge span. The car was stopped at a checkpoint. Once Dan was arrested the officer searched Dan's car and discovered marijuana in the trunk of his car. If the car trunk is within Dan's lunge span the search would be considered lawful. Dan will argue that the trunk of his car is not within his reach and the officer went beyond his authority when he searched the trunk of the car.

When the officer arrested Dan he immediately searched his car. Upon checking into Dan's car trunk he found marijuana. Thus, the search was done contemporaneous with the arrest.

Therefore, the search incident to an arrest is not a valid exception since the officer went beyond the lunge span.

Motion to Suppress Dan's Statement

Fourth Amendment - Seizure

The Fourth Amendment, applicable to the states via the Fourteenth Amendment, prohibits unreasonable seizures by government upon one's reasonable expectation of privacy. The general rule is warrantless seizures are presumed invalid absent an exception.

Based on the facts, the police officer saw a gun on Dan's front seat of the car and arrested Dan without a warrant. Hence, the presumption is an unreasonable seizure. Further, Dan was arrested by a police officer. Thus, there is government intrusion. Dan was being arrested and he has a reasonable expectation of privacy in himself.

Therefore, the Fourth Amendment applies and his arrest is presumed invalid.

Probable Cause

If a police officer is acting with probable cause he can arrest a suspect without a warrant.

The prosecution will argue when the officer saw the gun on Dan's seat and asked him if he was the owner and Dan stated he stole the gun, he had probable cause.

Dan will argue the probable cause obtained was in violation of his Fifth Amendment rights. The police officer asked Dan if he owned the gun. The officer never gave Dan any Miranda warnings. However, at the sobriety checkpoint the officer observed the gun, and asked the question. The police officer did obtain probable cause based on Dan's reply to the question. Since the probable cause used to arrest Dan was obtained legally, the arrest is valid.

Fifth Amendment - Self Incrimination -Gun stolen

The Fifth Amendment, applicable to the states via the Fourteenth Amendment, protects one against self incrimination. Once a suspect is arrested the police must inform the defendant of his right against self-incrimination prior to any custodial interrogation.

Dan was only at a sobriety check point when the officer saw the gun on his front seat of his car. Because he had freedom of movement, he was not in custody. Further, Dan's confession was

made subsequent to being asked if that was his gun. He was not under arrest previous to the statement being made.

Dan will contend that his statement was made after the police officer asked him if he was the owner of the gun. As such, he was the focus of the investigation. Dan will further argue that the police officer's question constituted the functional equivalent of a custodial interrogation. Thus, he should have been given a Miranda warning before the police officer made the statement to him.

However, the State will rebut that Dan blurted out his confession in the absence of coercion. He blurted out constitutes a spontaneous declaration for which Miranda rights do not attach. Nevertheless, under *Rhode Island v. Innis*, an officer who elicits an incriminating response during interrogation without first advising the defendant of his rights has violated Miranda. The arresting officer asked Dan who owned the gun during a routine checkpoint. This remark instigated Dan's blurt out. The officer made this attempt to elicit Dan's incriminating response before advising Dan of his right to remain silent pursuant to Miranda.

Therefore, the officer's statement was not the functional equivalent of a custodial interrogation. Thus, Dan's Fifth Amendment protection against self-incrimination has not been violated.

Fifth Amendment - Self Incrimination – Marijuana not his

Defined supra.

Once Dan was arrested he should have been given his Miranda rights.

An officer cannot interrogate a suspect without first giving a Miranda warning. Based on the facts Dan was given his Miranda rights. At that point the officer searched Dan's car. The officer found a bag of marijuana in the trunk of Dan's car. The officer showed Dan the marijuana and told Dan that he was in big trouble.

Waiver of Miranda Rights

A waiver is a voluntary relinquishment of a known right.

Once Dan was given his Miranda warnings he waived his right and stated "the marijuana was not his and that he had found it earlier that day in Lyon Park." Therefore, Dan did waive his rights under Miranda to remain silent.

Thus, there is no violation of Dan's Fifth Amendment rights against self incrimination.

Standing To Invoke the Exclusionary Rule

At common law, the party seeking to exclude evidence must have a proprietary or possessory right in the evidence seized. Modernly, the court will examine the claimant's reasonable expectation of privacy under the totality of the circumstances.

Dave will argue that the cocaine was in his car and should be suppressed. Since Dave is the owner of the car he does have a proprietary and possessory interest in the cocaine since it was in his car.

Modernly we look to the totality of the circumstances to assess a defendant's standing to invoke the exclusionary rule. Based on the same facts, Dave will be able to show that he had a reasonable expectation of privacy within the items in his own car.

Thus, based on the totality of the circumstances, Dave does have standing to assert the exclusionary rule regarding the cocaine.

Exclusionary Rule

Defined supra.

If a statement was obtained in violation of Dave's Fourth Amendment rights, any evidence obtained because of the violation will be excluded as tainted fruit of the poisonous tree. As discussed, the search of the car was in violation of Dave's rights. Since the arrest was based on probable cause that was obtained illegally the statement made after the arrest is fruit of the poisonous tree and inadmissible. Dave would have standing to invoke the exclusionary rule.

2. If Dan does not prevail on his motions, what theft crime can Dan be convicted of and why?

State v Dan

Embezzlement

Embezzlement is the fraudulent conversion of the rightfully entrusted property.

Dan worked at the church. One day a woman came in and told him she wanted to donate some property and handed him a book and a gun. The facts are not clear if Dan is an employee, or a mere volunteer for the church. The prosecution will argue that once Dan took the gun from the woman and that he never had custody of the gun as an agent for the church, and thus he never had rightful possession, making any taking a larceny.

However, the better argument is that Dan was working at the church when a woman came in and handed him the gun. He does not collect offerings or property as an integral part of his job. Thus, he was not rightfully entrusted with the gun.

Further, when Dan took the gun and placed it in the front seat of his car, he seriously interfered the church's rights in the gun. Therefore, Dan fraudulently converted the gun. Moreover, in taking the gun, Dan intended to defraud the church of the gun as evidenced by his intent placing the gun in his car.

Thus, if Dan is found to be an agent acting on behalf of the church, he can reasonably be charged with embezzlement.

Larceny

Larceny is the trespassory taking and carrying away of personal property of another, with the specific intent to permanently deprive.

Dan was given a gun by a woman that wanted to donate the gun to the church. Dan removed the gun from the church and placed it into his car. Hence, a trespassory taking and carrying away. The gun belonged to the church. Hence, it was the property of another. Dan removed the gun that belonged to the church, and placed it in his car. Therefore there was specific intent to permanently deprive the church of the gun. Dan may argue that he had the intent to return the gun, however, once the taking is fulfilled a larceny will be found, even if the property is returned.

Thus, Dan can be charged with larceny.

Question # 2

State law makes it a felony to either promote a dogfight or knowingly attend a dogfight where admission is charged. Ruth, a reporter for the *Dispatch*, City's only newspaper, observed a staged dogfight by posing as a patron and paying the admission fee. She took over 30 photographs of the event with a concealed camera. Later, she wrote an article about the event in the *Dispatch* that did not identify anyone else present, but which was accompanied by one of her photographs showing two dogs in bloody mortal combat.

The City police then asked Ruth if she knew the names of any persons at the illegal dogfight and requested all of her unpublished photographs in order to try to identify the fight promoters and attendees. With the backing of the *Dispatch*, Ruth flatly refused the police requests.

When Ruth's refusal came to the attention of the city council, several council members stated publicly that the *Dispatch* was guilty of "bad citizenship." The council then unanimously enacted an ordinance banning all coin-operated news racks from City's public sidewalks and any other public property in order to "improve public safety." The ordinance left unaffected those other news racks on public property, far fewer in number, that dispensed several kinds of free publications (commercial, political, religious, etc.).

The state prosecutor in City commenced a grand jury investigation of illegal dogfighting in City. The grand jury subpoenaed Ruth to testify and answer questions about the dogfight she had attended and to produce all her unpublished photos of the event. Ruth brought an appropriate action in state court seeking an order quashing the grand jury subpoena.

The *Dispatch* sells about half of its daily editions from coin-operated news racks located on City's sidewalks. The *Dispatch* commenced an action against the city council in the local federal district court, seeking a declaration that the ordinance banning coin-operated news racks violates rights guaranteed under the U.S. Constitution.

1. What arguments based on rights guaranteed by the U.S. Constitution could Ruth reasonably make in support of her action for an order quashing the grand jury subpoena, and how should the court rule on each? Discuss.
2. What arguments could the *Dispatch* reasonably make in support of its claim that the city ordinance violates rights guaranteed under the U.S. Constitution, and how should the court rule on each? Discuss.

Model Answer Constitutional Law

Question# 2

RUTH v. CITY

1. ARGUMENTS IN SUPPORT OF AN ORDER TO QUASH A GRAND JURY

SUBPOENA

Fifth Amendment – Self Incrimination

The 5th Amendment under the United States Constitution states that no person shall be compelled to testify against herself and that she has a right against self incrimination.

City started an investigation into illegal dog fighting. In order to help the investigation, City subpoenaed Ruth to testify at a grand jury hearing about the dogfight she attended and to produce the photos that she had taken. Ruth will argue she doesn't have to testify in front of a grand jury because if she does she will be admitting she was at the dog fight. State law makes it a felony to knowingly attend a dogfight where admission is charged. Ruth posed as a patron and paid the admission fee in order to get a story about the event. If she was required to testify before the grand jury, she would be admitting to violating the law. Ruth has a right to not incriminate herself.

Any testimony would incriminate her in reference to the violation of the dog fighting statute, which is a felony. Thus, her testimony is protected under the Fifth Amendment. Ruth would be required to appear at the grand jury hearing but once on the stand she can claim the 5th Amendment in order to prevent her from testifying. Additionally, the photos taken at the dog fighting event would also incriminate her, since she was the one taking the photos. However, the Fifth Amendment only applies to testimonial evidence. Photos are not testimonial and must be produced.

Thus, City can't compel Ruth to testify, although City can compel Ruth to produce the photographs of the dogfight in a criminal investigation pursuant to a grand jury indictment in the interests of justice because physical evidence is not protected. Therefore, Ruth's motion to quash will be denied but she may raise the 5th Amendment as to her testimony.

1st Amendment – Freedom of Speech

First Amendment freedom of speech is a preferred right under the United States Constitution, applicable to the states through the 14th Amendment. It is not an absolute right and can be restricted by the government under certain situations. The subject matter in dispute is the content

of Ruth's testimony on what she observed while attending the dogfight event Dispatch published. Therefore, the 1st Amendment is applicable.

Content Based Regulation

Government action that stifles speech on account of its message, or that requires the utterance of a particular message, contravenes this essential 1st Amendment right and is presumably invalid.

The City issued a subpoena mandating Ruth to testify at the grand jury hearing about the events that took place at the illegal dogfight she attended. Therefore, the court order is content based and must face strict scrutiny in order to be upheld.

Strict Scrutiny

In order to meet strict scrutiny, the state action must have a compelling state interest, it must be narrowly tailored to meet that interest, and least restrictive.

The City has a compelling interest to mandate Ruth to testify about the illegal dogfight she attended since it would help place the patrons to these events in jail for violating the law. Furthermore, the subpoena is requiring her to testify about the dogfight she had attended, which is narrowly tailored since it only compels her to testify about her participation at the event.

However, if Ruth testifies she would be admitting violating a crime that is a felony. To require her to testify is not least restrictive since the City could give Ruth immunity from violating the law. If Ruth knew she would not be prosecuted for violating the State Law she may testify. However, to require her to testify would possibly lead to her being prosecuted for violating the law, which makes the subpoena not narrowly tailored. Therefore, the order does not meet strict scrutiny and Ruth's first amendment rights will

be violated if forced to testify.

First Amendment - Freedom of Press

The press is not allowed any more First Amendment freedoms than other citizens under the Constitution. Ruth, as a reporter, went to a dogfight and paid admission to investigate this subject

matter as a matter of public interest. The police asked Ruth to give names of persons who attended the dogfight and requested all unpublished photos in order to identify those persons.

The City will argue they have the right to compel her testimony since there is evidence of a crime that has been committed and she has information about that crime. In order to compel the City will have to meet strict scrutiny test.

Strict Scrutiny

As discussed the City does have a compelling reason to compel Ruth to testify, however, it is not narrowly tailored since Ruth can be subject to criminal liability. Thus, the requirement to have her testify does not meet strict scrutiny.

1. DISPATCH v. CITY COUNCIL

First Amendment - Freedom Of Speech

First Amendment Freedom of Speech is a preferred right under the United States Constitution applicable to the states through the Fourteenth Amendment. It is not an absolute right and can be restricted by the government under certain situations. The subject matter in dispute is the newspaper Dispatch publishes. Therefore, the 1st Amendment is applicable. The City council enacted an ordinance banning all coin operated news racks from City's public sidewalks. The fact Dispatch will not be able to sell their papers in coin operated news racks will affect the citizens of City learning about what is going on within their City and their sales of newspapers. Dispatch's position is that the City's ordinance violates Dispatch's First Amendment right to speech, a preferred right under the United States Constitution.

Therefore, the 1st Amendment is applicable.

Content Based Regulation

Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential 1st Amendment right. This type of government action is presumptively invalid and subject to strict scrutiny.

Dispatch will contend that City's ordinance was passed because Ruth would not testify for the grand jury. City council members stated publicly that Dispatch was guilty of "bad citizenship." The City council then passed the law banning all coin operated news racks from the public

sidewalk. Thus, the ordinance is aimed at Dispatch's message. The City council will contend the ordinance is not aimed at their message and therefore, not content based.

First Amendment Speech – Content Neutral

City will argue that this statute seems to regulate conduct by banning news racks from City's public sidewalks, it is not aimed at the suppression of the message. Thus, it actually would be content neutral.

Public Forum

If a regulation effects a person's right in usage of a public forum, the City council will have to meet the burden of strict scrutiny in order to have the regulation upheld. In order to meet strict scrutiny, the state action must have a compelling state interest and must be narrowly tailored to meet that interest.

The City council will argue the purpose behind the ordinance is to improve public safety. Thus, there is a compelling interest to prevent coin operated news racks. Furthermore, the ordinance prohibits all coin operated news racks from public sidewalks is, hence narrowly tailored. However, Dispatch will contend the ordinance only prevents coin operated news racks. Other news racks that offer free publications are still permitted to be on public sidewalks. Therefore, since it only compels coin operated news racks the ordinance is not narrowly tailored.

Therefore, the ordinance violates Dispatch's First Amendments rights

Time/Place/Manner

The government can regulate conduct in public forums where expression is allowed under time, place and manner restrictions. The City council will have to show that the ordinance is for an important governmental interest, narrowly tailored to serve that interest, and leaves alternative channels of communication. As discussed above, the ordinance is content neutral. The City council passed the ordinance to improve public safety. However, they are only preventing coin operated versus non coin operated news racks. There is no nexus between coin operated and non-coin operated news racks being kept of the public sidewalks for public safety. Although there are alternative channels that Dispatch can get there paper to the citizens of city, the ordinance is not narrowly tailored and violates Dispatches rights guaranteed under the First Amendment.

Thus, the City can't regulate under time, place and manner against only coin operated news racks.

Equal Protection

The Equal Protection Clause prohibits government regulations that discriminate on the basis of an arbitrary classification as individuals similarly situated must be treated the same.

Dispatch will argue the ordinance is aimed at them since the City council publicly announced that Dispatch was guilty of “bad citizenship.”

Thus, the ordinance, instituted by the City council which prohibits all coin operated news racks is a government regulation. The ordinance allows non-coin operated news racks and not coin operated. Thus, the ordinance is treating those similarly situated differently and is discriminatory.

Dispatch has raised a proper Equal Protection Clause challenge.

State Action

In order to establish a violation of Equal Protection Clause, there must be state action involved.

City council has enacted the ordinance. Thus, since the ordinance is enforced there is state action.

Intentional Discrimination

Where a government action has a discriminatory purpose, de jure discrimination may be found.

The City council passed the ordinance due to the facts that Ruth would not testify at the grand jury hearing. The council stated that Dispatch was guilty of bad citizenship, and then passed this ordinance. The passing of the ordinance is, and by its terms, has an intentional discriminatory purpose. Therefore, de jure discrimination will be found.

Classification of the Discrimination

The right to Freedom of speech is considered a fundamental right and would fall into the highest classification. Strict scrutiny is applied to a government regulation which intentionally discriminates on the basis of a fundamental right. The regulation will violate the Equal Protection Clause unless it is substantially related to a compelling governmental objective, narrowly tailored to that objective and there is no alternative means.

As discussed, the City council passed this ordinance because Dispatch was guilty of bad citizenship. The ordinance intentionally discriminates solely on the basis of the freedom of speech.

The City council can show a compelling interest for public safety, but since the ordinance only bans “coin operated” news racks and not “all” news racks the ordinance is not narrowly tailored. The ordinance is discriminatory and violates the Equal Protection Clause of the United States Constitution.

City will contend that they are only regulating news racks, not Dispatch’s content based speech, and would only have to meet the rational basis test. The ordinance need only be rationally related to a legitimate concern. Based on passing the ordinance for public safety the City has a legitimate concern, and the ordinance prohibiting the coin operated news racks is related to that concern.

However, since the regulation does interfere with a fundamental right, the ordinance does violated Dispatched equal protection rights.

Question # 3

David and Vic were farmers with adjoining property. They had been fighting for several years about water rights.

In May, Vic and his wife, Wanda, were sitting in the kitchen when Vic received a telephone call. During the call, Vic became quite angry. As soon as he hung up, he said the following to Wanda: "That rat, David, just called and told me that he was going to make me sorry! He used some sort of machine to disguise his voice, but I know it was him!"

In June, Wanda and Vic passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died from a massive heart attack. David was charged with manslaughter in California Superior Court.

At David's trial, the prosecution called Wanda, who testified about Vic's description of the May telephone call.

During cross-examination of Wanda, the defense introduced into evidence a certified copy of a felony perjury conviction Vic had suffered in 2007.

The prosecution then introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.

During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before June, but that he had not heard about the second incident until after his trial had commenced.

Assuming that all appropriate objections were timely made, should the California Superior Court have admitted:

1. Wanda's testimony about Vic's statement regarding the May phone call? Discuss.
2. The certified copy of Vic's 2007 felony perjury conviction? Discuss.
3. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
4. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
5. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss.

Answer according to California law.

Model Answer Evidence
Question# 3

1. Wanda's testimony about Vic's statement concerning the May Phone call:

Logical relevancy

Logical relevancy is any evidence that has a tendency and reason to prove or disprove a material fact that is of consequence to the determination of the action.

Wanda's testimony concerning the May phone call stating that Vic told her that David told him that he was going to make him sorry has a tendency to show there is a feud between the parties making it material to Vic's state of belief that David was going to hurt him in some way which goes to show David was the aggressor when he killed Vic.

Therefore Wanda's testimony is logically relevant.

Proposition 8

Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code , which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury.

In this case, the evidence tends to show that David had a preexisting intent to hurt Vic and thus makes it more likely that he was the initial aggressor in the fight that led to Vic's death. The testimony has significant probative value and outweighs any risk of unfair prejudice, confusion of issues, or misleading the jury.

Therefore, the evidence would not be barred by legal relevancy.

Lay opinion

A witness may only testify as to those matters to which she has personal knowledge, and has perceived the matter.

Wanda personally heard Vic's statement concerning the phone call, and as a result, she has sufficient personal knowledge to testify. After the phone call Vic immediately told Wanda what David had said, establishing that she perceived the matter.

Therefore, her testimony is allowed as lay opinion.

Multiple Hearsay

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

In this case, Wanda's statement is multiple: 1) David's statements to Vic over the phone and 2) Vic's statement made to her.

Both statements were made while sitting in the kitchen, an out of court statement. David's statement to Vic shows David is out to get Vic, and that he carried out his threat, the truth of the matter asserted. Further, Vic's statement to his wife that David called him and told him he was going to make him sorry is being offered to show that David was the initial aggressor, the truth of the matter asserted.

The testimony is inadmissible hearsay.

In general, hearsay is inadmissible absent an exception. In a situation where a statement contains two levels of hearsay, such as here, both levels of hearsay must fall within an exception in order to be admissible.

David's Statement to Vic:

Exception - Admission

A party admission is where a party to the litigation makes a statement inconsistent with a present litigation stance taken at trial.

David is the party defendant in the present action. His statement to Vic that he intended to "make him sorry" is a statement of his intent which is inconsistent with his present litigation stance at trial that he was acting in self defense.

David's statement is admissible as a party admission.

Statement Against Interest

A statement made by a party or non-party, who is unavailable, who made a statement which at the time made was against their proprietary, penal or pecuniary interest.

David is a party and is present at trial, thus he is available to testify. Further, the statement "I am going to make you sorry" is a statement made knowingly against his penal interest showing that he is going to harm Vic. However, David is available to testify.

Therefore, the statement would not qualify under this exception.

Exception – State of Mind

A person's out-of-court declaration of state of mind when in issue may be admissible to prove the

probability that the person engaged in the subsequent act pursuant to that declared state of mind.

David directly expressed to Vic his intent to harm him. David's statement shows his intent that he was the aggressor in the fight, thereby negating his claim of self defense. The statement shows David's state of mind to make Vic sorry showing he carried out his threat.

Dan's statement is admissible under state of mind.

Vic's Statement to Wife:

Contemporaneous Statement

A hearsay statement is admissible if it is made describing or explaining conduct and the statement is made contemporaneously or immediately thereafter.

The statement made by Vic to wife Wanda describes Vic's belief that he was just on the phone with David and that David was going to make him sorry. Thus, the statement made is describing the conduct. Vic made the statement about the phone call after he hung up, and not while he was actively listening to David. Thus, the statement was not contemporaneous, but was made immediately thereafter.

Wanda's testimony would be admissible under this exception.

Spontaneous Statement

A hearsay statement is admissible if it is made describing or explaining conduct and the statement was made while under stress, relating to the startling event or condition.

Vic became quite angry during the call, thus indicating the call itself was a startling event or condition. In addition, David's statement that he was going to make Vic sorry would be a startling event or condition. Vic's statement about the call was made to Wanda as soon as he hung up, thus indicating that he was still under the stress of the phone call.

Therefore, the statement would qualify as a spontaneous statement, and would be admissible.

2. Certified Copy of Vic's 2007 Felony Perjury Conviction:

Logical Relevance

Defined supra.

The evidence of Vic's conviction has a tendency and reason to prove a material fact that Vic was the aggressor supporting David's self defense claim. Further, David's preexisting intent to hurt

Vic is in dispute, since David is claiming he acted in self-defense and was not the initial aggressor.

Therefore, the evidence is logically relevant.

Character Evidence

Character Evidence is any evidence offered to show that a person acted in conformity therewith is inadmissible.

The introduction of a certified felony perjury conviction of Vic is offered to prove that, since Vic had a propensity to be a liar, he was acting in conformity with that trait when he stated David called and said he was going to make him sorry.

The perjury conviction is being offered to prove Vic acted in conformity therewith and is improper character evidence absent an exception.

Defendant's Exception

A Defendant can introduce the pertinent trait of the victim in order to show he was the aggressor.

The evidence offered by the defense is being offered to show Vic's character to truthfulness and not that Vic was the aggressor in the fight between David and himself.

Therefore, the perjury conviction is inadmissible.

Impeachment of Character for Honesty - Past Conviction of a Crime

Common law permits impeachment by any felony, whether pertinent to truthfulness or veracity or not. The federal rules allow impeachment based on a prior felony conviction if that conviction involves dishonesty or a false statement. If the prior conviction is any other felony, the court must weigh the probative value of the evidence against the undue prejudice to the witness. California allows impeachment evidence of any felony conviction involving moral turpitude.

The conviction is being introduced into evidence to show Vic's character for truthfulness. Under California law, the court has the discretion to allow in evidence of prior felony convictions for the purposes of impeaching if such convictions are for crimes of moral turpitude. In this case, the

conviction is for perjury, or lying while under oath, which is a crime of moral turpitude. Thus, the court would have the discretion to admit it for purposes of impeachment.

Hearsay

The conviction is hearsay, in that it is an out-of-court statement offered to prove the truth of the matter asserted, namely, that Vic was convicted for felony perjury in 2007.

The testimony is inadmissible hearsay.

Exception – Judgment

A judgment of a prior felony conviction is an exception to the general hearsay rule, and would thus be admissible.

In conclusion, the court did not err in admitting the conviction so long as evidence of the conviction is not otherwise excluded.

Legal Relevance -Prop. 8

No evidence may be admitted where its probative value is substantially outweighed by its prejudicial impact.

The defense will likely argue that the court should find a reasonable jury would make no inference against Vic given the facts that the conviction is being offered during the cross-examination of Wanda, and thus indicating that it is meant to attack the credibility of Wanda's testimony rather than Vic's character. Furthermore, David may attempt to argue that his argument and fight with Vic was, in part, due to Vic's denial that he had made the phone call telling David that he would be sorry, showing that David's self-defense argument more probable than not.

However, the prosecution will assert that the introduction of the perjury conviction is unrelated to the crime before the court and that the conviction was for perjury, not for a crime of violence. To allow the conviction would only confuse the jury. It could lead them to believe that Vic was a liar. Such inference could prejudice their minds as whether David murdered Vic. Moreover, Vic's character for truthfulness and veracity is not at issue since he did not (and could not) testify at trial due to his untimely death. Hence, the prejudicial impact of such evidence substantially outweighs its probative value.

Therefore, the evidence should be excluded as legally irrelevant.

3. Certified Copy of David's 2008 Assault Conviction:

Logical relevancy

Defined supra.

The prosecution's introduction of David's assault conviction has a tendency in reason to prove that David had the propensity to start fights and has a character for violence and negates his claim for self defense.

Thus, assault conviction is logically relevant.

Character Evidence

The prosecution may not introduce evidence of the defendant's bad character to prove his propensity to commit the crime charged unless the defendant has first opened the door to his own character.

The prosecution's introduction of David's assault conviction was intended to establish his bad character to act in the same manner as the aggressor in the present action.

However, the defendant has not yet opened the door by introducing any evidence of his good character; the prosecution may not introduce evidence of David's bad character to show a propensity to commit the crime charged.

This testimony is improper character evidence.

Impeachment

Under California law, a witness can only be impeached with a misdemeanor conviction if it is one of moral turpitude – otherwise, it is inadmissible. In this case, the conviction was for simple assault, which is not a crime of moral turpitude. As a result, the conviction would be inadmissible.

Thus, the court erred in admitting the prior felony conviction.

4. David's Testimony about the First Fight:

Logical Relevancy

Defined Supra.

David's testimony has a tendency in reason to prove his self-defense claim by showing Vic's character for violence, a fact at issue, since the prosecution claims that David was the initial aggressor, while David claims that Vic started the fight.

Thus, the testimony is logically relevant.

Character Evidence

Defined supra.

David testimony that he knew of Vic's breaking of a man's arm is being used to show that Vic had a character for violence and he acted in conformity with such character during his fight with David. Therefore, David is trying to show Vic acted in conformity therewith.

Therefore, absent an exception, this is improper character.

Victim's Exception

When relevant to support an asserted defense the defendant in a criminal case may offer into evidence the pertinent character trait of the victim to show that the victim acted in conformity with that character trait.

David's is claiming self-defense and is bringing into evidence that Vic broke a man's arm with a tire iron to show Vic initiated the fight and that he was the aggressor. David's testimony would constitute specific acts, as he is testifying to specific acts that Vic had done in the past. Therefore, the method of character evidence used is permissible under the California rules of evidence.

Therefore, the testimony is admissible.

5. David's Testimony about the Second Fight:

Logical relevancy

Defined supra.

The evidence has a tendency to prove David's claim of self-defense by showing Vic acted in conformity with his character for violence which is a material fact.

Thus, the testimony is logically relevant.

Character Evidence

David's introduction of a prior act of Vic threatening a woman with a gun is character evidence, as it is being used to show Vic has a character for violence and acted in conformity with that character during the June fight with David. Therefore, the testimony is character evidence.

The general rule character evidence is inadmissible to show conformity therewith.

This testimony is improper character evidence absent an exception.

Exception - Victim's Exception

Defined Supra.

A criminal defendant can bring into evidence the victim's character for violence if he claims self-defense and wants to show that the victim was the initial aggressor.

David is claiming self-defense and wishes to show that Vic was the initial aggressor. The testimony that Vic threatened a woman with a gun does support David's claim of self defense. Further, the testimony is a specific act, as David is testifying to a specific violent act that took place in the past, and thus is a permissible use of character evidence in California.

However, since the testimony is being introduced to support David's claim for self defense, and he was not aware of the incident of where Vic threatened a woman with a gun until after the trial commenced, the testimony is too prejudicial and is inadmissible since it does not support David's belief that he needed to defend himself.

Therefore, the testimony is inadmissible.