Exam Number ____

Evidence
Professor Seaman
Final Exam – Fall 2003

Instructions for Part II

Part II consists of two multi-part questions based on the same general set of hypothetical facts. It takes place in a fictional town in a fictional jurisdiction. Assume that this jurisdiction has adopted the Federal Rules of Evidence, including the Advisory Committee Notes, and that it follows federal precedent on all evidentiary issues.

You have two hours (120 minutes) to complete Part II.

If you are handwriting this exam: (1) please begin a new Bluebook for your answer to Question 2; (2) skip lines between writing; and (3) write on only one side of the page. Please write legibly!!

If you are typing this exam: Please begin your answer to Question 2 on a new page.

In evaluating your answers, I will be looking especially for correct identification of issues, in-depth analysis, and good organization.

GOOD LUCK!!

In December 2003, Danny Defendant was tried for the murder of his estranged wife, Vera Victim, and the attempted murder of her friend, Bobby Boyfriend. Both were shot in the back, minutes after they came out of a local restaurant. Danny's defense is alibi: he claims that he was with his friend Al Bigh, watching television at Bigh's home, the entire day and night of the shootings. Danny is twenty-nine years old.

Prior to trial, Judge Wise held an *in limine* hearing and considered defense objections to certain evidence. In particular, Defendant moved to exclude certain prior convictions and other prior acts. Defendant's record contained the following prior convictions: (a) a 1999 misdemeanor conviction for stalking a former girlfriend; (b) a 1995 felony assault conviction, for his role in a barfight that began when the victim approached Danny's date and asked her to dance; and (c) a 1997 misdemeanor conviction for obtaining money under false pretenses. In addition, the prosecution indicated during the hearing that, if permitted, it would offer the following evidence at trial: (d) testimony of Carrie Thur to the effect that she has known Danny Defendant for twenty years and that, in her opinion, he has a terrible temper, is insanely jealous, and cannot control his violent nature; (e) testimony of Gunn Dealersen, the owner of a local gun shop, that he had recently sold a gun similar to the alleged murder weapon to a man who resembled Danny Defendant, though he is unable to state conclusively that the man was Defendant. Assume that both the defense attorney and the prosecutor made all appropriate objections and arguments with respect to the above items of evidence.

Question 1: You are a law clerk working for Judge Wise. The judge has asked you to advise him on the issues raised during the *in limine* hearing. Specifically, he would like you to outline for him the objections and arguments made by the defense and the arguments made by the prosecution regarding the above-described evidence, and to suggest the best rulings. In addition, the judge is unclear whether it will matter, in terms of the admissibility of any of the evidence, if the Defendant testifies at trial. He asks you to discuss whether and how the admissibility of each item of evidence will be affected if Defendant chooses not to testify as opposed to if he does testify. Finally, the judge generally tends to be quite concerned about his reversal rate on appeal, so you should mention whether these rulings would be appealable should Defendant be convicted, and under what standard of review. (In order to answer this question, you might need to refer to other facts that will be shown at trial, as described below. Feel free

to refer to the evidence described in the remainder of this Part below, as you deem necessary.)

In its case in chief, evidence offered by the prosecution included the following:

(1) **The testimony of Boyfriend.** Boyfriend testified that, on the night in question, he and Vera went to dinner. At the restaurant, Vera told him that she was becoming very scared of Danny. She said she had been receiving numerous hang-up phone calls late at night and was sure that he was spying on her. She said, "Bobby, be careful. He might come after you." Bobby also testified that Vera gave him a piece of paper with a license tag number scribbled on it. She said to him, "This car was parked in front of my house several times last week. I called my neighbor Mrs. Sweet and asked her to walk her dog past the car and then write down the license plate number, and this is what she gave me." Boyfriend described the attack upon Vera and him as they emerged from the restaurant as follows: "The sidewalk was deserted, and we were holding hands. All of a sudden I heard a loud noise and I felt Vera collapsing next to me. Then I heard another noise and I began to collapse too. As I lay on the sidewalk feeling my life ebb out of my body, I heard Vera say, 'Danny has done it.' I said to her, 'Hang in there. You can make it. Danny shot me too but we cannot let him murder our love.'"

(2) Based upon this foundation, the prosecutor also offered into evidence **the piece of paper with the license number written on it.**

(3) **A scrap of paper, on which was written, "Lenny – it's good they don't know that I killed the dog."** Other evidence showed that, a few weeks before the shootings, Boyfriend's dog had died after consuming rat poison. Defendant's attorney is named Lenny Lawyer, and this note was found, during a recess in the trial, on the floor under the defense table. The prosecutor called a handwriting expert, who testified that the handwriting on the note matched authenticated exemplars of Defendant's handwriting. The judge did not hold a Daubert hearing before admitting the testimony of the expert.

(3) **A transcript of a telephone conversation between an unidentified male voice and Victim that was taped by Victim's answering machine.** The tape was found in the Victim's answering machine after she was killed. In the transcript, the man threatens Victim several times and asks her about her boyfriend. The prosecutor had the tape transcribed by a secretary in her office, and then destroyed the tape. The transcript contains the following: "Male voice: you are my wife and you belong to me. I'd better not catch you with anyone else"; "Male voice: I still love you so much – why do you want to leave me? Can't we try to work on our marriage?"; and "Female voice: Danny, please, you have to get on with your life." The parties have stipulated that the female voice on the tape is that of Victim.

(4) **The gun and a glove.** A handgun and a leather glove were found by police in a dumpster behind the restaurant. Though ballistics tests were inconclusive, detectives were able to recover DNA from sweat and skin cells inside the glove. According to a ballistics expert, the victims were shot with bullets that could have been fired from the gun found in the dumpster. Prosecution experts testified that the DNA recovered from the glove "matched" Defendant's DNA, and that only one in a billion people would match the DNA in the glove. (Again, judge Wise declined to hold a Daubert hearing before ruling the foregoing expert testimony admissible.) Testimony demonstrated that the glove and gun were placed by police inside ziplock baggies at the scene and sealed with police tape; transferred to the lab where they were checked in; and transferred from the lab to the police station following testing, where they were placed in a secure evidence room. However, the items at one point disappeared from the secure evidence room for approximately three weeks and then reappeared.

Question 2: Please discuss the evidentiary issues raised by the items described in (1) through (4) above. In your answer, you should specify any objections the defense could raise, arguments in favor of and against admissibility, and the most likely ruling by the court.

END OF EXAM

HAVE A GREAT VACATION!!

Exam ID: 259
Course: Evidence
Professor Name: Seaman
Exam Date: Wednesday, December 17, 2003

Question 1:

As a preliminary matter, the standard of review for evidentiary matters is abuse of discretion. This highly favors affirmance of lower court decisions. In fact, the FREs are very liberal, and designed to give district courts a lot of discretion in their decisions. This has been confirmed from Daubert, and in the FRE 611 allowance of discretion to the trial judge to run the trial. Next, we will consider the proposed evidence.

Alibi witness. Al Bigh can testify for the prosecution as long as he is able to testify from actual knowledge that he was spending time with Defendant. His statement will definitely be relevant to the case because it goes to an essential element of his defense. The possibility that he is lying is taken care of by the adversary system: he can be impeached, and the jury will decide whether he is telling the truth.

Prior Convicitons and Past Acts:

Past acts evidence is inadmissible to show action in conformity or action on a certain occasion, but it may be admitted for other purposes, such as knowledge, motive, intent, identification, preparation, plan, or impeachment (FRE 404(b)). If the defendant testifies, however, we will have to also consider FRE 608 and 609, which deal with impeachment of a witness with prior bad acts or convictions. Also, all the following convictions, if relevant and otherwise admissible, would have to be authenticated. But under FRE 902, certified public documents are self-authenticating. Under the BER, we

could still admit a certified copy rather than the original conviction record under FRE 1005.

Also, under the Luce case, a criminal defendan must testify in order to preserve a claim for improper impeachment with prior convictions. If he testifies on direct to "remove the sting," he cannot later challenge the trial court's in limine decision to allow the evidence. Ohler. This may be unfair to defendants, but it is the Supreme Court's precedent.

(a) 1999 misdemeanor conviction for stalking former girlfriend.

First, this evidence does not seem particularly relevant. Defendant will probably object that P is only introducing the evidence to demonstrate a character of violence. FRE 404(b) does not allow this unless P can demonstrate that the evidence is being offered for some other permissible purpose. What possible purposes could be advanced here? Prosecution may try to offer something like a hatred of women as a motive for the current crime, but that is nothing more than the improper inference that the rules are trying to prevent. Might it be offered for impeachment? Impeachment of whom?

If the defendant testified, rule 609 would apply to decide whether we could impeach him with the prior conviction. 609(a)(2) says that when the witness is the accused, a misdemeanor conviction is inadmissible to impeach unless it shows character of untruthfulness. A crime of stalking, although creepy, is not what the FREs consider a crime showing character for untruthfulness, such as fraud or perjury.

Assuming relevance, and that the prosecution tried to offer the judgment as proof of some element of the current crime, the conviction would not be admissible hearsay under the prior judgment exception 803(22) because the exception only applies to final criminal felony judgments, and this conviction was a misdemeanor.

Additionally, even if otherwise admissible, the probative value of the conviction seems to be substantially outweighed by a danger of unfair prejudice, so it should be kept out under 403. The conviction is not probative of anything relevant, and stalking conviciton could only unfairly hurt him in front of the jury, not to mention the time wasted on this issue.

(b) 1995 felony assault conviction for barfight.

Again, the felony assault conviction does not seem relevant. The FREs try to prohibit jurors from making an improper inference of a defendant's violent behavior in the current situation based on past convictions. The prosecution would have to show that it was offering the statement for a permissible purpose. Here, no such purpose is apparent. The statement shows nothing more than defendant's violent temper. I think we should rule for defendant based on the relevance issue.

The statement is also highly prejudicial against defendant because it shows a prior crime of violence, although not quite as prejudicial as if it had been a prior conviction for murder or rape. Still, I think this evidence is not probative at all, so it should be kept out under 403.

It could possibly be used to impeach the defendant if the defendant testifies as a witness. Under 609, a past conviction can be let in if it involves false statement or dishonesty (which this, assault, doesn't), or under 609(a)(1) if it is another felony and probative value outweighs prejudice. This rule favors exclusion. I do not think this evidence would be allowed for use by the prosecution because it is not probative in impeaching W, and all it does it bring in front of the jury otherwise impermissible evidence of a past, highly prejudicial conviction.

So whether or not defendant testifies, I think this evidence should be excluded.

Otherwise, if relevant, the conviction itself could be offered under the hearsay exception for past felony convictions 803(22).

(c) 1997 misdemeanor for obtaining money under false pretenses.

If defendant testifies here, this past act, although a misdemeanor, should be allowed because it shows a character for untruthfulness (609(a)(2)). False pretenses is a crime of fraud or deceit, which is what the FREs require in order to establish a crime of dishonesty, so it is allowable under 609(a)(1), but only to impeach W's character for truthfulness, not other purposes.

Otherwise, if defendant does not testify, it seems pretty irrelevant. If defendant doesn't testify, the conviction can only come in if it is probative of some fact other than propensity, or to show criminal disposition. This prior conviction has little to do with the present crime, and is not otherwise admissible.

Althoug the crime is not that probative, this crime is much less prejudicial than the previous two mentioned because those were crimes of violence, so 403 shouldn't really keep it out.

The conviction is not allowed under 803(22) because it is a misdemeanor.

P's other proffered evidence:

(d) Carrie Thur's Testimony.

This proffered evidence is reputation or opinion testimony offered against defendant. First, Thur can only testify as such if the prosecution deomnstrates that she has personal knowledge. Prosecution must first lay a foundation of how Thur knows of this reputation, so that the jury can see the basis for her opinion. That she testifies that she has known him for 20 years should be sufficient.

Also, if these are her opinions, W's statements must be helpful for a clear understanding of the testimony. 701. Here, these conclusions about violent temper are probably helpful, but would be more helpful if she could give specific examples.

Second, we need to look first into FRE 404 and 405 to see what type of testimony is allowed. If character is not in issue, as in this case, 404(a) does not allow its admission. However, in a criminal case, as here, there are certain exceptions: character of defendant offered by defendant, character of the victim, and character of the witness. Already, Thur's testimony cannot be allowed because we are talking about defendant's character and it is not offered by the defedant. The only way we could allow Thur's

statements to be let in would be if defendant has already opened the gates. Once a defendant offers character witnesses in his own favor, prosecution can rebut by claling counter-character witnesses under 404(a)(1) or by bringing in past specific instances, if relevant. So here, we should allow the testimony provided that it is used only for that purpose.

If defendant testifies, W's statements can be allowed as impeachment to attack reputation, but only reputation of truthfulness or untruthfulness. 608(a). These statements are not about untruthfulness, but are about violence and temper, so they cannot be used to impeach.

Under 403, these statements are not unfairly prejudicial, but they are not that probative either. Since the rule favors inclusion, I say we should allow it under 403.

We also have to contend with the Confrontation Clause. Here, defendant will have a chance to cross-examine Thur at trial, so there should be no issue.

(e) Gunn Dealersen's Testimony.

Of course, prosecution must lay a foundation and show that W's testimony is from personal knowledge. He runs the store, he remembers selling the gun, so the statements are self-evidently from personal knowledge.

The gun dealer's trestimony is more relevant, but it is only conditionally relevant: W remembers selling the gun to a man who MIGHT have been defendant. Whether the conditional fact is present is a jury issue under 104(b). This means that the judge should admit the testimony (assuming that a reasonable juror could find that defendant

purchased the weapon) and allow the jury to decide, based on all the evidence, whether defendant bought the gun (and additionally, whether the bullet came from the gun found on the scene).

W's statement is a past act, but it is being used for a purpose other than propensity to commit the crime. It is being used to show at least preparation and planning (buying the gun recently, where the crime involved a gun), and perhaps also identity. Therefore, we should admit this testimony. Also, exrinsic evidence will be allowed.

It makes no difference if defendant testifies. Unless W's statements are used in cross-examination against defendant's assertion that he has never bought a gun, the statements are not being used to impeach defendant, so 608 is not an issue.

There is no 403 balancing problem because this is HIGHLY probative, and not unfairly prejudicial.

Also, there will be no Confrontation issue because defendant will have adequate opportunity to cross-examine at the trial.

Question 2:

(1) Testimony of the boyfriend.

B can testify assuming the prosecution lays a sufficient foundation and shows that B had personal knowledge of all the things he said. Since he was present on the scene and seems to have been conscious the whole time, this doesn't seem to be an issue.

Vera told him she was becoming scared of Danny. This statement is hearsay because made out of court, but it should be admissible as a state of mind. 803(3) She is stating that she is afraid at present, so not a statement of belief or past.

She had been receiving hang-up phone calls. Defendant will probably argue this is irrelevant, but I think it is conditionally relevant, assuming the prosecution can show somehow that D was the one calling. Her statement that she was sure D was spying on her is arguably not from personal knowledge, but instead an opinion with no basis. P might argue that it should be admissible for the non-hearsay purpose of showing her state of mind. This will only work if her state of mind is relevant, and I do not think it is. Therefore, this part of the statement should be stricken.

Vera: Bobby, be careful, he might come after you. This statement is arguably not from personal knowledge. But based on her past experience knowing her husband, and based on what she though he knew, I think the personal knowledge was there: she only said that he MIGHT come after him. This is not admissible as a present state of mind under 803(3) because it is an opinion and does not relate to declarant's will. The statement is probably too prejudicial to defendant to be admitted under 403. Additionally, because V is not present to be cross-examined, there may be a

confrontation clause problem: the necessity prong in Roberts (although not required any more) is satisfied, but there are no particularized guarantees of trustworthiness that would allow us to let this in.

Vera: this car was in front of my house last week, so I gave this number to Sweet, and this is what she gave me. Her statement sying what she did last week, by itself, would be inadmissible hearsay. But her statement describing what she was handing her B at the present time at dinner was probably admissible as a present sense impression, so we should let the whole statement in. Defendant may argue the statement is irrelevant, but we should let it in conditionally if the prosecution tells us he/she will link it up to evidence that the car belonged to defendant or someone defendant had been associated with. Conditional relevance will be for the jury to decide. 104(b).

The two loud noises. These are not statements because a gun cannot intend to make an assertion. No hearsay or relevance problem.

Vera (after being shot): Danny has done it. Although hearsay, assuming V thought she was dying (which is likely, although not completely established by the facts here in front of me), this statement is admissible as a dying declaration. 804(b)(2). V is unavailable because of death, her statements were about the cause of the impending death, and this is a homicide crime. There is no Confrontation Issue because even if not a firmly rooted exception, the Roberts test is satisfied because of her present unavailability.

Bobby: Hang in there, you'll make it. Danny shot me too ...." This statement is admissible because of the same reason. The facts show that Danny though he was dying. Although the common law required actual death, the FREs liberalized the rule and do not require that unavailability be the result of death.

Both of these statements are highly probative because it appears that the V and B both saw who did it. Of course, it has not been established that they had personal knowledge, but a jury might find that they did, so we should admit the statements.

(2) Paper with license plate number on it.

First, there is an authentication issue. We could authenticate by getting the trier of fact or an expert to compare the handwriting with an authenticated exemplar of V's handwriting, or we could get a lay witness who has personal knowledge of V's handwriting. I am still not sure about whether this is relevant or not, but we should admit it conditionally, assuming that prosecution will try to link it up with relevant evidence that the car belonged to defendant. The BER is satisfied because this is the original document, so there is no further issue there.

(3) Note saying "Lenny – its good they don't know I killed the dog"

First, authentication. P needs to show that the letter was from defendant. The circumstances in which evidence is found can be sufficient authentication under 901(b). Here, the letter was to Lenny, which is really likely to be the lawyer, Lenny. The note was also found near the defense table, where defendant and Lenny had probably been together. Also, the handwriting authenticates it: handwriting can be authenticated via lay witness testimony of someone who is familiar, or by expert or trier of fact comparison with authenticated exemplars.

Is it relevant? It is conditionally relevant, assuming the jury finds that the defendant poisoned the dog. Although it is a past wrongful act, the poisoning might show an animus toward B's dog, which is relevant to show motive. I don't think 403 balancing should keep this evidence out because it is highly probative.

Defendant might also argue hearsay. But it is not offered for the truth of the matter asserted. The note asserts that defendant is glad they didn't find out about the poison, and is ptobably not intended to asser that he did it. Even if it is hearsay, it is admissible as an admission of a party opponent – no corroboration is required because we are talking about his own statement, assuming authentication.

As for the Daubert hearing, although Daubert can be used for exapert testimony of scientific or technical or other witnesses, the FREs give the trial court a lot of discretion on whether to have a Daubert hearing or not. Under Daubert, as long as the judge has some way of discriminating reliable expert evidence from unreliable, he/she can act as the gatekeeper with broad discretion to admit exclude expert testimony. Only overturned if it is an abuse of discretion, a high standard.

We should admit the note.

(4) Transcript of phone conversation.

BER requires that when proving the contents of a writing (including a tape recording), the original must be brought into evidence, or in most cases, a duplicate is admissible also. 1003. Here, we do not have either: the tape has been destroyed and the transcript is not a duplicate. And we are trying to prove the contentsof the recording.

But under 1004, the fact that it has been destroyed, as long as not done in bad faith, means that we can bring in other evidence, whatever it may be. There is no evidence suggesting that the tape was destroyed in bad faith. The transcript is admissible for this purpose asuming it is authenticated as the work of the secretary.

If the secretary testifies as to what the recording said originally, P might be able to bring in the transcript as a past recollection recorded. 803(5). W must adopt the writing as an accurate statement of her memory at the time, and not be able to remember. If this is the case, we can allow its reading into testimony, but not its admission into evidence.

We also need to authenticate that the voice on the machine belongs to D. Authentication of a voice can be done by having someone familiar with that voice testify that it is, in fact, D's voice. The problem is that this is a transcript rather than the tape, so it would have had to be someone who had heard the tape before it was destroyed. But the fact that he refers to her as his wife, and we know that she is V, and that she refers to him as Danny, authenticates the document.

The statement I better not catch you with someone else is arguably hearsay. But not to prove the fact asserted. Only to prove that he was threatening and angry with her, possibly to show motive, so admissible non-hearsay.

I still love you so much. Hearsay, but admissible as state of mind. Also admissible to rebut any indication that he was angry with her and wanted to kill her. Defendant should be able to offer even if it is hearsay, to show state of mind or due to due process rights. Exclusion of such evidence might be unconstitutional.

The female voice saying you have to get on with your life: possibly hearsay. It is not admitted for truth of matter asserted. Instead, it can be admitted to show effect on the hearer: he became angry and had a possible motive to want to kill her and the boyfriend.

(5) Gun and glove.

Authentication will be a big problem. The evidence was found on the crime scene, so that is a step toward authenticating the gun and glove.

Ballistics expert. Pobably admissible without a Daubert hearing because it has been used for a long time, but the trial judge has discretion to have or dispense with the hearing. It is relevant because it might show that the gun was used in the murder, but only conditionally: relevance depends on whether that gun could be matched up with defendant. The fact that it was found so close to the gloves, which contained his DNA, also helps authenticate.

As for the DNA, the court has the discretion of whether to require a Daubert hearing, but DNA evidence is usually allowed regardless because it has been shown so reliable. But the prosecution may want to request the hearing to remove it as an avenue for appeal. The fact that the DNA is probability is okay. The exclusion of probability evidence is usually not applied in blood tests. The one in a billion number is a frequentist approach that doesnt consider prior probability of guilt. The problem with DNA is that a jury might just believe it because of the qualification of the expert. But like I said, DNA is so widely accepted that it would be strange and probably improper not to let it in.

Chain of possesion is one way to show authentication. The fact that there was a break in the chain of possession of the evidence for such a long time might pose an authentication problem, but it more likely poses a problem of the weight the jury should give to the evidence. Authnetication, additionally, is a question of conditional relevancy under 104(b). I think it will not look good to the jury, but it is their choice.

Exam ID: 268
Course: Evidence
Professor Name: Seaman
Exam Date: Wednesday, December 17, 2003

I. 1999 Misdemeanor conviction for stalking former girlfriend

A. Prior conduct

B.

II. 1995 Felony assault conviction

III. 1997 misdemeanor conviction for obtaining money under false pretenses

IV. Reputation testimony of Danny by Thur

V. Testimony by Dealerson that he sold a gun to a man that resembled Danny

Evidence of Danny's 1999 misdemeanor conviction for stalking his former girlfriend should not be allowed.

The defense will argue that the prosecution is seeking to use evidence of this crime to prove the character of Danny to show that his actions on the night of the murder were in conformity with this prior conviction. This is specifically not allowed under FRE 404(b). They will also argue that even if the prosecution does have an acceptable reason for bringing in such evidence, it should be excluded under FRE 403 because evidence of such actions is unfairly prejudicial against Danny. Allowing such evidence will result in the jury giving it too much weight and it will dilute the prosecution's burden of proving Danny's guilt.

The prosecution will argue that they are not offering the evidence to prove Danny's propensity to stalk his ex-girlfriend's but instead to prove that he has difficulty in ending

relationships with ex-girlfriends. Evidence of this prior conviction will be used to prove motive which is allowable under FRE 404(b). Danny's difficulty in ending relationships gave him motive for stalking and killing Vera.

This evidence should not be allowed because it is unfairly prejudicial against Danny under FRE 403. The crime committed is too closely related to the act of which Danny is accused. Furthermore, there is other evidence that is as probative and less prejudicial. The prosecution's argument for allowing it under 404(b) is a weak attempt to get the evidence before the jury to prove propensity.

Danny's testifying is irrelevant because this crime does not fall under FRE 609.

Because we are excluding the evidence, it will not be appealable upon conviction because we are agreeing with defense. However, if we admitted the evidence, the standard of review would be abuse of discretion.

The 1995 Felony assault conviction can be allowed to impeach Danny.

The defense will again argue that evidence of this prior crime is too prejudicial and should not be allowed under FRE 403, and that the prosecution is attempting to show Danny's propensity for violence which is strictly prohibited under FRE 404(b)(*Old Chief*).

The prosecution will again argue that evidence of this crime will be used to show Danny's motive behind the killing of Vera. Furthermore, evidence should be allowed to impeach Danny under FRE 609(1) because the conviction was for a felony and the conviction was less than 10 years ago.

This evidence should be allowed because it does show motive under FRE 404(b) and it can be used for impeachment under FRE 609 provided this court finds that the probative value of the evidence outweighs its prejudicial effect on the accused.

Danny's failure to testify will effect his ability to challenge this court's ruling on the in limine motion. If Danny chooses not to testify or if he testifies under direct to "remove the sting" of the prior conviction, he cannot challenge the ruling on appeal. (*Luce; Ohler*).

The standard of review for allowing this testimony is abuse of discretion.

The 1997 misdemeanor conviction for obtaining money under false pretenses is allowed to impeach Danny.

The defense's only argument is that it is irrelevant to the crime and is unfairly prejudicial against Danny.

The prosecution will argue that it should be allowed to impeach Danny under FRE 609(2). The crime did involve dishonesty and is directly relevant to Danny's truthfulness.

This also shall be reviewed under an abuse of discretion standard.

Danny's failure to testify will effect his ability to challenge this ruling on appeal as described above regarding the felony assault conviction.

Thur's testimony should not be allowed because it is character evidence being used to prove conduct on a particular occasion. FRE 404(a).

The defense will claim that the prosecution is attempting to introduce this evidence to show that Danny's character proves that he committed the act of killing Vera. This is prohibited by FRE 404(a). This evidence does not meet any of the exceptions because Danny has not offered any evidence of his good character. The only way this evidence should be allowed is if Danny calls a witness to verify his good character. The prosecution would be allowed to call Thur to rebut this evidence.

The prosecution might attempt to claim that she is simply offering her opinion under FRE 701. Thur is not an expert and her opinion is rationally based on her perception and her testimony is helpful to the jury in determining a fact in issue.

This evidence should be excluded under FRE 404(a). The evidence is not helpful to the jury. It is simply an attempt by the prosecution to prove that Danny has a character trait of a bad temper and a violent nature.

Danny's failure to testify will not effect the appealability of this decision.

The standard of review is abuse of discretion.

The testimony of Dealersen will be disallowed because it is irrelevant.

The defense will argue that the fact that he sold a gun to someone who looked like Danny is irrelevant. It does not have any tendency to make the existence of any fact that is of consequence to this action more or less probable. FRE 401. Without Dealersen identifying Danny as the purchaser of the weapon, this fact is irrelevant.

The prosecution might try to argue that the odds of someone looking like Danny and buying a similar gun and not being Danny are remote. Therefore, this evidence is relevant.

Without Dealersen identifying Danny, this is irrelevant and should be excluded. Danny's lack of testifying will not affect the appealability of this decision. The decision will be reviewed under an abuse of discretion standard.

Testimony of Boyfriend

Vera's statement that she was scared of Danny

The defense will argue that the statement is hearsay and cannot be used for the truth of the matter asserted. The statement cannot be allowed for the non-hearsay purpose – state of mind of the declarant because the state of mind of the victim is irrelevant in a murder case. The prosecution will argue that it should be allowed under FRE 803(3) as a statement of Vera's then existing emotional condition. The defense will argue that this is also irrelevant. This evidence will not be allowed because there is no plausible argument can find to support its relevancy.

The statement that she was getting numerous phone calls is also hearsay. It does not meet any of the exceptions.

Her statement that she is sure he is spying on her is also inadmissible hearsay. It does not fall under FRE 803(3) because it is a statement of belief being used to prove the fact believed. There is also no proof of personal knowledge regarding the fact that Danny was spying on her.

Vera's statement that she asked Sweet to walk her dog past the car and write down the number would not be allowed under the Hillmon doctrine to prove that Sweet actually did this act. The statement was made after Sweet did it. If she had told Bobby that she was going to ask Sweet to do this, it might then fall under FRE 803(3). However, some courts do not allow such statements to prove the actions of 3rd parties.

The statement that he might come after Bobby is hearsay and opinion not based on personal knowledge.

The fact that the car was parked in front of her house is hearsay. It is not present sense impression because too much time had passed.

The boyfriend's description of them leaving the restaurant and the fact the sidewalk was deserted is admissible because it is not a statement made out of court.

Vera's statement Danny has done it is admissible if there was some evidence that she had personal knowledge that Danny had killed her. Apparently there is none. The sidewalk was deserted and there is no proof that she saw her killer. If she did, it would be allowed as a dying declaration because this is a murder trial and she is speaking about the cause of her death. Not allowed because no personal knowledge.

The hang in there statement is hearsay. There is no evidence that he has personal knowledge that Danny shot him. It is not admissible.

Both declarants' statements that Danny shot them are lacking personal knowledge and would be considered unfairly prejudicial.

Piece of paper is hearsay. It is an out of court statement by Sweet. It was meant to assert that the car had the tag number written down. It could be admitted as a recorded recollection. The prosecution would have to prove that Sweet had the knowledge when she wrote it; that Sweet wrote it or adopted the writing; that it was fresh in her memory when she wrote it, and that it was accurate when recorded. The best evidence rule will apply, but since it is the original, this is not an issue. The paper would have to be authenticated either by Sweet, a layperson that knew Sweet's handwriting, or by an expert.

Scrap of paper admitting killing the dog.

Admission

This could come in as an admission of a party opponent if it is authenticated. The defense will claim that the document is subject to attorney-client privilege. The court will likely rule that the attorney and client did not take reasonable steps to keep the matter confidential so the privilege is waived. The handwriting expert might be allowed to show similarities and differences between the note and the sample. However, some courts do not allow the expert to state a conclusion as to whether the writing was done by the defendant. These courts limit the expert to simply aiding the jury in making this decision. The defense might try to argue that the killing of a dog is irrelevant. There is no evidence that he killed Boyfriend's dog. This will probably be allowed because it shows Danny's motive

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Transcript of the telephone conversation.

This evidence will be subject to the best evidence rule. If the court finds that the prosecution destroyed the tape in "bad faith," it will not be allowed because the transcript is not a duplicate. The prosecution will argue that it is standard procedure for the secretary to destroy tapes after they are transcribed and this was not done in bad faith.

Without the tape, it will be difficult to prove that the male voice was Danny's. However, because the parties stipulated that the female voice was Vera's, the jury could find that the male voice was Danny's because he says "you are my wife." This is assuming that Vera only had one husband.

This evidence will probably not be allowed because there is no rational explanation for the prosecution destroying the tape. It was not an in house tape that was transcribed and destroyed on a routine basis.

The gun and a glove:

Failure do hold the Daubert hearing could lead to an appeal if Danny is convicted. However, assuming the DNA testing and ballistics testing were done with accepted procedures, the appeal will not be successful. Both types of tests are widely accepted. The prosecution will want the glove admitted to show that Danny was at the scene where the gun was located and where the assault occurred. The defense will argue that DNA might tie Danny to the glove, but there is no evidence that ties either the glove or Danny to the gun. The jury will get the evidence because it can circumstantially tie Danny to both the gun and the crime. A reasonable jury could infer that if Danny's glove was in the dumpster, he put it there with the gun after he killed Vera. The defense will also make a chain of custody argument to get the evidence excluded because it disappeared for 3 weeks. This argument will not be successful because the testing was done before the chain of custody was broken.