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.