

Courtroom Drama without Trauma: Evidence 2009

Wisconsin State Public Defender Training Division

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I. Foundations

A. Authentication

1. Wis. Stats. §909.01 General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
2. Photos
 - a. Does it show what scene, object, etc. looked like at time.
 - b. Don't need the photographer to lay foundation.
 - c. Foundation for videotape same as photograph. *State v. Peterson*, 222 Wis. 2d 449 (Ct. App. 1998).
3. Voice
 - a. Witness must have heard the voice before & recognize it.
 - b. Alleged statements of self-identification made in a phone call and in personal contact may not themselves be used to identify the speakers. *Nischke v. Farmers & Merchants Bank*, 187 Wis.2d 96 (Ct. App. 1994).
 - c. Tapes are properly identified and authenticated when party to the recorded conversation identifies the defendant's voice and testifies that the tapes accurately depict the conversation. *State v. Curtis*, 218 Wis.2d 550 (Ct. App. 1998).
4. Handwriting (non-expert)
 - a. Witness must've seen it before & can identify as writer's.
 - b. Familiarity can't be acquired from litigation.

5. Document. Testimony of a court employee that she had examined a certified copy of a foreign court order, and that the exhibit to be admitted into evidence was a copy of that order, sufficiently authenticated the exhibit. *State v. Smith Sr*, 2005 WI 104.
 6. Chain of custody – Perfect time line for chain of custody not required; the standard for the admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed. *State v. McCoy*, 2007 WI App 15.
- B. Personal Knowledge – §906.02 Wis. Stats. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.
- C. Business Records. § 908.03(6) Wis. Stats. Can introduce through certification, stipulation or witness – if using witness, they must be person with knowledge who can state:
1. What the record is & how witness knows this
 2. How is record created
 3. When records created
 4. Record used in regular course of business
 5. Medical records - must be available to opposing counsel for inspection 40 days in advance of their use in court. Sec.908.03(6m).
- D. Be sure to check statutes to see which types of records require foundational witness and which are self authenticating or have specific hearsay exceptions.
- E. Demonstrative Evidence
1. Court has discretion on whether to admit. See *State v. Peterson*, 222 Wis. 2d 449 (Ct. App. 1998). Factors to consider are:
 - a. Degree of accuracy in recreation of actual prior conditions.
 - b. Complexity and duration of the demonstration.
 - c. Other available means of proving same facts.
 - d. Risk that the demonstration may impact on the fairness of the trial;
 - e. Whether the exhibit will aid the jury or confuse it

2. Witness permitted to use doll to demonstrate the force used to cause injuries to the child victim. Expert disagreement on exact cause of the injuries goes to weight, not admissibility. State not precluded from using demonstration to support element of utter disregard for human life when defense didn't contest the amount of force used to cause injuries. Probative value wasn't outweighed by unfair prejudice. *State v. Gribble*, 2001 WI App 227.

F. Impeachment: Prior Inconsistent Statements

1. Legal Requirements:

- a. No requirement to show previous statement to witness; must show to opposing counsel upon request at end of questioning. Sec. 906.13(1) Wis. Stats.
- b. Extrinsic evidence of prior inconsistent statement is admissible without first giving witness an opportunity to explain or deny the statement if witness has not been excused from testifying. *State v. Smith*, 2002 WI App 118.
 - i. When seeking to admit a prior statement of a witness, it is safer to cross-examine the witness about the statement before bringing in extrinsic evidence of the statement.
 - ii. Party objecting to such testimony is required to specify that objection is on grounds of sec. 906.13(2)(a) – a general confrontation objection is insufficient to preserve the record. *State v. Nelis*, 2007 WI 58.
2. Use the RAC or ARC method – Recommit, Accredit, Confront (or Accredit, Recommit, Confront). See LaVigne & Mastantuono, “Impeachment”, The Wisconsin Defender, Fall 2005 at <http://wisspd.org/html/publications/WdefFall2005/Fall05.asp>

- G. Preserving Objections An objection is sufficient to preserve an issue for appeal, if it apprises the court of the specific grounds upon which it is based. A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal. *State v. Nelis*, 2007 WI 58. Other cases on preserving objections: *State v. Norwood*, 2005 WI App 218; *State v. Kutz*, 2003 WI App 205.

II. Relevancy

- A. Basic Definition per Blinka, Wisconsin Practice: Wisconsin Evidence § 401.1 at 82

1. The evidence must relate to a fact or proposition that is of consequence to the determination of the action.
 2. The evidence must have probative value, that is, a tendency to establish those consequential propositions.
- B. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice § 904.03 Wis. Stats. Example: Weak probative value was strongly outweighed by prejudice by proffered evidence of group tendencies and motives to lie--or tell the truth--when making credibility judgments about individual members of those groups. *State v. Burton*, 2007 WI App 237.
- C. The right to confrontation is not violated when the court precludes a defendant from presenting evidence that is irrelevant or immaterial. *State v. McCall*, 202 Wis.2d 29 (1996).
- D. Scope of Cross Examination
1. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. § 906.11(2). This includes evidence that is circumstantial and inferential of motive to lie. *State v. Jang*, 2006 WI App 48.
 2. Evidence that challenges the credibility of a state's witness promotes that goal and cannot be summarily dismissed as overly prejudicial. This is of particular importance in a case that relies primarily on whether an officer or the defendant is telling the truth. It is not appropriate for the trial court to assume that the defendant was lying and the officer was telling the truth. Resolution of credibility issues and questions of fact must be determined by the factfinder. *State v. Missouri*, 2006 WI App 74.
 3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, if probative of truthfulness or untruthfulness and not remote in time, can be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness. § 906.08(2) Wis. Stats.
 - a. Extrinsic evidence may not be used to impeach a witness' credibility on a collateral matter. You must "take the answer". See *Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997).
 - b. A matter is collateral if the fact could not be shown in evidence for any purpose independently of the contradiction. *McClelland v. State*, 84 Wis.2d 145 (1978).

- c. Extrinsic evidence offered by the state solely to bolster a witness's credibility, by showing that he had provided reliable information leading to the arrests of other drug dealers, violated extrinsic evidence rule. *State v. Moore*, 2002 WI App 245.
 - 4. ***Bias is never collateral.*** “The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely” *State v. Williamson*, 84 Wis.2d 370, 383 (1978); see also *State v. Missouri*, 2006 WI App 74.
 - 5. Admissibility regarding witness’ involvement in criminal justice system
 - a. Prosecution witness’ probationary status is relevant to credibility. *State v. White*, 2004 WI App 78.
 - b. Evidence of deferred prosecution agreement if criminal charge still pending may also be relevant. *State v. Chu*, 2002 WI App 98.
 - c. Specific details of cooperating witness’s plea negotiation, including reduced maximum penalties permitted. *State v. Ross*, 2003 WI App 27 ¶ 45.
 - d. Witness's pending criminal charges are relevant to bias, even absent promises of leniency. *State v. Barreau*, 2002 WI App 198.
 - e. Court properly excluded evidence of charges dismissed against prosecution witness when dismissal not part of any negotiation. *State v. McCall*, 202 Wis.2d 29 (1996).
 - f. Parole eligibility status. *State v. Scott*, 2000 WI App 51.
 - 6. Gang affiliation may be a permissible area of cross examination. *State v. Rodriguez*, 2006 WI App 163; *State v. Long*, 2002 WI App 114.
 - 7. Defendant’s exercise of right to remain silent not admissible, but defense may “open the door” by his own remarks about his post-arrest behavior, thus permitting impeachment of testimony. *State v. Nielson*, 2001 WI App 192; *State v. Cockrell*, 2007 WI App 217.
- E. State cannot cross examine defense witness about gang membership to show pro-defendant bias unless state can first demonstrate that defendant was member of the gang. *State v. Long*, 2002 WI App 114.

- F. Ascribing the purported motivations or truth-telling tendencies of an entire neighborhood to one of its residents is not an acceptable form of impeachment. Absent evidence that the defendant was himself a gang member, a gang expert's testimony should not have been allowed when the expert's testimony insinuated, without any basis, that the defendant was a part of the gang culture, if not actually a member of a gang. *State v. Burton*, 2007 WI App 237

III. Other Crimes Evidence under sec 904.04(2) Wis. Stats.

- A. General Rule: evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Sec. 904.04(2) (a) Wis. Stats.
- B. 1st degree sexual assault and child sexual assault case rules differ
1. Statutory. Prior conviction of 1st degree sexual or child sexual assault that is similar to the alleged violation is admissible as evidence of the person's character in order to show that the person acted in conformity therewith. Sec. 904.04(2)(b) Wis. Stats.
 2. Case law- greater latitude of proof permitted in child sexual assault cases as to other like occurrences. *State v. Veach*, 2002 WI 110; *State v. Hammer*, 2002 WI 92.
 3. Greater latitude rule was available in cases where the other acts evidence is pornography, not prior sexual assaults, if the adult victim functions at the level of a child due to disabilities. *State v. Normington*, 2008 WI App 8.
 4. Courts have permitted acts remote in time in child sex abuse cases. See for example *State v. Opalewski*, 2003 WI App. 145 in which acts that occurred 15-25 years earlier were not considered remote.
 5. Look for and argue factual dissimilarities. See *State v. Meehan*, 2001 WI App 119. In this case victims were of different ages (14 and 23), factually dissimilar (one act in a bedroom after an illegal entry in middle of night while victim was sleeping; other act in a public place during day when victim was awake. Also *State v. McGowan*, 2006 WI App 80, which disallowed evidence from defendant's prior sexual acts as a 10 year old juvenile in defendant's adult case of sexual assault of child.
- C. The Sullivan Test: A three-step approach. *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 36 (1998).

1. Is the other act offered to acceptable purposes under 904.04(2).
 2. Is the other act relevant for the purpose asserted.
 3. Does the probative value of the other act outweigh its prejudicial effect (Wis. Stats. § 904.03).
 4. Court is to look at the similarity between the other act and the act at issue in the trial. The more similar the acts, the more likely it is that the court will allow the other act to be disclosed to the jury.
 5. Note: Sullivan test sometimes interpreted very broadly by the court. See *State v. Hunt*, 2003 WI 81, where other acts evidence found permissible to show victim's state of mind, to provide corroboration of information provided to police and to establish credibility of victims and witnesses original allegations in light of later recantations.
- D. Party seeking to use other acts evidence bears the burden of establishing relevance. Party opposing admission must show that probative value of the evidence is substantially outweighed by unfair prejudice.
- E. Other crimes evidence less likely to be admitted if the other acts were committed when defendant was a juvenile. *State v. McGowan*, 2006 WI App 80.
- F. Examples of Acceptable Purposes under §904.04(2) Wis. Stats.. Note: this is not an exhaustive list.
1. Motive
 - a. A state of mind or emotion that causes a person to act in a certain way; the reasons which lead the mind to desire the result of the act. *State v. Fishnick*, 127 Wis.2d 247 (1985).
 - b. Other acts offered for motive must occur before the charged act. *State v. Balistreri*, 106 Wis.2d 743 (1982).
 2. Intent. Focus on similarity of the prior act. *State v. Evers*, 139 Wis.2d 424 (1987).
 3. Preparation and/or Plan
 - a. A definite, continuing plan, scheme or conspiracy. Deliberate steps taken by a person to accomplish the purpose. *State v. Balistreri*, Id.

- b. Other acts which are separate incidents, not related to steps in a plan, are not admissible under this exception. *State v. Harris*, 123 Wis.2d 231 (Ct. App. 1985).
- 4. Knowledge. The state of knowledge that is in dispute in the case; must have occurred prior to the charged crime. *State v. Roberson*, 157 Wis.2d 447 (Ct. App. 1990).
- 5. Identity
 - a. Must be placed in issue in the case.
 - b. Should be such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant. *State v. Fishnick*, 127 Wis.2d 247 (1985); *State v. Rushing*, 197 Wis.2d 631 (Ct. App. 1995).
 - c. Is subject to the “greater latitude” test in child sexual assault cases. *State v. Hammer*, 2002 WI 92.
- 6. Absence of Mistake or Accident. Evidence only permitted when defendant expressly or impliedly defends case on grounds of accident or mistake. *State v. DeKeyser*, 221 Wis.2d 435 (Ct. App. 1998).
- 7. Context. See *State v. Hunt*, 2003 WI 81; *State v. Shillcutt*, 116 Wis. 2d 227 (Ct. App 1983); *State v. Clemons*, 164 Wis. 2d 506(Ct. App. 1991). But in *State v. Payano*, 2008 WI App 74, court rejected “context” testimony. Defendant was charged with shooting at police entering his apartment and claimed self defense (believing that police were armed intruders); court disallowed testimony that previous day defendant had drugs and handgun.
- G. Acquittal on prior act does not preclude its use at trial for admissible purpose. *State v. Arrendondo*, 2004 WI App 7.
- H. Defense can “open the door” to what might otherwise be inadmissible other acts evidence. *State v. Edmunds*, 229 Wis. 2d 67 (Ct. App. 1999).
- I. Cannot be used to backdoor evidence of other convictions or pending cases. Defendant’s recognizance bond in criminal case found in the same room as a controlled substance and meant to show his connection to the drug, was inadmissible. *State v. Harris*, 2008 WI 15 ¶ 86.
- J. Consciousness of Guilt or Innocence – not identical to other crimes evidence; admissibility issues

1. Evidence of a criminal act of the accused intended to obstruct justice or avoid punishment can be used to prove consciousness of guilt. *State v. Bauer*, 2000 WI App 206.
2. Evidence of flight is not other-acts evidence but, rather, “an admission by conduct”. *State v. Anderson*, 2005 WI App 238.
3. Evidence of offer to take polygraph may be admissible if the person making the offer believes that the test or analysis is possible, accurate, and admissible. *State v. Shomberg*, 2006 WI 9; *State v. Santana-Lopez*, 2000 WI App 122, ¶4

K. Other Crimes Evidence is not Just for the Prosecutor

1. The defendant can introduce evidence of other acts against complaining witness to show proof of motive to lie or other acceptable purpose under 904.04(2). *State v. Kimpel*, 153 Wis.2d 697 (Ct. App. 1989); *State v. Johnson*, 184 Wis.2d 324 (Ct. App. 1994).
2. Frame-up evidence, even when relevant, is subject to a 904.03 balancing test and court may exclude it. *State v. Richardson*, 210 Wis. 2d 694 (1997).
3. Defendant permitted to call witnesses to support defense that police officer abused him and planted drugs when the other witnesses had similar experience with same officer. Other acts evidence can also be admitted to show the bias or prejudice of a witness. *State v. Missouri*, 2006 WI App 74.
4. Defendant permitted to introduce evidence of prior felony conviction of third party to show third party was the person who was in possession of a firearm, not defendant. *State v. Jackson*, 2007 WI App 145.
5. Evidence that store clerk, who claimed to be armed robbery victim, previously stole from store, sold drugs and “shorted” persons in drug sales was relevant to support defense theory that clerk not robbed by the defendant but rather took the money voluntarily from the till to pay off a drug debt. *State v. White*, 2004 WI App 78.
6. Misidentification of defendant by other victims relevant in defense that someone who looked like defendant was the perpetrator. *State v. Davis*, 2006 WI App 23.

7. Other acts evidence of an unknown third party used by defense on issue of identity is to be analyzed under the *Sullivan* test. *State v. Scheidell*, 227 Wis.2d 285 (1999). Defendant does not have to establish that the two crimes are the "imprint" or "signature" of the third party, but the similarities between the other act evidence and the charged crime must be shown, particularly where an unknown individual committed the allegedly similar crime. Such other acts evidence must do more than raise conjecture or speculation. Also see *State v. Denny*, 120 Wis.2d 614 (Ct. App 1984).

IV. Other areas relating to relevancy- Character Evidence

- A. When can one admit evidence that a witness is a truthful or an untruthful person?
 1. A party can attack the credibility of a witness by evidence in the form of reputation or opinion evidence. *State v. Eugenio*, 219 Wis.2d 391 (1998); *State v. Cuyler*, 100 Wis.2d 133 (1983); 906.08
 - a. Specific acts of conduct are not admissible, except on cross-examination.
 - b. Evidence of truthful character is only admissible after character of witness has been attacked (except for accused who testifies on own behalf).
 - c. Where an attorney attacks the character for truthfulness of a witness in opening statement, testimony to rehabilitate the witness may be allowed.
 2. See section II - D regarding cross-examination of a witness regarding specific acts to attack credibility if the acts are probative of untruthfulness.
 3. Character evidence, including statements by counsel during opening, can open the door to rehabilitative evidence by the state.
 4. "Vouching" not permitted; a witness may not give an opinion as to whether another witness is telling the truth. *State v. Haseltine*, 120 Wis.2d 92 (Ct. App. 1984); may not claim witness lack mental capacity to lie. *State v. Tutlewski*, 231 Wis.2d 379 (Ct. App. 1999)
 - a. Improper for prosecutor to suggest that that expert witness in child sex assault case believed that victims were truthful during evaluation. *State v. Delgado*, 2002 WI App 38.

- b. Prosecutor may cross examine defendant regarding veracity of another witness by asking if witness mistaken or lying in testimony.

State v. Bolden 2003 WI App 155; *State v. Jackson*, 2004 WI 94.

B. Pertinent Traits of Character Which are be Admissible

- 1. Evidence of a pertinent trait of the accused's character when offered by accused (then prosecutor can rebut). Wis. Stats. §904.04 (1)(a). However, rebuttal is limited to that which rebuts the character trait being established. *State v. Brecht*, 143 Wis.2d (1988).
- 2. Pertinent trait of victim's character offered by defendant (then prosecutor can rebut). Wis. Stats. § 904.04(1)(b).
 - a. DA can admit evidence of peacefulness of victim in homicide case when the defense is that victim was first aggressor.
 - b. Rape Shield law exception.
- 3. Character of Witness is admissible. Wis. Stats. § 904.04(1)(c)
 - a. Reputation or opinion evidence
 - b. Cross examination on matters related to credibility
 - c. Prior Convictions
- 4. When character or trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of the person's conduct. Wis. Stats. §904.05(2).

VI. Evidence in Self Defense Cases

A. McMorris Evidence. *McMorris v. State*, 54 Wis.2d 144 (1973); *State v. Daniels*, 160 Wis.2d 85 (1991); *State v. Head*, 2002 WI 99.

- 1. In prosecution for assault or homicide, prior acts of victim's violence that accused aware of at the time are admissible for purpose of establishing accused's state of mind about danger victim posed.
- 2. The testimony relates to the defendant's state of mind, showing what his beliefs were concerning the victim's character. Such evidence helps the jury determine whether the defendant "acted as a reasonably prudent person would under similar beliefs and circumstances" in the exercise of a privilege of self-defense.

3. Defendant can introduce supporting evidence to prove reality of acts of which s/he claims knowledge - a defendant is not limited merely to his own assertion that he had knowledge of particular violent acts.
4. The discovery statute does not require the defense to give pretrial notice of a claim of self-defense or of intended evidence to support such a claim. *State v. McClaren*, 2008 WI App 118, *petition for review granted*.

B. There are other Means to Admit Victim's Prior Acts of Violence

1. Reputation and Opinion Evidence see sec. IV above.
2. 904.04(2) Evidence

VII. Third Party Suspects - The Denny "Legitimate Tendency Test": *State v. Denny*, 120 Wis.2d 614 (Ct. App 1984)

- A. When defense wants to admit evidence to show that a third party had motive & opportunity to commit crime, defense must provide *some* evidence to directly connect the third person to the crime charged. Evidence must not be remote in time, place or circumstance.
- B. Defendant is not required under *Denny* test to prove the guilt of the third party.
- C. When evidence showed motive and opportunity by third party to commit crime, evidence that third party lied about their whereabouts to police, was in relative proximity to victim and was with another person who engaged in suspicious conduct, was admissible under *Denny* test. *State v. Knapp*, 2003 WI 121.

VIII. Expert Witnesses - Generally

- A. The Wisconsin standard for the admission of expert testimony. *State v. Walstad*, 119 Wis.2d 483 (1984). A three part test:
 1. Is the expert qualified under 907.02?
 2. Is the evidence relevant under 904.01? "An expert's opinion which makes the defendant's guilt more or less probable than without the opinion is relevant." *State v. Shaw*, 124 Wis.2d 363(1985).
 3. Will the testimony assist the trier of fact under §907.02 Wis. Stats.
- B. Admission left to the court's discretion

1. Trial court must exercise its discretion in accordance with accepted legal standards and in accordance with the facts of record. Appellate court will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision. *State v. Shomberg*, 2006 WI 9.
 2. Wisconsin courts do not play a “gatekeeper” function as do federal courts under *Daubert v. Merrill Dow*, 509 U.S.579 (1993).
 3. Examples of permissible expert testimony under the Walstad standard.
 - a. Death scene analysis. *State v. Swope*, 2008 WI App 175.
 - b. Field Sobriety Tests. *State v. Wilkins*, 2005 WI App 36.
 - c. Engaging in a securities transaction. *State v. LaCount*, 2008 WI 59.
- C. The parameters of expert testimony about character.
1. Comparative testimony, such as that comparing the behavior of a sexual assault victim at trial to the behavior of other victims is permissible per *State v. Jensen*, 147 Wis.2d 240 (1988).
 2. Example: Child Sexual Assault. Testimony can include opinions regarding symptomatology common to child sexual assault victims; (3) the testimony can include a description of the symptoms exhibited by the victims; and (4) the testimony can include the expert's opinion as to whether or not the victims' behavior is consistent with behavior of sexual assault victims *State v. Delgado*, 2002 WI App 38.
 3. A witness may not testify that another witness is telling the truth per *State v. Haseltine*, 120 Wis.2d 92 (Ct. App. 1984). This includes statements such as the expert believed the witness, was certain the witness was a rape victim, etc. *State v. Romero*, 147 Wis.2d 264 (1988).
 4. Testimony that child could not have been coached to make up allegation found to violate *Haseltine*. *State v. Krueger*, 2008 WI App 162.
 5. **Practice Note:** Testimony by an expert in the *Jensen* area must be carefully monitored. Some of the testimony may be admissible and other portions may not. A motion in limine to preclude this testimony coupled with a “continuing objection” to the testimony is insufficient to preserve the objection to the inadmissible portions of the expert’s testimony-specific objections must be made to the inadmissible testimony. *State v. Delgado, Id.*

6. Courts have allowed expert testimony to bolster prosecution theory in cases where there is victim recantation. *State v. Bednarz*, 179 Wis.2d 460 (Ct. App. 1993).

D. Discovery Issues.

1. When prosecutor introduces Jensen testimony by witness who has examined the victim, it may trigger defense right to conduct psychological examination of the witness.
State v. Maday, 179 Wis. 2d 346(Ct. App. 1993).
2. An expert's status as the complainant's treating therapist does not preclude that expert from being 'retained' by the State for purposes of *Maday*.
State v. Rizzo I, 2002 WI 20.
3. When State's "Jensen" testimony is limited to the complainant's delay in reporting, and defense expert concedes that he could assess that aspect without a personal examination, *Maday* examination isn't necessary.
State v. Rizzo II, 2003 WI App 236.

E. Defense Use of Expert Character & Behavioral Evidence-Examples:

1. Battered Woman Syndrome in Self-Defense Homicide.
 - a. Domestic violence expert can testify about the lasting impact of verbal and psychological abuse on victims generally and how the defendant (a battered woman accused of killing abusive partner) compared to the profile of the verbally and psychologically battered woman expert had constructed.
State v. Peters, 2002 WI App 243.
 - b. Such comparison testimony is permitted so long as it does not include *conclusions* about the battered person's actual beliefs at the time of the offense, about the reasonableness of those beliefs or about the person's state of mind before, during and after the criminal act.
State v. Richardson, 189 Wis. 2d 418, 426 (Ct. App. 1994).
 - c. Courts can use such testimony to help determine appropriateness of jury instructions on perfect and imperfect self defense.
Peters, Id.

2. Child Testimony. Expert testimony is admissible in child sexual assault case on how suggestive interview procedures and techniques used with young child can shape child's answers and affect reliability of recollections, is admissible. *State v Kirschbaum*, 195 Wis.2d 11 (Ct. App 1995); but court excluded similar evidence in *State v. Walters*, 2003 WI App 24, *rev'd on other grds.* 2004 WI 18. Counsel contemplating admitting this testimony should read both cases carefully for tips on how to make the record and should also raise constitutional issues.
3. Defendant's Character for Lack of Violence. Expert character evidence on defendant's passive/aggressive personality, that defendant fits profile of one who is unlikely to commit the crime, therefore less likely he did it. *State v. King*, 75 Wis.2d 26(1977).
4. TPR parent's ability to meet the conditions for return of her children. *Brown Co. v. Shannon R.*, 2005 WI 160.
5. Defendant Sexual Disorder Profile Evidence – the *Richard AP* Rule
 - a. *State v. Richard A. P.*, 223 Wis.2d 777 (Ct. App. 1998) Reversible error to exclude expert evidence that a sexual assault defendant did not suffer from a sexual disorder and thus did not fit the “profile” of a child sex offender.
 - b. *State v. Davis*, 2002 WI App 75. *Richard A.P.* expert testimony regarding defendant's character profile can be admitted (i.e., doesn't fit profile of those who commit the crime) as circumstantial evidence that defendant didn't commit crime, **but**
 - c. *State v. Walters*, 2004 WI 18. The admissibility of Richard A.P. evidence was not compelled by case law, but rather was subject to the discretionary determination of the circuit court.
 - d. Reciprocal Discovery. Admission of defendant's psychological profile *may* entitle prosecutor to compel defendant to undergo examination by state's expert – if so, state may only admit this testimony in rebuttal.
6. Eyewitness Identification. Court upheld trial court's exclusion of expert testimony regarding lack of reliability in eyewitness identification, but added that there would probably be a different standard today given developments in scientific knowledge about misidentification. *State v. Shomberg*, 2006 WI 9.
7. False Confessions

- a. Experts on Police Interrogation Techniques, Voluntariness and False Confession. Courts are split on admissibility of expert testimony in this area. Contrast *U.S. v. Hall*, 974 F. Supp. 1198, (C.D. Ill 1997) aff'd 165 F.3d 1095 (7th Cir); *Miller v. State of Indiana*, 770 N.E.2d 763 (2002); (permitting such testimony) with *Vent v. State of Alaska*, 67 P.3d 661 (2003) (upholding trial court's exclusion of such testimony).
- b. Expert testimony regarding defendant's medical and psychological condition admissible and helped establish involuntariness of confession. *State v. Hoppe*, 2003 WI 43. See also footnotes in *State v. Jerrell CJ*, 2005 WI 105, regarding expert issues concerning false confessions.
- c. **Practice Note:** Expert witness should be called and up-to-date research presented by anyone litigating this issue. See discussion in *Shomberg, Id.* for similarities with ruling on eyewitness identification expert.

F. Admissibility of Defense Expert Witness – Constitutional Issues

- 1. The exclusion of an expert witness violates a defendant's constitutional right to present a defense when such exclusion infringes upon a weighty interest of the accused – which is to present “fundamental elements” of the defense. *State v. St. George*, 2002 WI 50 (2002).
- 2. The court is to make a two-part inquiry:
 - a. What is the defendant's interest in admitting the evidence and is the evidence clearly central to the defense? Defense must satisfy four factors:
 - i. The testimony of the expert meets the standards of sec 907.02;
 - ii. The expert's testimony is clearly relevant to a material issue in the case;
 - iii. The expert's testimony is necessary to the defendant's case;
 - iv. The probative value of the testimony outweighs the prejudicial effect.
 - b. Is the exclusion of the evidence arbitrary and disproportionate to the purpose of the rule of exclusion so that exclusion undermines fundamental elements of the defendant's defense?

- c. Can a court categorically exclude a type of expert testimony on reliability grounds? Appellate court said yes as to PBT test, what will WI Supreme Court say? *State v. Fischer* 2008 WI App 152, *PFR granted 2/10/09*

- G. Expert cannot be conduit for inadmissible evidence. *State v. Coogan*, 154 Wis.2d 387 (Ct. App. 1990).
 - 1. Hearsay data is not automatically admitted for the truth unless otherwise admissible under an exception to the hearsay rule. *State v. Weber*, 174 Wis.2d 988 (Ct. App. 1993).
 - 2. Lawyer must carefully distinguish a testifying expert's opinion from the basis on which expert relied, especially when the basis is inadmissible. *State v. Watson*, 227 Wis.2d 167 (1999).
 - 3. This applies to expert testimony at a reverse waiver hearing. *State v. Kleser*, decided 3/10/09, recommended for publication

- H. Experts and the Right to Confrontation
 - 1. Crime lab supervisor who didn't actually perform lab tests permitted to testify that controlled substance was cocaine. *State v. Williams*, 2002 WI 58.
 - a. Court held the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.
 - b. Admission of the lab report in error – lab report was prepared in anticipation of litigation and thus not admissible even though it is a business record.
 - 2. This is an ongoing hot topic. Wisconsin has repeatedly held that a defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another. *State v. Barton*, 2006 WI App 18. **But** the U.S. Supreme Court will rule on this issue this term in *Melendez-Diaz v. Mass.* so stay tuned!

IX. Rape Shield Law: Wis. Stats § 972.11. Evidence concerning the complaining witness' prior sexual conduct or opinions of the witness' prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence. Evidence of victim's prior sexual conduct is not relevant to whether defendant engaged in non-consensual sex. *State v. Droste*, 115 Wis.2d 48(1983).

A. The statutory exceptions:

1. Evidence of the complaining witness' past conduct with the defendant.
2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
4. Admissibility of evidence under statutory exceptions must be litigated in pretrial motion.
5. *State v. DeSantis*, 155 Wis.2d 774 (1990) and *State v. Jackson*, 216 Wis.2d 646 (1998). In determining whether to allow evidence permissible under statutory exceptions court is to determine:
 - a. whether the proffered evidence fits within the exceptions in sec. 972.11(2)(b) 1-3;
 - b. whether the evidence is material to a fact at issue in the case;
 - c. whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.

B. Constitutional right to present evidence and of confrontation under Sixth Amendment may require expansion of rape shield law under some circumstances. *State v. Herndon*, 145 Wis.2d 91 (Ct. App. 1988), *Herndon* was modified by *State v. Pulizzano*, 155 Wis.2d 633 (1990).

C. The Judicial Exception – *State v. Pulizzano*. Defendant must show that the proffered evidence meets five criteria:

1. The prior acts must have clearly occurred;
2. The prior acts must closely resemble those of the present case;
3. The prior acts must be clearly relevant to a material issue;
4. The evidence must be necessary to the defendant's case; and

5. The probative value of the evidence must outweigh its prejudicial effect.
 6. If the five prongs are met, the court must then balance the parties' interests to determine if the evidence is admissible.
 7. Most common & successful use of *Pulizzano* test is to demonstrate that child sexual assault victim has knowledge of sexual conduct from something other than alleged assault by defendant, by demonstrating child has alternative source of knowledge from previous assault.
 - a. Previous sexual touching held to not be sufficiently similar to sexual intercourse to be admissible; however, sexual intercourse held similar enough to admit prior assault in cases where defendant charged with sexual touching. *State v. Dodson*, 211 Wis.2d 886 (1998).
 - b. State has duty to provide defense with information regarding child's prior accusations of sexual abuse by other perpetrators as such evidence is exculpatory and may form basis to bring *Pulizzano* motion. *State v. Harris*, 2004 WI 54.
- D. Admission of expert testimony (*Jensen* evidence) by the state does not "open the door" to allow testimony barred by rape shield law. *State v. Dunlap*, 2002 WI 19.
- E. Rape Shield law bars testimony that regarding complainant's absence of sexual activity. *State v. Penegar*, 139 Wis.2d. 569 (1987); *State v. Mitchell*, 144 Wis. 2d 596 (1988).
- F. Related Matters not covered by Rape Shield Law
- a. Written expressions of sexual desires are not conduct or behavior and may be admissible. *State v. Vonesh*, 135 Wis. 2d 477 (Ct. App. 1986).
 - b. Complainant's prior demonstrably false claim of sexual assault does not come within the rape-shield law. *Jessie L. Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001).

X. Hearsay

- A. Applicability of Hearsay Rules.
1. Hearsay is admissible in preliminary matters in which a court determines the admissibility of evidence. Wis. Stats. Sec.901.04(1). *State v. Frambs*, 157 Wis. 2d 700 (Ct. App. 1990).

2. Hearsay is not admissible at preliminary hearings and juvenile reverse waiver hearings. *State v. Kleser*, decided 3/10/09, recommended for publication.

B. Definition of Hearsay

1. Wis Stats. § 908.01 (3) A statement, other than one made by the declarant, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
2. A statement is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion by the declarant.
3. If there is a dispute about whether the speaker intended to express a fact, condition or opinion, the burden is on the party claiming that an utterance contains an implicit assertion to show that a particular expression of fact, opinion, or condition was intended by the speaker. The trial court determines this in pre trial motions. *State v. Kutz*, 2003 WI App 205.
4. Court found that an instruction can still be an assertion under 908.01(3). *Id.*
5. Constitutional Issue: A mechanistic application of the law of hearsay should not defeat a defendant's right to obtain a fair trial through the presentation of reliable hearsay evidence. Evidence that qualifies for admission under an exception to the hearsay rule, and is critical to the defense implicates constitutional rights directly affecting the ascertainment of guilt and should be admitted under *Chambers v. Mississippi*, 410 U.S. 284 at 302. *State v. Knapp*, 2003 WI 121.

C. Statements that are NOT Hearsay

1. A statement is not hearsay if it is not used to prove the truth of the statement but is offered for another purpose.
 - a. A statement is not hearsay if it is used to show the statements affects on the listener's motive, plan, knowledge, anger, fear or identification.
 - b. If a statement is "not offered for the truthfulness of the statement, and it has no probative value unless offered for the truth of the statement, the statement is inadmissible hearsay. *State v. Sveum*, 220 Wis. 2d 396 (Ct. App. 1998).

2. Prior Consistent Statements- 908.01 (4)(a)2

- a. A prior consistent statement by witness is not hearsay, and may be offered for substantive purposes, if (1) the witness testifies at trial and is subject to cross-examination concerning the statement, (2) the statement is consistent with the witness's testimony, and (3) the statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. *State v. Miller*, 231 Wis.2d 447 (Ct. App. 1999).
- b. The rule that the prior consistent statement declarant is subject to cross-examination concerning the statement requires only the opportunity for cross-examination, and not an actual cross examination about his or her prior statement. *Id.*
- c. The prior consistent statement must predate the alleged recent fabrication or improper influence or motive. *State v. Peters*, 166 Wis.2d 168 (Ct. App. 1991).
- d. When prior consistent statements may be admitted, under rule of completeness, court has discretion to admit as much of the prior statement as is needed to provide context and prevent distortion. Entire transcripts not necessarily admitted under the rule of completeness. *State v. Meehan*, 2001 WI App 119; *State v. Eugenio*, 219 Wis.2d 391 (1998), *State v. Sharp*, 180 Wis.2d 640 (Ct. App 1993).
- e. When witness testifies and no attack is made on witness' credibility, it is improper to bolster the in-court testimony by use of prior consistent statements. *Virgil v. State*, 84 Wis.2d 166 (1978).

3. Prior Inconsistent Statements-

- a. § 906.13 Wis. Stats. The statute permits the admission of a prior inconsistent statement when the witness has either been cross-examined about the statement or is available to be examined.
- b. A prior inconsistent statement is admissible without first giving witness an opportunity to explain or deny the statement if witness has not been excused from testifying. *State v. Smith*, 2002 WI App 118. **But** when seeking to admit a prior statement of a witness, it is safer to cross-examine the witness about the statement before bringing in extrinsic evidence of the statement.
- c. A witness's claimed non-recollection of a prior statement may constitute inconsistent testimony. *State v. Lenarchick*, 74 Wis. 2d 425 (1975).

4. Identification Made Soon After Perception. Wis Stats. § 908.01(4)(a)3 allows the admission of an identification of a person made soon after perceiving the person. This applies to statements of identification made soon after perceiving the suspect or his or her likeness in the identification process. *State v. Williamson*, 84 Wis. 2d 370 (1978).
5. Admission of a Party Opponent
 - a. 908.01(4)(b) allows admission of a statement against a party if:
 - i. it is a statement by the party's individual or representative capacity; or
 - ii. a statement of which the party has manifested the party's adoption or belief in its truth; or
 - iii. a statement by a person authorized by the party to make a statement concerning the subject, or
 - iv. a statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or
 - b. There must be facts that support a reasonable conclusion that a defendant has "embraced the truth" of someone else's statement as a condition precedent to finding an adoptive admission. *State v. Rogers*, 196 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995).
 - c. An attorney can become a witness through pleadings.
 - d. Statements made by counsel during criminal proceedings may be admissible at trial as admissions of the defendant. *State v. Cardenas-Hernandez*, 219 Wis. 2d 516 (1998).
 - e. Prosecutor statements may be considered admissions if the court is convinced the prior statement is inconsistent with the statement at the later trial, and the statements are equivalent of testimonial statements, and the inconsistency is a fair one and an innocent explanation does not exist. Id.
 - f. Admissions incidental to an offer to plead are a special kind of party admission: they are impossible to segregate from the offer itself because the offer is implicit in the reasons advanced, therefore Section 904.10 trumps 908.01 (4)(b). *State v. Norwood*, 2005 WI App 218.

- g. Statements made during a guilty plea hearing are inadmissible for any purpose, including impeachment, at a subsequent trial. *State v. Mason*, 132 Wis. 2d 427 (Ct. App. 1986).

6. Co-Conspirator Statements

- a. 908.01 (4)(b)5 allows a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy.
- b. A statement is made in furtherance of a conspiracy when the statement is part of the information flow between conspirators intended to help each perform his or her role. A statement of a coconspirator that is not hearsay may be used as evidence against another member of the conspiracy. *State v. Savanh*, 2005 WI App 245. Court also found that a statement made to another which was overheard by a police informant was not testimonial.
- c. A statement is made “in furtherance of the conspiracy” when the statement is part of the information flow between conspirators intended to help each perform his or her role. *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997).
- d. The existence of a conspiracy under sub. (4) (b) 5 must be shown by a preponderance of the evidence by the party offering the statement. *Bourjaily v. United States*, 483 U.S. 171 (1987).

XI. Hearsay Exceptions - Declarant Availability Immaterial

A. Excited Utterance- 908.03(2)

- 1. Three Requirements:
 - a. A startling event or condition.
 - b. The declarant must make an out-of-court statement that relates to the startling event or condition.
 - c. The statement must be made while the declarant is still under the stress of excitement caused by the event or condition. Wis. Stats. 908.03(2); *State v. Huntington*, 218 Wis.2d 671 (1998).
- 2. Time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described.

3. For adults, an event of an extreme nature that has a severe effect on the declarant has been found to justify a lapse of a few hours. See *State v. Boshcka*, 178 Wis. 2d 628, 640-41, (Ct. App. 1992) (statements made within a few hours after declarant suffered a repeated and aggravated sexual assault and threat of death should she report it, made to the first people she talked to after the incident).
4. Statements made by a five year-old child to his mother one day after an alleged sexual assault by the defendant were admissible under the excited utterance exception to the hearsay rule, since a more liberal interpretation is provided for that exception in the case of a young child alleged to have been the victim of a sexual assault. *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668 (1975).
5. Alleged victim's statements about the defendant's threats the night before to another person the next morning were not an excited utterance because she was not under the stress of the event when she made the statements. *State v. Kutz*, 2003 WI App 205
6. 911 tapes are admissible under this exception. *Ballos v. State*, 230 Wis.2d 495 (Ct. App. 1999). (note: 911 tapes also found admissible as present sense impression and statement of recent perception).

B. Refreshing Recollections and Past Recollection Recorded

1. If a witness can look at writing which refreshes the witness's memory and witness can then testify from witness's independent recollection, the testimony and not the writing is admitted as present recollection refreshed. *State v. Wind*, 60 Wis.2d 267 (1973).
2. If the attempt to refresh witness's recollection is unsuccessful, the writing can be admitted as a past recollection recorded. Wis. Stats. 908.03(5). Foundational requirements are:
 - a. Witness must once have known about the matter that is recorded in the document.
 - b. Witness must have insufficient present memory about the event to permit full and accurate testimony.
 - c. Document must have been made when the matter was fresh in the witness' mind.
 - d. Document must accurately reflect what the witness once knew
3. There is no requirement that the memorandum be prepared by the person whose past recollection it records. *State v. Jenkins*, 168 Wis.2d 175 (Ct. App. 1992). This is a firmly rooted hearsay exception. *Id.*

C. Records of Regularly Conducted Activity

1. Foundation for Admissibility- To be qualified under this exception, a witness must have knowledge regarding the contemporaneousness of the entries, the person(s) who recorded them, and whether they were made in the course of regularly conducted business activity. *Berg-Zimmer & Assocs., Inc. v. Central Mfg. Corp*, 148 Wis. 2d 341, 350-51 (Ct. App. 1998).
2. Are police reports business records? *State v. Gilles*, 173 Wis.2d 101(Ct. App. 1992); *State v. Williams*, 2002 WI 58.
 - a. Wis. Stats sec. 908.03 (6), the business records exception, allows the introduction of memorandum made in the course of a regularly conducted activity.
 - b. All of the declarants involved in the making of the memorandum must be part of the organization which prepared the record. If one of the declarants is not part of the organization, an additional level of hearsay is presented which must fall within some other exception.
 - c. When the report contains out-of-court assertions by citizens (non-police), an additional level of hearsay is contained in the report and an exception for that hearsay must also be found.
 - d. Documents made in anticipation of litigation are not admissible under the business records exception, *Williams, Id.*
3. Crime lab reports, although records of regularly conducted activity, are not admissible under this exception because they are prepared in anticipation of litigation. *State v. Williams*, 2002 WI 58
4. 911 calls are records of regularly conducted activity as long as the content falls under another hearsay exception. *Ballos v. State*, 230 Wis.2d 495 (Ct. App. 1999).

D. Medical Treatment

1. Wis. Stats. § 908.03(4)- Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
2. A medical record containing a diagnosis or opinion is admissible, but may be excluded if the entry requires explanation or a detailed statement of judgmental factors.
Noland v. Mutual of Omaha Insurance Co. 57 Wis. 2d 633 (1973).

E. Then Existing Mental, Physical or Emotional Condition

1. 908.03 (3) allows a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
2. Allows a declarant's statements about her state of mind to prove her state of mind but does not allow a declarant's statements of conduct by another to prove the truth of that conduct solely because that conduct is relevant to the declarant's state of mind. *State v. Kutz*, 2003 WI App 205.

XII. Hearsay Exceptions - Declarant Unavailable

A. Statements Against Interest

1. 908.045 (4)- allows a statement which was at the time of its making is so far contrary to the declarant's pecuniary or proprietary interest or would make the declarant an object of hatred, ridicule, or disgrace and that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
2. Co Defendants and Statements Against Interest 908.045(4). State may not use co-defendant's statements against interest; this exception is not firmly rooted and violates constitutional right to confrontation. *Lilly v. Virginia*, 527 U.S. 116 (1999).
3. Defense use of statements against interest. *State v. Anderson*, 141 Wis.2d 653 (1987); *State v. Johnson*, 181 Wis.2d 470 (Ct. App. 1993); *State v. Malcolm*, 2001 WI App 291(Ct. App. 2001).
 - a. In deciding the admissibility of a statement against interest, the proper inquiry is not whether the judge believes the statement to be true but whether there is sufficient corroboration for a reasonable person to conclude that it *could* be true.
 - b. The critical need for hearsay evidence, in particular statements against penal interest, is especially apparent in criminal trials where the exclusion of a statement exculpating an accused could result in an erroneous conviction. *Anderson, Id.*
 - c. A statement against penal interest offered to exculpate the accused must be excluded if the trial court, in the exercise of its discretion, concludes that, consistent with Rule 901.04(2), no reasonable jury could find that the statement could be true.

- d. The rule does not require the admission of an out-of-court statement that tends to expose the declarant to criminal liability when the corroboration is merely debatable.
 - e. A statement offered under Rule 908.045(4), Stats. can be sufficiently self-corroborating to be admissible.
4. Corroboration could be the defendant's statement or testimony.

B. Statements Against Social Interest

- 1. A statement that shames the speaker in his community and subjects the declarant to ridicule, hatred or disgrace.
- 2. A statement that makes the declarant an object of hatred, ridicule, or disgrace requires that the declarant have a personal interest in keeping the statement secret. *State v. Stevens*, 171 Wis. 2d 106 (Ct. App. 1992).
- 3. Exception applies not only to statements against penal interests, but also to statements against social interests. *Murillo v. Frank*, 402 F.3d 786 (2005) but, confrontation may prohibit admissibility.
- 4. Wisconsin's Social Interest Exception is not supported by any data. *Murillo v. Frank, Id.*

C. Former Testimony Hearsay Exception

- 1. §908.045(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.
- 2. Caution: Crawford v. Washington must be complied with in order for former testimony to be admitted into evidence. See Crawford Section.

D. Dying Declaration

- 1. 908.045 (3) allows statements made under belief of impending death. A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what declarant believed was their impending death.
- 2. In order for the statement to be a dying declaration was the declarant:
 - a. Notified by police or medical staff that he or she was dying?

- b. Did the declarant make a statement that he/she thought he/she was dying?

E. Statements of Recent Perception

1. §908.045(2) allows statements of reception perception if
 - a. Statement must not be made in response to any pending or anticipated investigation or litigation and appear to be made in good faith (cannot be in response to police or investigator).
 - b. Statement must narrate, describe or explain an event or condition that was recently perceived by declarant.
 - c. Statement must have been made when declarant's recollection was clear.
2. This is not a firmly rooted hearsay exception and may violate right to confrontation; confrontation not violated if a non-testimonial hearsay statement has particularized guarantees of trustworthiness. *State v. Manuel*, 2005 WI 75.
3. This exception does not apply to the aural perception of an oral statement privately told to a person. *State v. Stevens*, 171 Wis.2d 106 (Ct. App 1992).
4. Allows more time between the observation of the event and the statement, as opposed to the exceptions for present sense impression and excited utterances. *State v. Weed*, 2003 WI 85; *Ballos*, *Id.*

F. Impeaching a Hearsay Declarant

1. 908.06- When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness.
2. A defendant who introduces testimony from an unavailable declarant cannot later claim that he was harmed by his inability to cross-examine that declarant when prior inconsistent statements are introduced to impeach an out-of-court statement introduced by the defendant. *State v. Smith*, 2005 WI App 152.

G. Child Video Statements

1. 908.08 allows in any criminal trial or hearing, juvenile fact finding, the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section. Must comply with other sections under 908.08.
2. As long as the child is available for questioning at the defendant's request, the confrontation clause is satisfied because it only mandates that the declarant be present and subject to full cross-examination at trial. *State v. James*, 2005 WI App 188.
3. The recorded "oral statement of a child who is available to testify," made admissible by Wis. Stat. Rule 908.08, is the testimony of that child, supplemented by in-court testimony as provided for by Rule 908.08(5), irrespective of whether that "oral statement" is "sworn" ... See *State v. Anderson*, 2006 WI 77, ¶103, 291 Wis. 2d 673, 720 (statements made and admitted under Rule 908.08 have "the effect of a direct examination") therefore the audiovisual recordings of the witness must be transcribed by an official court report. *State v. Pablo Ruiz-Velez*, 2008 WI App 169.

H. Expert Witnesses

1. Wis. Stats. sec .907.03 permits an expert to base an opinion or inference if of a type reasonably relied upon by experts in the particular field, on facts or data which are not be admissible in evidence.
2. While opinion evidence may be based upon hearsay, the underlying hearsay data may not be admitted unless it is otherwise admissible under a hearsay exception. *State v. Weber*, 174 Wis. 2d 98 (Ct. App. 1993).
3. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and when it must be excluded altogether. *State v. Watson*, 227 Wis. 2d 167(1999); *Staskal v. Symons Corporation*, 2005 WI App 216.
4. Expert permitted to rely on and testify to hearsay statistics in forming his opinion. *State v. Swope*, 2008 WI App 175.
5. Wis. Stats. § 907.03 does not give license to the proponent of an expert to use the expert solely as a conduit for the hearsay opinions of others. *State v. Williams*, 2002 WI 58, ¶19.
6. Permitting an examining professional to be nothing more than a conduit for the opinions of others violates a due process rights in a civil proceeding. Examining professional must reach their conclusion through an independent evaluation of the subject and not through a review of the opinions of other experts. *Walworth County v. Theresa B.*, 2002 WI App 223.

7. Trial court may not substantively rely on opinion hearsay testimony admitted through expert witness at a reverse waiver hearing. *State v. Kleser*, decided 3/10/09, recommended for publication.

XIII. Constitutional Right to Present a Defense. A defendant's right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules. *State v. Knapp*, 2003 WI 121. "(W)here constitutional right directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the needs of justice". *Knapp*, citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

XIV. Confrontation—The Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004)

- A. The Sixth Amendment guarantees the right of a criminal defendant to confront his accusers in court.
 1. Therefore, whenever an out of court statement is proffered against a criminal defendant, a court must determine not only if the statement is admissible under a hearsay exception but additionally if its admission comports with the constitutional right to confrontation.
 2. The right to confrontation is not new. It is a right guaranteed and upheld in many pre-Crawford cases. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Supreme Court held that this "bedrock procedural guarantee applies to both federal and state prosecutions." *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine.)
 3. The Supreme Court has always been concerned about a defendant's Sixth Amendment Constitutional right to Confrontation. See for example *Chambers v. Mississippi*, 410 US at 302; *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (excluded a co-defendant's statement that was not subject to cross examination because the statement did not fall under a firmly rooted hearsay exception.); *Roberts v. Russell*, 392 U.S. 293, 294-295 (1968) and *Bruton v. United States*, 391 U.S. 123, 126-128 (1968) (excluded accomplice confessions where the defendant had no opportunity to cross-examine.)
 4. Pre Crawford, Courts allowed an unavailable witness's out of court statement if it had adequate indicia of reliability and fell within a firmly rooted hearsay exception or it bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66. The trial court would decide if the statement was reliable and many different standards and factors were considered depending on the court or jurisdiction.

5. Where testimonial statements are involved, the Court did not believe that the Framers meant to leave the Sixth Amendment's protection to the erratic nature of the rules of evidence, much less a court's notion of "reliability. The *Roberts* test allowed a jury to hear evidence, untested by the adversary process, based on a judge's decision that the statement was reliable. **"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."** *Crawford* at 61-62.
 6. A defendant has the right to cross-examine witnesses against him who give testimony, except in cases where an exception to the confrontation clause was recognized at its founding. *Id.* at 53-54.
- B. The laws of hearsay still apply. Out of court statements must still be admissible pursuant to a hearsay exception under the rules of evidence. *State v. Manuel*, 2005 WI 75, ¶23; *if* the statement is found admissible then a confrontation analysis is engaged, *Id.*

What does the confrontation clause require? Confrontation clause is if an extrajudicial testimonial statement is admitted against the defendant unless the witness is unavailable **and** the defendant had a prior opportunity to cross-examine the witness. *Crawford* at 53-54. A statement is testimonial if it is made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Crawford* at 52. If the court holds that statement to be testimonial, it is an automatic violation of the right to confrontation per *Crawford, Id.* If the statement is not testimonial, in Wisconsin a court is to analyze the statement under *Ohio v. Roberts* standard. *State v. Manuel*, 2005 WI 75, ¶60.

C. Definition of Testimonial per *Crawford*:

When the circumstances indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, the statement is testimonial, and confrontation is implicated. *Crawford* at 52.

1. Statements taken by police officers in the course of interrogations are also testimonial under even a narrower standard. *Id.* at 52.
2. Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. *Crawford* at 68.
3. Statement made to another for purpose of criminal investigation.
4. Tell someone to tell police/law enforcement.

5. Affidavits or other sworn statements. *Id* at 51.
 6. Statement under circumstances that would lead an objective witness reasonably to believe that the statement would be available during trial. *Id.* at 52.
- D. Non testimonial Statements Definition. Statement that is an “off-hand, overheard remark”, a casual remark to a friend or family member, business records, or statements in furtherance of a conspiracy. *Id.* at 56. Examples of non-testimonial statements:
1. Dying Declarations- The Supreme Court stated in *Crawford* that historical analysis indicates there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. In *foonate 6* the Court states that one deviation it has found involves dying declarations. Common Law cases allowed testimony to be given under the awareness of impending death. *Giles* at 2687. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243-244, 39 L. Ed. 409, 15 S. Ct. 337 (1895). The Court states that “dying declaration” are *sui generis* (being the only example of its kinds, unique) as was an exception to confrontation at its founding. *Crawford* at 53-54, 56.
 2. Statements made to loved one or acquaintances without any contemplation of being used in a court proceeding are not testimonial statements. *State v. Manuel*, 281 Wis. 2d 554, ¶53.
 3. Statement of coconspirator during drug transaction, conveyed to jury via police informant buying drugs as part of controlled buy and while buying drugs, overheard the statement, is not testimonial. *State v. Savanh*, 2005 WI App 245.
 4. Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an **ongoing** emergency. Thus, accusation made in 911 calls immediately after incident held non testimonial. *Davis v. Washington*, 547 U.S. 813 (2006). In *Washington*, the Court stated that 911 calls were not testimonial when made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency **but** the Court cautions that the purpose of call may segue from non testimonial report of ongoing emergency to testimonial recitation, in that instance, the trial judge should redact the testimonial portion of the 911 call. *Washington*, 547 US 813.

5. Experts- Current Wisconsin law is that statements made by other to experts does not violate confrontation clause because not offered for the truth of the matter assert but made as the basis of the expert's testimony. *State v. Barton*, 2006 WI App 18. The U.S. Supreme Court will rule on this issue this term in *Melendez-Diaz v. Mass.*, 128 S. Ct. 1647, (Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington* (2004) and may overrule WI law on this topic.
6. The use of expert witnesses as a conduit for opinions of other examining individuals, when the testifying expert did not examine the defendant, poses a substantial risk of violating the defendant's due process rights. The defendant is unable to confront the witnesses (experts) who the testifying expert used to base his/her opinion. The testifying expert must all independently confirm the facts the opinion is based upon. *Walworth County v. Therese B.*, 2003 WI App 223. (This applies to guardianship and protective placement case in which the court finds that because the defendant has a potential for loss of liberty by an involuntary commitment, due process applies)

E. Post Crawford Cases finding Statements to be Testimonial

1. Police interview of complainant at scene, shortly after incident, elicited "testimonial" statement. *Davis v. Washington*, 547 US 813, 817 (quoting facts from *Hammon v. Indiana*.) They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 822.
2. Statement may still be testimonial even if the statement was unsolicited by the police. *State v. Jensen*, 2007 WI 26 (overruling *State v. Hemphill*, 2005 WI App 248.) In *Jensen* the Court found the letter address by the deceased was testimonial because a reasonable person would have anticipated the letter, addressed to the police, to be used later at a trial. *Id.* at ¶ 27. The court also found that voicemails left on the police officer's voicemail were testimonial because they were left to investigate the defendant's activities. *Id.* at ¶ 30.
3. Officers testifying as to the course of their investigation and giving testimony about information that is not subject to cross examination as to why they investigated or showed photo of defendant found to violate the confrontation clause because the statements are testimonial. *U.S. v. Silva*, 380 F.3d 1018 (7th Cir. 2004).
4. Pretrial Identification of defendant was testimonial. *State v. King*, 2005 WI App 224, 287 Wis. 2d 756.

5. Interview by detective at a hospital, although an excited utterance, was testimonial because there was structured police questioning. *Id.*
 6. The Court allows the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Crawford* at 59 citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985).
- F. Confrontation rights can be forfeited by a defendant under the doctrine of forfeiture by wrongdoing.
1. Forfeiture by wrongdoing is not an exception established at the time of the Confrontation Clause's founding. *Giles v. California*, 128 S. Ct. 2678, 2687 (2008).
 2. In 1997, The Court approved a Federal Rule of Evidence (§ 804(b)(6)) which allowed unconfrosted statements only when the defendant engaged in wrongdoing which was intended to "procure the unavailability of the witness." *Davis v. Washington*, 547 U.S. 813, 833.
 3. Did the defendant engage in conduct **designed to prevent the** witness from testifying? *Giles* at 2687
 4. The court can consider earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help and the court can review evidence of **ongoing** criminal proceedings at which the victim would have been expected to testify. *Id.*
 5. Defendant's intent to prevent witness from testifying needs to be shown by a preponderance of the evidence. *Id.*
 6. No separate Confrontation Clause for domestic violence cases. The Court found that "abridging the constitutional rights of criminal defendant's" is not in the State's arsenal to combat domestic violence. *Id* at 2692.
 7. When acts of domestic violence are intended to dissuade a victim from resorting to outside help, testifying in criminal prosecutions, prevent testimony from police, or seclude witness for purposes of prosecution and the relationship culminates in a homicide, the circumstances of pending criminal prosecutions, isolation, dissuasion, may support a finding that the homicide may allow prior statements admissible under the forfeiture doctrine. *Id.*
- G. Unavailability for confrontation purposes requires:
1. The hearsay declarant does not appear at the trial and, critically, if there is either a "firmly rooted hearsay" exception or that statement has "particularized guarantees of trustworthiness. *Manuel* at ¶67.

2. The state makes a good-faith effort to produce that declarant at trial. If there is a remote possibility that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The length to which the prosecution must go to produce a witness is a question of reasonableness. *King* at 287.
 3. A defendant who introduces testimony from an unavailable declarant cannot later claim that he was harmed by his inability to cross-examine that declarant when prior inconsistent statements are introduced to impeach an out-of-court statement introduced by the defendant. *State v. Smith*, 2005 WI App 152.
- H. If the Statement is testimonial, and declarant is unavailable court is to determine did the defendant have a full opportunity to cross examine the witness? *Crawford* at 68.
1. Former testimony from witness, who testified at a co-defendant's trial and is then unavailable for the defendant's trial, is inadmissible. *State v. Hale*, 2005 WI 7. The Court found that Hale did not have a prior opportunity to cross examine the witness. The Court went on to say, "we conclude that prior testimony may be admitted against a criminal defendant only when that defendant has had a prior opportunity to cross-examine the witness giving that testimony." *Id* at ¶58.
 2. A witness' repeated claim of loss of memory did not deny confrontation because the declarant was subject to cross examination. The court found that as long as the declarant is in court and subject to cross examination, confrontation is satisfied. Confrontation Clause does not guarantee that the declarant's answers to those questions will not be tainted by claimed memory loss, real or feigned. *State v. Rockette*, 2006 WI App 103.
 3. A client's brother implicated him for the murder during his testimony at the preliminary hearing. At trial, the brother invoked the Fifth Amendment and his preliminary hearing testimony was admitted. The court found that the defendant did not have a full opportunity to cross his brother, as to motive [because the court sustained objections as to witnesses' credibility], even though the defendant had an opportunity to cross exam the brother, therefore the defendant's confrontation rights were violated. *State v. Stuart*, 2005 WI 47.
 4. Video statements satisfy Crawford as long as the child is available for questioning at the defendant's request. Confrontation mandates that the declarant be present and subject to full cross-examination at trial. *State v. James*, 2005 WI App 188.

5. If the defendant's attorney had a full opportunity to cross examine the witness, confrontation has been satisfied. If no opportunity by the defendant's attorney for full cross examination, confrontation is not satisfied and the statement is not admitted at trial.
- I. Wisconsin courts still engage in a confrontation analysis in deciding admission of non-testimonial statements. Court is to determine if the statement is non testimonial, is the witness available (*Ohio v. Roberts, Id.* analysis) and if there is either a "firmly rooted hearsay" exception or that statement has "particularized guarantees of trustworthiness." *Manuel* at ¶ 67.
 1. *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Roberts* at 66.
 2. Accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule. *Lilly v. Virginia*, 527 U.S. 116, 134 (1999).

XV. When to do a motion in limine. *State v. Wright*, 2003 WI App 252

- A. The trial court has directed that the evidentiary issue be resolved before trial;
- B. The evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court,
- C. The evidentiary issue is significant and unresolved under existing law;
- D. The evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue resolved in advance of trial so as to save the time and resources of all concerned; or
- E. A party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine.