CHAPTER 904

EVIDENCE — RELEVANCY AND ITS LIMITS

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

904.01 Definition of "relevant evidence". "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

History: Sup. Ct. Order, 59 W (2d) R66.

Introduction of a portion of a bloodstained mattress was both relevant and material by tending to make more probable the prosecution's claim that the victim had been with the defendant and had been molested by him. Bailey v. State, 65 W (2d) 331, 222 NW (2d) 871.

Most important factor in determining admissibility of conduct evidence prior to the accident is degree of probability that the conduct continued until the accident occurred; evidence of defendant's reckless driving 12 1/2 miles from accident scene was properly excluded as irrelevant. Hart v. State, 75 W (2d) 371, 249 NW (2d) 810.

Evidence of crop production in other years held admissible to prove damages for injury to crop. Cutler Cranberry Co. v. Oakdale Elec. Coop. 78 W (2d) 222, 254 NW (2d) 234.

Complaining witness's failure to appear to testify on 2 prior trial dates was not relevant to credibility of witness. Rogers v. State, 93 W (2d) 682, 287 NW (2d) 774 (1980).

Evidence of post-manufacture industry custom was admissible under facts of products liability case. Evidence of good safety record of product was not relevant. D.L. v. Huebner, 110 W (2d) 581, 329 NW (2d) 890 (1983).

Probability of exclusion and paternity are generally admissible in criminal sexual assault action in which assault allegedly results in birth of child, but probability of paternity is not generally admissible. State v. Hartman, 145 W (2d) 1, 426 NW (2d) 320 (1988).

In sexual assault action where assault allegedly resulted in childbirth, HLA and red blood cell test results showing paternity index and probability of exclusion were admissible statistics. Statistic indicating defendant's probability of paternity was inadmissible. State v. Hartman, 145 W (2d) 1, 426 NW (2d) 320 (1988).

904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

History: Sup. Ct. Order, 59 W (2d) R70.

Testimony that weapons were found at accused's home was admissible as part of chain of facts relevant to accused's intent to deliver heroin. State v. Wedgeworth, 100 W (2d) 514, 302 NW (2d) 810 (1981).

Evidence of defendant's prior sexual misconduct was irrelevant where only issue in rape case was whether victim consented. State v. Alsteen, 108 W (2d) 723, 324 NW (2d) 426 (1982).

Defendant does not have constitutional right to present irrelevant evidence. State v. Robinson, 146 W (2d) 315, 431 NW (2d) 165 (1988).

904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History: Sup. Ct. Order, 59 W (2d) R73.

Under this section it was within the discretion of the trial court to admit the victim's bloodstained nightgown and to allow it to be sent to the jury room where (a) the nightgown clearly was of probative value, since available photographs failed to show the underside of the garment; (b) the article was not of a nature which would shock the sensibilities of the jury and inflame it to the prejudice of defendant, and (c) no objection was made to the sending of the item as an exhibit to the jury room. Jones (George Michael) v. State, 70 W (2d) 41, 233 NW (2d) 430.

Evidence of alcoholic degenerative impairment of plaintiff's judgment had limited probative value, far outweighed by possible prejudice. Walsh v. Wild Masonry Co., Inc. 72 W (2d) 447, 241 NW (2d) 416.

Trial judge did not abuse discretion in refusing to admit exhibits offered at the 11th hour to establish a defense by proof of facts not previously referred to. Roeske v. Diefenbach, 75 W (2d) 253, 249 NW (2d) 555.

Where evidence was introduced for purpose of identification, the probative value of conduct during a prior rape case exceeded the prejudicial effect. Sanford v. State, 76 W (2d) 72, 250 NW (2d) 348.

Where defendant was charged with attempted murder of police officers in pursuit of defendant following armed robbery, probative value of evidence concerning armed robbery and showing motive for murder attempt was not substantially outweighed by dangers of unfair prejudice. Holmes v. State, 76 W (2d) 259, 251 NW (2d) 56.

Where evidence of other conduct is not offered for valid purpose under 904.04 (2), balancing test under 904.03 is inapplicable. State v. Spraggin, 77 W (2d) 89, 252 NW (2d) 94.

Although continuance is more appropriate remedy for surprise, where unduly long continuance would be required, exclusion of surprising evidence may be justified under this section. State v. O'Connor, 77 W (2d) 261, 252 NW (2d) 671.

In prosecution for possession of amphetamines, where syringe and hypodermic needles, which had only slight relevance to charge, were admitted into evidence and sent to jury room, case was remanded for new trial because of abuse of discretion. Schmidt v. State, 77 W (2d) 370, 253 NW (2d) 204.

See note to Art. I, sec. 7, citing Chapin v. State, 78 W (2d) 346, 254 NW (2d) 286.

Evidence which resulted in surprise was properly excluded under this section. Lease America Corp. v. Ins. Co. of N. America, 88 W (2d) 395, 276 NW (2d) 767 (1979).

Trial court abused discretion by excluding official blood alcohol chart offered in evidence by accused driver. State v. Hinz, 121 W (2d) 282, 360 NW (2d) 56 (Ct. App. 1984).

904.04 Character evidence not admissible to prove conduct; exceptions; other crimes. (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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.

History: Sup. Ct. Order, 59 W (2d) R75; 1975 c. 184

A defendant claiming self defense can testify as to specific past instances of violence by the victim to show a reasonable apprehension of danger. McMorris v. State, 58 W (2d) 144, 205 NW (2d) 559.

Evidence of delinquency in making withholding tax payments by 3 other corporations of which accused had been president was admissible to show wilfulness of accused in failing to make such payments as president of 4th corporation. State v. Johnson, 74 W (2d) 26, 245 NW (2d) 687.

Where prosecution witness is charged with crimes, defendant can offer evidence of such crimes and otherwise explore on cross-examination the subjective motives for the witness' testimony. State v. Lenarchick, 74 W (2d) 425, 247 NW (2d) 80.

When defendant claims accident in shooting deceased, prosecution may present evidence of prior violent acts to prove intent and absence of accident. King v. State, 75 W (2d) 26, 248 NW (2d) 458.

See note to Art. I, sec. 8, citing Johnson v. State, 75 W (2d) 344, 249 NW (2d) 593.

See note to 161.41, citing Peasley v. State, 83 W (2d) 224, 265 NW (2d) 506 (1978).

Evidence of prior conduct, i.e. defendant's threat to shoot his companion, was admissible to show that defendant's later acts evinced a depraved mind under 940.23. Hammen v. State, 87 W (2d) 791, 275 NW (2d) 709 (1979).

Evidence of defendant's prior fighting was admissible to refute defendant's claim of misidentification and to impeach defense witness. State v. Stawicki, 93 W (2d) 63, 286 NW (2d) 612 (Ct. App. 1979).

Defendant's 2 prior convictions for burglary were admissible to prove intent to use gloves, long pocket knife, crowbar, and pillow case as burglarious tools. Vanlue v. State, 96 W (2d) 81, 291 NW (2d) 467 (1980).

Criminal acts of defendant's co-conspirators were admissible to prove plan and motive. Haskins v. State, 97 W (2d) 408, 294 NW (2d) 25 (1980).

Evidence of other crimes was admissible to show plan and identity. State v. Thomas, 98 W (2d) 166, 295 NW (2d) 784 (Ct. App. 1980).

Evidence of similar killing, committed 12 hours after shooting in issue, was relevant to show that both slayings sprang from like mental conditions and to show plan or scheme. Barrera v. State, 99 W (2d) 269, 298 NW (2d) 820 (1980).

See note to 971.12, citing State v. Bettinger, 100 W (2d) 691, 303 NW (2d) 585 (1981).

See note to 971.12, citing State v. Hall, 103 W (2d) 125, 307 NW (2d) 289 (1981).

See note to 904.02, citing State v. Alsteen, 108 W (2d) 723, 324 NW (2d) 426 (1982).

"Other crimes" evidence was admissible to complete story of crime on trial by proving its immediate context of happenings near in time and place. State v. Pharr, 115 W (2d) 334, 340 NW (2d) 498 (1983).

"Other crimes" evidence was admissible to rebut defendant's claim that his presence in backyard of burglarized home was coincidental and innocent. State v. Rutchik, 116 W (2d) 61, 341 NW (2d) 639 (1984).

Where accused claimed shooting was in self-defense, court abused discretion by excluding opinion evidence as to victim's reputation for violence. State v. Boykins, 119 W (2d) 272, 350 NW (2d) 710 (Ct. App. 1984).

Under "greater latitude of proof" principle applicable to other-acts evidence in sex crimes, particularly incest or indecent liberties with children, sex acts committed against complainant and another young girl 4 and 6 years prior to charged assault were admissible under (2) to show "plan" or "motive". State v. Friedrich, 135 W (2d) 1, 398 NW (2d) 763 (1987).

Admission under (2) of prowling ordinance violation by defendant accused of second-degree sexual assault and robbery was harmless error. State v. Grant, 139 W (2d) 45, 406 NW (2d) 744 (1987).

Admission of prior crimes evidence discussed. State v. Evers, 139 W (2d) 424, 407 NW (2d) 256 (1987).

904.05 Methods of proving character. (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a 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 his conduct.

History: Sup. Ct. Order, 59 W (2d) R80.

When defendant's character evidence is by expert opinion and prosecution's attack on basis of opinion is answered evasively or equivocally, then trial court may allow prosecution to present evidence of specific incidents of conduct. King v. State, 75 W (2d) 26, 248 NW (2d) 458.

Self-defense—prior acts of the victim. 1974 WLR 266.

904.06 Habit; routine practice. (1) ADMISSIBILITY. Except as provided in s. 972.11 (2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

History: Sup. Ct. Order, 59 W (2d) R83; 1975 c. 184

Although specific instance of conduct occurs only once, evidence may be admissible under (2). French v. Sorano, 74 W (2d) 460, 247 NW (2d) 182.

904.07 Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11.

History: Sup. Ct. Order, 59 W (2d) R87.

Subsequent remedial measures by mass producer of defective product was admitted into evidence under this section even though feasibility of precautionary measures was not controverted. Chart v. Gen. Motors Corp. 80 W (2d) 91, 258 NW (2d) 681.

Evidence of remedial change was inadmissible where defendant did not challenge feasibility of change. Krueger v. Tappan Co. 104 W (2d) 199, 311 NW (2d) 219 (Ct. App. 1981).

Evidence of post-event remedial measures may be introduced under both negligence and strict liability theories. See note to 904.01, citing D. L. v. Huebner, 110 W (2d) 581, 329 NW (2d) 890 (1983).

904.08 Compromise and offers to compromise. (1) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This subsection does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

(2) With respect to an action arising out of mediation under s. 767.11, this section applies to compromises, offers to compromise and compromise negotiations which occur during that mediation.

History: Sup. Ct. Order, 59 W (2d) R90; 1987 a. 355.

While this section does not exclude evidence of compromise settlements to prove bias or prejudice of witnesses, it does exclude evidence of details such as the amount of settlement. Johnson v. Heintz, 73 W (2d) 286, 243 NW (2d) 815.

Plaintiff's letter suggesting compromise between codefendants was not admissible to prove liability of defendant. Production Credit Asso. v. Rosner, 78 W (2d) 543, 255 NW (2d) 79.

Where letter from bank to defendant was unconditional demand for possession of collateral and payment under lease and was prepared without prior negotiations, compromise or agreement, letter was not barred by this section. Heritage Bank v. Packerland Packing Co. 82 W (2d) 225, 262 NW (2d) 109.

904.09 Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

History: Sup. Ct. Order, 59 W (2d) R93.

904.10 Offer to plead guilty; no contest; withdrawn plea of guilty. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for his conduct. Evidence of statements made in court or to the prosecuting attorney in

connection with any of the foregoing pleas or offers is not admissible.

History: Sup. Ct. Order, 59 W (2d) R94.

Where accused entered plea agreement and subsequently testified at trials of other defendants, and where accused later withdrew guilty plea and was tried, prior trial testimony was properly admitted for impeachment purposes. State v. Nash, 123 W (2d) 154, 366 NW (2d) 146 (Ct. App. 1985).

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

904.11 Liability insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

History: Sup. Ct. Order, 59 W (2d) R97.

904.12 Statement of injured; admissibility; copies. (1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition as described in s. 908.03 (1), (2) or (3).

(2) Every person who takes a written statement from any injured person or person sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or his personal representative, furnish the person who made such statement or his personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or his personal representatives, to furnish such true, correct and complete copy thereof as herein required.

(3) This section does not apply to any statement taken by any officer having the power to make arrests.

History: Sup. Ct. Order, 59 W (2d) R99.

904.13 Information concerning crime victims. (1) In this section:

(a) "Crime" has the meaning described in s. 950.02 (1m).

(b) "Family member" has the meaning described in s. 950.02 (3).

(c) "Victim" has the meaning described in s. 950.02 (4).

(2) In any action or proceeding under ch. 48 or chs. 967 to 979, evidence of the address of an alleged crime victim or any family member of an alleged crime victim or evidence of the name and address of any place of employment of an alleged crime victim or any family member of an alleged crime victim is relevant only if it meets the criteria under s. 904.01. District attorneys shall make appropriate objections if they believe that evidence of this information, which is being elicited by any party, is not relevant in the action or proceeding.

History: 1985 a. 132.