Question 4

Victor had been dating Daniel's estranged wife, Wilma. Several days after seeing Victor and Wilma together, Daniel asked Victor to help him work on his pickup truck at a nearby garage. While working under the truck, Victor saw Daniel nearby. Then Victor felt gasoline splash onto his upper body. He saw a flash and the gasoline ignited. He suffered second- and third-degree burns. At the hospital, he talked to a police detective, who immediately thereafter searched the garage and found a cigarette lighter. Daniel was charged with attempted murder. At a jury trial, the following occurred:

a. Tom, an acquaintance of Daniel, testified for the prosecution that Daniel had complained to Tom that Victor had "burned" him several times and stated that he (Daniel) would "burn him one of these days."

b. Victor testified for the prosecution that, while Victor was trying to douse the flames, Daniel laughed at him and ran out of the garage.

c. At the request of the prosecutor, the judge took judicial notice of the properties of gasoline and its potential to cause serious bodily injury or death when placed on the body and ignited.

In his defense, Daniel testified that he was carrying a gasoline container, tripped, and spilled its contents. He denied possessing the lighter, and said that the fire must have started by accident. He said that he ran out of the garage because the flames frightened him.

d. On cross-examination, the prosecutor asked Daniel, "Isn't it true that the lighter found at the garage had your initials on it?"
The prosecutor urged the jury to consider the improbability of Daniel's claim that he had accidentally spilled the gasoline.

e. During a break in deliberations, one juror commented to the other jurors on the low clearance under a pickup truck parked down the street from the courthouse. The juror measured the clearance with a piece of paper. Back in the jury room, the jurors tried to see whether Daniel could have spilled the gasoline in the way he claimed. One juror crouched under a table and another held a cup of water while simulating a fall. After the experiment, five jurors changed their votes and the jury returned a verdict of guilty.

Assume that, in each instance, all appropriate objections were made.

1. Should the court have admitted the evidence in item a? Discuss.
2. Should the court have admitted the evidence in item b? Discuss.
3. Should the court have taken judicial notice as requested in item c? Discuss.

4. Should the court have allowed the question asked in item d? Discuss.
5. Was the jury's conduct described in item e proper? Discuss.

Answer A to Question 4

4)

A. Tom's (T) Testimony Re Daniel's (D) Statement

The issue is whether T's testimony regarding Daniel's prior statement that D would "burn him (Victor- V) one of these days" is admissible against D.

Logical Relevance

Evidence is logically relevant if it has the tendency to make any fact of consequence in the case more probable or less probable than it would be without the evidence. Here, the main issue of the case is whether D tried to murder V. The statement that D would burn V at some point is relevant to prove that D acted intentionally, rather than accidentally, as claimed.

Legal Relevance

Evidence must be discretionarily relevant and there must not be any extrinsic public policy reasons against its admission. The judge has the discretion under FRE 403 to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, jury confusion, misleading or waste of time, among other reasons.

Here, the statement that D would "burn" V is probative of D's motive for acting and for rebutting D's claim that it was an accident, however it is also highly prejudicial to D. All evidence is prejudicial to one party, however, and 403 will only exclude it if the prejudice substantially outweighs probativeness, which is the not the [sic] case here.

As there are not public grounds for excluding the evidence, it would be logically and legally relevant.

Presentation

T testified apparently in the prosecution's case-in-chief. Because T was the person spoken to, he has personal knowledge of the statement and, so long as he could communicate it and appreciate his oath to tell the truth, would be competent to testify.

Hearsay

Hearsay is a statement made by the declarant other than at trial that is introduced for the purpose of proving the truth of the matter asserted in the statement. Hearsay is inadmissible unless it falls within one of the hearsay exceptions within the federal rules. Here, the statement was made out[-]of[-]court by D in a conversation with T.

Truth/Non-Hearsay

The prosecution will argue that it is not introducing the statement for it's [sic] truth, but rather as circumstantial evidence of D's state of mind, which is not hearsay under the rules. The prosecution will claim that the statement indicates that D had a grudge against T and his state of mind was one of hatred or disdain. Because attempt is a specific intent crime, this non-truth assertion could be relevant to show that D had the intent to harm T. This argument has merit, however, it would be better for the prosecution's case if it can get the statement in for the truth.

Admission by a Party Opponent

A statement by a party opponent is not hearsay under the federal rules and comes in for the truth. It need not be against interest when made and may be based on hearsay. In this case, D made the statement to T and it could come in against him as non-hearsay under the FRE.

Hearsay Exceptions

Present Intent

A statement made by a person showing an intent to do something is an exception to the hearsay rule and may be admissible to show that the declarant actually followed through with the act in question. Though more commonly associated with statements like "I'm meeting Joe at 10 on Tuesday" to show that the meeting with Joe happened, here it could be admissible to show that D followed though with what he said he was going to do and actually burned V.

B. V's Testimony that D Laughed While V was Trying to Douse Flames

Relevance

V's testimony is logically relevant because it tends to prove that D acted with an intent to harm V in that, if he hadn't meant for V to catch on fire he would not have been laughing and he would try to help V. Also, it contradicts D's claim that he ran out of the garage frightened.

V's testimony is prejudicial against D, as it tends to paint him as quite the villain, however it is not unduly so and it does not substantially outweigh the probative value. No public policy considerations apply. Accordingly the evidence is relevant.

Presentation

V is testifying in the prosecution's case[-]in[-]chief. As the victim, V was present at the accident and has personal knowledge of the events, although V could be subject to impeachment regarding his ability to really perceive what was happening (he was on fire, after all). However, V has personal knowledge and is competent to testify so long as he has memory, can communicate and can appreciate the requirement of telling the truth.

Hearsay

As mentioned, hearsay is an out[-]of[-]court statement made by the declarant for the purpose of proving the truth of the matter asserted in the statement.

Statement

The issue here is whether D's laughing was a statement. Assertive conduct is treated like a statement and subject to all the hearsay rules. Generally, assertive is that which tends to substitute for a statement, such as nod of the head instead of "yes" or pointing in a direction instead of "turn left." Because it has the effect of a statement, assertive conduct is treated like a statement.

D will argue that the laughing is assertive conduct and thus inadmissible to prove the truth, that D laughed, unless it fits within a hearsay exception or may be non-hearsay. He will argue that it is the equivalent of a statement such as "this is great" or "I said I would burn you."

The prosecution will counter with the argument that it was merely laughing and, unlike assertive conduct such as pointing or nodding, there is no way to determine what was meant by it so it cannot be assertive. It is more likely that a judge would overrule an objection by the defense and that V's testimony comes in and is not hearsay.

Exceptions/Non-hearsay

Even if the judge were to reject the prosecution's argument, the statement could come in as an admission by a party opponent, as discussed earlier. Alternately[sic], it could be admissible as an excited utterance because the laughter was made while D was under the stress of the excited event and arguably related to the startling event.

C. Judicial Notice of the Properties of Gasoline

It is proper for a court to take judicial notice of things that are easily proven or of common knowledge in the community. If evidence is required to demonstrate the fact in question, judicial notice may not be proper. The effect of judicial notice in a criminal case

is to satisfy the prosecution's burden of proof, but the jury may elect to disregard the judicially noticed fact and decide otherwise.

The issue is thus whether the properties of gas and its potential to cause serious bodily injury or death when placed on the body and ignited was proper. On the one hand, most adults drive and are familiar with gas stations and the warnings that are all over the station regarding no flames. One the other hand, most people have not played around with gasoline and matches and are not likely familiar with the effects it can have on the body-how long it will burn, how much gas needs to be on the person, when it will explode, etc. This is important because if there is a certain amount of gas required, D could argue the amount spilled on V was insufficient.

While it may have been proper to take judicial notice of the flammable quality of gasoline, the effects of its ignition are not so likely common knowledge. Accordingly, the judge erred in taking judicial notice of this fact and should have required the prosecution to present expert testimony regarding the specific potential of gas to cause serious injury or death when placed on the body and ignited.

D. Cross-Examination of D re Lighter

Relevance

The question tends to prove ownership of the lighter and refute D's claim that he did not own it/impeach him on that issue. It is highly probative and, while somewhat prejudicial, the prejudice does not substantially outweigh the probative value. There are no policy[-]based reasons for exclusions and, accordingly, the evidence is properly admissible.

Form

Leading

A question that suggests the answer is a leading question and is generally not allowed. Here, the prosecutor's question suggests that the lighter had D's initials on it, and is thus leading. Leading questions are allowed, however, on cross-examination, preliminary matters, hostile witnesses and witnesses who are having trouble remembering. Accordingly, because this was cross[-]exam, the leading question was proper.

Assumes Facts in Evidence

The question assumes that, one, there was lighter [sic] found that has been introduced, which on these facts has not been introduced into evidence. The lighter could be an exhibit and would have to be introduced by someone with knowledge[,] who could authenticate the lighter and indicate the chain of custody. After this a proper foundation would be laid and the prosecution could ask the question.

The lighter may self-authenticate, however, as sort of a label, but that is generally

reserved for commercial items.

Best Evidence

The initials on the lighter could be considered a writing and the question is aimed at oral testimony to prove its contents. The best evidence rule requires that, before testimony regarding contents may be given, the original, in this case the lighter[,] must be produced or a decent reason for its absence must be given. Here, there is no indication that the lighter has been introduced and thus the content of it, the initials, could not be testified to by D if his only knowledge of the content came from the lighter.

E. Jury's Conduct

Juries are prohibited from conducting independent investigations of the case, and such conduct may result in a mistrial for the defendant. Here, one juror when [sic] and measured the clearance on a pickup and the jury tried to re-enact the "accident" in the jury room. Jurors are not restricted to what they can do in the jury room and may use any means to explore and discuss the facts. The only real issue is whether the measuring of a, not D's, pickup truck was independent investigation, plus it was done while the jury was in recess and should not have been discussing the case.

It is likely that the act by the juror was impermissible independent investigation, because he went outside the evidence presented in court. Accordingly, the case should be declared a mistrial unless it can be shown that it was harmless error.

Harmless Error

An error is harmless if, even without the error, there is no reasonable doubt that the case would have come out differently. Here, the independent investigation resulted in a demonstration that changed the minds of 5 jurors, which would have resulted in a hung jury. On the other hand, the jurors, in their deliberations may have eventually decided to act out the event and could have guessed at the clearance of the truck and come to the same conclusion. Although a jury is not allowed to testify regarding what happens in the jury room, unless 3 or more of the 5 would not have eventually changed their minds the error would be harmless. Because it is likely that the jury would have eventually acted out the incident, the error is likely harmless and the juror misconduct, though improper, will not have an effect on the outcome of the case.

Answer B to Question 4

1) The issue is whether the ct should have admitted T's testimony that D complained of being "burned" by V & that he would "burn" V one day.

Relevance

Evidence is relevant if it tends to make any fact of consequence in a proceeding more or less probable. Here this evidence is relevant b[e]c[ause] it tends to make it more likely that D was the one who caused the fire that burned V & more likely that it was not an accident as D claims it was, but deliberate.

However, even evidence that is logically relevant may be excluded if the court finds that its probative value is substantially outweighed by its unfair prejudicial effect to the party ag[ains]t whom it is offered. Here, T's st[ate]m[an]t is offered ag[ains]t D to show the fire wasn't an accident. It's [sic] probative value is great b[e]c[ause] it is a st[ate]m[en]t that D himself said he wanted to "burn" V & V was in fact literally burned in a fire D claims he started by accident. It is very prejudicial to D b[e]c[ause] it tends to completely negate D's accident defense. However, it is not unfavorably prejudicial - it doesn't increase the chances that the jury will convict just b[e]c[ause] D is a bad guy, rather it goes right to the central issue in the case of whether the fire was deliberate or accidental. Thus, the court shouldn't exclude it on this basis.

Character Evidence in Crim Case

The prosecution cannot present evidence of bad character of a △ in a criminal case unless character is directly at issue or unless the △ initiates by putting a pertinent trait of his own or the victim's character substantively at issue. In addition, the prosecution can't use evidence of specific instances, only reputation or opinion evidence to establish character.

Here, this testimony about D is being offered in our attempted murder case where character is not an element of the crime. It is being offered in the prosecution's case[-]in[-]chief, it is arguably character evidence b[e]c[ause] the statement about D casts D in a bad light b[e]c[ause] it makes him look like a vindictive person out to get V b[e]c[ause] he feels V has "burned" him by dating his estranged wife. In addition, it is evidence of a specific instance where D told T something, not evidence of D's reputation for vindictiveness or violence or T's opinion to that effect. Thus, it seems at first glance that it is barred by the rules against character evidence in criminal cases offered by the prosecution.

However, the prosecution is entitled to offer evidence of specific instances by the△even if it reflects negatively on the △'s character if offered for a non-character if offered for a non-character purpose such as sharing motive or intent to commit a crime.

Here, D's st[ate]m[en]t about feeling burned by V is relevant to show he had a motive to

harm V deliberately. This is especially true in light of the fact V was seeing D's estranged wife b[e]c[ause] that gives meaning to what D meant when he said he felt burned. In addition, his saying he was going to burn V someday is evidence of intent to do the instant crime. Thus, T's st[ate]m[en]t is admissible even if it is specific instance that reflects badly on D's character offered in the state's case[-]in[-]chief.

Personal Knowledge

Witnesses can only testify as to matters of which they have personal knowledge. Here T has personal knowledge of D's st[ate]m[en]t because it was made directly to him.

Hearsay (HS)

HS is an out[-]of[-]court st[ate]m[en]t offered for the truth of the matter asserted therein.

D's st[ate]m[en]t was made to T out of court before the burning incident took place. It is being offered to show that D wanted to burn V & had motive to do so. Thus, it is hearsay & should be excluded unless an exclusion or exception applies.

Party Admission

St[ate[m[en]ts by a party, offered against a party[,] are deemed non-HS under the criminal law & the FRE.

Here the statement is by D - the △ in this case & it is being offered ag[ains]t him. Thus it is non-HS and can come in.

St[ate]m[en]t ag[ains]t Interest

Statements by any person that are against their penal, property, or civil liability interest at the time made are admissible even if HS as long as the declarant is unavailable at trial.

Here D's st[ate]m[en]t was arguably ag[ains]t his penal interest when made b[e]c[ause] it clearly showed he had intent to do harm to V. However, D is not unavailable b[e]c[ause] he has taken the stand in this case & has waived his privilege against self[-]incrimination w[ith] respect to his motive using an accident defense. Thus this exception doesn't apply.

State of Mind of Declarant

St[ate]m[en]ts offered as direct evidence of a declarant's state of mind are admissible HS. Here, this st[ate]m[en]t is being offered to show that D had a motive & intent to hurt V & the st[ate]m[en]t is precisely about D having had that state of mind. Thus it is admissible under this exception.

The court didn't err in admitting T's st[ate]m[en]t.

2) V's Testimony
Relevance

V's st[ate]m[en]t about D laughing and running out while V was burning is relevant b[e]c[ause] it tends to show D wanted V to burn & again makes his accident defense less likely.

However, the probative value of this is low, the mere fact that D didn't help V & may have laughed doesn't necessarily mean D deliberately set the fire, although his general animosity towards V may have led him to laugh at V's misfortune & leave instead of helping him. On the other hand, the potential the jury will convict D b[e]c[ause] he was coldhearted & callous & not just b[e]c[ause] he actually deliberately set the fire is great. Thus the court should use its discretion to exclude this testimony.

Character Evidence

This was evidence of a specific instance where D laughed & declined to help V, & it reflects very poorly on his character. It was offered by the prosecution in its case[-]in[-]chief. Thus it should be excluded as impermissible character evidence b[e]c[ause] it doesn't seem relevant to any noncharacter purpose & will only inflame the jury against D b[e]c[ause] he acted in a morally reprehensible way by laughing & turning his back on V.

Hearsay

A nonverbal act can be a st[ate]m[en]t for the purposes of the HS rule if it is intended as an assertion. Here D laughed & walked out on V. This may arguably be intended as an assertion by D to V of his hatred for V & his delight that V was burning. Thus, it might be subject to exclusion as an out[-]of[-]court st[ate]m[en]t.

However, even if this argument were accepted[,] it would come in under the party admission exclusion b[e]c[ause] it was conduct by D, and is being offered ag[ains]t him.

3) Judicial Notice

Judicial notice of adjudicative facts (facts that have to be proven in a case) is proper when the facts noticed are either ① notorious facts commonly known to the public or ② facts capable of ready & accurate verification.

Here the prosecution formally requested the court notice the fact that gasoline has certain chemical properties & has potential to cause serious injury or death when placed on the body & lit.

These facts will probably qualify under both categories. It is common knowledge that gasoline is highly flammable & even if lay people weren't aware of all its properties these are scientific facts capable of ready verification. In addition, it is common knowledge that

person's[sic] can be seriously hurt or killed if doused w/ gasoline that is then ignited. Moreover, that is again something capable of verification by expert testimony/scientific experiment. Thus, it was proper for the judge to notice these facts.

Effect of Notice

Since this was a criminal case, the effect of this notice was to relieve the prosecution of its burden of proving these facts & the jury could be told that the prosecution had met its burden but didn't have to accept it as conclusively proven.

4) Question on X

Every party has an absolute right to cross any live witness - even if that witness is the △ in a criminal case.

Here D took the stand & testified, thus he is subject to cross[-]examination on matters relating to his testimony on direct, or else his direct must be stricken.

D testified that he didn't have any lighter w/ him when he was in the garage. Thus it is proper for the prosecution to question him about the lighter on X.

Impeachment

Any witness can be impeached w/a prior inconsistent statement that is materially different from his testimony at trial.

Here D, [sic] testified that he didn't have any lighter when at the garage. The prosecutor is asking him about the lighter found at the scene that has his initials on it which clearly states that the lighter was in fact his. Since this is materially different from what D said at trial, the prosecution is entitled to use it to impeach D & discredit his testimony.

In addition, b[e]c[ause] the prior inconsistent st[ate]m[en]t of D's initials written on his lighter qualifies as a party admission, (st[ate]m[en]t by D, offered ag[ains]t him), the prosecution can use it as substantive evidence that the lighter did in fact belong to D.

5) The issue is whether the jury's conduct during deliberation was proper.

Jurors are not permitted to conduct independent investigations of the facts. Rather they are supposed to look at the facts presented by the parties & to apply the law as instructed by the judge.

Here, the jurors took their own initiative to go out & measure a truck that wasn't even the truck involved in the accident, & to reenact the accident themselves in the jury room. This was prohibited conduct, & in a criminal case could be grounds for mistrial if it had a

substantial effect an the outcome of the case.

Here the experiment led 5 jurors to change their votes. Thus they clearly affected the case & therefore a mistrial should be declared.