CHAPTER 901

EVIDENCE — GENERAL PROVISIONS

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

901.01 Scope. Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973).

Evidence: A collection of rules not in the statutes. Marion, WBB July, 1985.

901.02 Purpose and construction. Chapters 901 to 911 shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973); 1981 c. 390.

901.03 Rulings on evidence. (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

(2) RECORD OF OFFER AND RULING. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form.

(3) HEARING OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973); 1991 a. 32.

An offer of proof must be made as a necessary condition precedent to the review of any alleged error in the exclusion of evidence. Without an offer there is no way to determine whether the exclusion was prejudicial. State v. Moffett, 46 Wis. 2d 164, 174 N.W.2d 263.

In order for an error to be "plain error" it must be so fundamental that a new trial must be granted so as not to deny a basic constitutional right. State v. Vinson, 183 Wis. 2d 297, 515 N.W.2d 314 (Ct. App. 1994).

Not all constitutional errors are plain errors. Some may be harmless errors. The state has the burden of showing that an error is harmless beyond a reasonable doubt. State v. King, 205 Wis. 2d 81, 555 N.W.2d 174 (Ct. App. 1996), 95−3442.

When a defendant alleges that a prosecutor's statements constituted plain error, the test is whether, in the context of the entire record of the trial, the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Cameron, 2016 WI App 54, ___ Wis. 2d ___, ___ N.W.2d ___, 15−1088.

901.04 Preliminary questions. (1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) HEARING OUT OF THE PRESENCE OF A JURY. Hearings on any of the following shall be conducted out of the presence of the jury:

(a) Admissibility of confessions.

(b) In actions under s. 940.22, admissibility of evidence of the patient's or client's personal or medical history.

(c) In actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302 (2), if the court determines that the offense was sexually motivated, as defined in s. 980.01 (5), admissibility of the prior sexual conduct or reputation of a complaining witness.

(cm) Admissibility of evidence specified in s. 972.11 (2) (d).

(d) Any preliminary matter if the interests of justice so requires.

(4) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross−examination as to other issues in the case.

(5) WEIGHT AND CREDIBILITY. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

History: Sup. Ct. Order, 59 Wis. 2d R1, R14 (1975); 1975 c. 184, 421; 1985 a. 275; 1987 a. 332 s. 64; 1991 a. 32, 269; 1993 a. 97, 227; 1995 a. 456; 2005 a. 277; 2007 a. 116.

While witnesses may be questioned regarding their mental or physical condition when such matters have a bearing on their credibility, evidence that a witness was subject to epilepsy did not warrant disregarding his testimony in the absence of a showing of what effect the epilepsy had on his memory. Sturdevant v. State, 49 Wis. 2d 142, 181 N.W.2d 523 (1970).

A voluntary confession was not rendered inadmissible although the arrest was made outside the statutory jurisdictional limits of the arresting officer. State v. Ewald, 63 Wis. 2d 165, 216 N.W.2d 213 (1974).

A psychiatric witness whose qualifications as an expert were conceded had no scientific knowledge on which to base an opinion as to the accused's lack of specific intent to kill. There was no basis for a finding under subs. (1) or (2) to admit the testimony. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

A defendant has no confrontation clause rights as to hearsay at a pretrial motion hearing. The trial court could rely on hearsay in making its decision. State v. Frambs, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990).

Sub. (1) permits an out−of−court declaration by a party's alleged co−conspirator to be considered by the trial court in determining whether there was a conspiracy. State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992).

Before a demonstrative videotape may be admitted there must be a foundation that it is a fair and accurate reproduction of what was seen and was produced under conditions reasonably similar to conditions of the actual event. Even with the foundation established, the evidence may be excluded on a finding that its probative value is outweighed by its prejudicial effect. State v. Peterson, 222 Wis. 2d 449, 588 N.W.2d 84 (Ct. App. 1998), 97−3737.

As with evidence bearing directly on consciousness of guilt, evidence of consciousness of innocence is also relevant. An offer to take a polygraph test or a DNA test is relevant as long as the person offering to take the test believes the test to be possible, accurate, and admissible. However an offer to take a DNA test would be a mere hollow gesture if the offeror knew that a test would reveal nothing. State v. Santana−Lopez, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, 99−0742.

Evidence of criminal acts by an accused that were intended to obstruct or avoid punishment was not evidence of "other acts" admissible under sub. (2), but was admissible to prove consciousness of guilt of the principal criminal charge. State v. Bauer, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902, 99−2589.

The results of polygraph examinations are inadmissible in civil cases. While an offer to take a polygraph examination may be relevant to the offeror's credibility, that a person agreed to a polygraph at the request of law enforcement has not been found admissible and could not be without proof that the person believed the results would accurately indicate whether he or she was lying. Estate of Neumann v. Neumann, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821, 00−0557.

While a defendant's offer to take a polygraph test is admissible because it may reflect a consciousness of innocence, an agreement to submit to a polygraph test at the suggestion or request of another is not an offer and is not admissible. There is no exception to this rule when the request or suggestion for the polygraph test comes from the defendant's attorney. State v. Pfaff, 2004 WI App 31, 269 Wis. 2d 786, 676 N.W.2d 562, 03−1268.

Under the circumstances of the case, when a defendant seeks to introduce evidence of prior specific instances of violence within the defendant's knowledge at the time of the incident in support of a self−defense claim, the circuit court has the authority under s. 906.11, in conjunction with sub. (3) (d), to order the defendant to disclose prior to trial any specific acts that the defendant knew about at the time of the incident and that the defendant intends to offer as evidence so that admissibility determinations can be made prior to trial. State v. McClaren, 2009 WI 69, 318 Wis. 2d 261, 767 N.W.2d 550, 07−2382.

In making preliminary factual determinations, courts may examine the evidence, including hearsay statements, sought to be admitted. Bourjaily v. United States, 483 U.S. 171 (1987).

901.05 Admissibility of certain test results. (1) In this section, "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(2) Except as provided in sub. (3), the results of an HIV test, as defined in s. 252.01 (2m), are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding, as evidence of a person's character or a trait of his or her character for the purpose of proving that he or she acted in conformity with that character on a particular occasion unless the evidence is admissible under s. 904.04 (1) or 904.05 (2) and unless the following procedures are used:

(a) The court may determine the admissibility of evidence under this section only upon a pretrial motion.

(b) Evidence which is admissible under this section must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(3) The results of a test or tests under s. 938.296 (4) or (5) or 968.38 (4) or (5) and the fact that a person has been ordered to submit to such a test or tests under s. 938.296 (4) or (5) or 968.38 (4) or (5) are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding.

History: 1987 a. 70; 1989 a. 201 ss. 34, 36; 1991 a. 269; 1993 a. 32; 1995 a. 77; 1999 a. 188; 2009 a. 209.

901.053 Admissibility of evidence relating to use of protective headgear while operating certain motor vehicles. Evidence of use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33 (3g), 23.335 (8) (a) or (b), or 347.485 (1), who operates or is a passenger on a utility terrain vehicle, as defined in s. 23.33 (1) (ng), a motorcycle, as defined in s. 340.01 (32), an all−terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, is not admissible in any civil action for personal injury or property damage. This section does not apply to the introduction of such evidence in a civil action against the manufacturer or producer of the protective headgear arising out of any alleged deficiency or defect in the design or manufacture of the protective headgear or, with respect to such use of protective headgear, in a civil action on the sole issue of whether the protective headgear contributed to the personal injury or property damage incurred by another person.

History: 2003 a. 148; 2011 a. 208; 2015 a. 170.

901.055 Admissibility of results of dust testing for the presence of lead. The results of a test for the presence of lead in dust are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding unless the test was conducted by a person certified for this purpose by the department of health services.

History: 1999 a. 113; 2007 a. 20 s. 9121 (6) (a).

901.06 Limited admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

History: Sup. Ct. Order, 59 Wis. 2d R1, R21 (1973).

Admissibility for the purpose of establishing identity prevails over inadmissibility for another purpose. State v. Stawicki, 93 Wis. 2d 63, 286 N.W.2d 612 (Ct. App. 1979).

901.07 Remainder of or related writings or statements. When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

NOTE: This section is shown as amended eff. 1−1−18 by SCO 16−02A. Prior to 1−1−18 it reads:

901.07 Remainder of or related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

History: Sup. Ct. Order, 59 Wis. 2d R1, R22 (1973); 1991 a. 32; Sup Ct. Order No. 16−02A, 2017 WI 92, filed 10−11−17, eff. 1−1−18.

NOTE: Sup. Ct. Order No. 16−02A states that: "The Judicial Council Notes to Wis. Stats. §§ 901.07, 906.08, 906.09, and 906.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Judicial Council Note, 2017: This amendment is consistent with *State v. Eugenio*, 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998), which acknowledged that the rule of completeness is applicable to oral testimony, and with *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999), review denied, 230 Wis. 2d 275, 604 N.W.2d 573 (1999), which provided guidance on how, and when, to apply the rule of completeness.

> "The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule ... '[A]n out−of−court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out−of−court statements that might have been made contemporaneously.'" *Eugenio*, 219 Wis. 2d at 412 (citations omitted).

The rule of completeness requires a statement, including otherwise inadmissible evidence, be admitted in its entirety when necessary to explain an admissible portion of a statement. The rule is not restricted to writings or recorded statements. State v. Sharp, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993).

A party's use of an out−of−court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. *Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), 96−1394.

This section applies to written and recorded statements. The rule of completeness for oral statements is encompassed within s. 906.11. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), 96−1394.

901.08 Admissibility of sexual conduct. (1) In this section:

(a) "Sexual conduct" means any conduct or behavior relating to sexual activities, including prior experience of sexual intercourse or sexual contact, use of contraceptives, and sexual life−style.

(b) "Sexual misconduct" includes a violation of s. 940.22 (2), 940.225 (1), (2), or (3), 940.32, 942.08, 942.09, 948.02, 948.025, 948.05 (1) or (1m), 948.055 (1), 948.06, 948.07, 948.075, 948.08, 948.09, 948.095, 948.10, or 948.11 (2) and includes sexual harassment, as defined in s. 111.32 (13).

(c) "Victim" means a person against whom sexual misconduct allegedly has been committed.

(2) In a civil action involving damages for an injury resulting from sexual misconduct, any evidence concerning a victim's sex-

ual conduct, opinions of the victim's sexual conduct, and reputation as to the victim's sexual conduct, offered to prove that the victim engaged in other sexual conduct or to prove the victim's sexual predisposition may not be admitted into evidence during the course of any hearing or trial, nor may any reference to such sexual conduct be made in the presence of the jury, except the following:

(a) Evidence of the specific, consensual sexual conduct between the alleged offender and the victim.

(b) Evidence of specific instances of sexual conduct by the alleged victim after an in camera showing by the party requesting the admission that the sexual conduct was the actual cause of the victim's injury for which damages are requested in the action.

History: 2009 a. 138.

901.09 Submission of writings; languages other than English. (1) The court may require that a writing in a language other than English offered in evidence be accompanied by a written translation of the writing into English with an attached affidavit by the translator stating his or her qualifications to perform the translation and certifying that the translation is true and correct.

(2) A party may object to all or parts of a translation offered under sub. (1) or to the qualifications of the translator. The court may order a party objecting to all or part of a translation to submit an alternate translation of those parts of the original translation to which the party objects, accompanied by a translator's affidavit as described in sub. (1). If an objection is made to the qualifications of the translator and the court finds that the translator is not qualified the court may reject the offered translation on that ground alone without requiring an alternative translation by the objecting party.

(3) The court may require a party offering into evidence a translation under sub. (1) or an alternative translation ordered by the court under sub. (2) to bear the cost of the translation.

History: Sup. Ct. Order No. 09−03, 2010 WI 100, filed 7−27−10, eff. 1−1−11.

NOTE: Sup. Ct. Order No. 09−03 states that "the Comment to 901.09 of the statutes is not adopted, but will be published and may be consulted for guidance in interpreting and applying 901.09 of the statutes."

Comment, 2010: This rule is not intended to apply strictly to evidence in documentary form. Parties often offer evidence not contained in documents that consists of or contains statements made in a foreign language, for example, recordings of telephone calls to 911 operators, recordings of police interrogations, and surveillance recordings. The better practice when offering such evidence is for a party to offer a written transcript of the recording, to aid the jury or the court in understanding the recording. Sometimes the transcript is received as evidence, but not always, and in any event the recording is considered primary and the transcript merely an aid. If a party offers in evidence a recording accompanied by a transcript, this rule governs the transcript.

This rule does not require the court to provide the party with an interpreter for purposes of preparing the translation required by this rule. [Re Order effective January 1, 2011]