CHAPTER 904

EVIDENCE — RELEVANCY AND ITS LIMITS

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.

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 Wis. 2d R1, R66 (1973).

Evidence of a defendant's expenditure of money shortly after a burglary was properly admitted. State v. Heidelbach, 49 Wis. 2d 350, 182 N.W.2d 497 (1971).

Discussing the difference between relevancy and materiality. If counsel fails to state the purpose of a question objected to on grounds of immateriality, the court may exclude the evidence. State v. Becker, 51 Wis. 2d 659, 188 N.W.2d 449 (1971).

The 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 the defendant. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).

The most important factor in determining the admissibility of evidence of conduct prior to an accident is the degree of probability that the conduct continued until the accident occurred. Evidence of the defendant's reckless driving 12 miles from the accident scene was irrelevant. Hart v. State, 75 Wis. 2d 371, 249 N.W.2d 810 (1977).

Evidence of crop production in other years was admissible to prove damages for injury to a crop. Cutler Cranberry Co. v. Oakdale Electric Cooperative, 78 Wis. 2d 222, 254 N.W.2d 234 (1977).

A complaining witness's failure to appear to testify on two prior trial dates was not relevant to the credibility of the witness. Rogers v. State, 93 Wis. 2d 682, 287 N.W.2d 774 (1980).

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

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

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

Human leukocyte antigen and red blood cell test results showing the probability of exclusion and the paternity index are generally admissible in a criminal sexual assault action in which the assault allegedly resulted in the birth of a child, but the probability of paternity is not generally admissible. State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988).

Third-party testimony corroborating the victim's testimony against one defendant was relevant as to a second defendant charged with different acts when the testimony tended to lend credibility to the victim's testimony against the second defendant. State v. Patricia A.M., 176 Wis. 2d 542, 500 N.W.2d 289 (1993).

Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant. State v. Tabor, 191 Wis. 2d 482, 529 N.W.2d 915 (Ct. App. 1995).

Evidence of why a defendant did not testify has no bearing on guilt or innocence, is not relevant, and is inadmissible. State v. Heuer, 212 Wis. 2d 58, 567 N.W.2d 638 (Ct. App. 1997), 96-3594.

A psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child was relevant. State v. Richard A.P., 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998), 97-2737. See also State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913, 00-2916.

A negative gunshot residue test cannot conclusively prove that a person was not the shooter of a gun, but it is relevant as it has a tendency to make it less probable. State v. DelReal, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App. 1999), 97-1480.

There is neither a blanket restriction of *Richard A.P.*, 223 Wis. 2d 777 (1998), evidence nor is it compelled. Courts must scrutinize the evidence on a case-by-case basis to assess admissibility. State v. Walters, 2004 WI 18, 269 Wis. 2d 142, 675 N.W.2d 778, 01-1916.

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 Wis. 2d R1, R70 (1973).

A defendant does not have a constitutional right to present irrelevant evidence. State v. Robinson, 146 Wis. 2d 315, 431 N.W.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 Wis. 2d R1, R73 (1973).

It was within the discretion of the trial court under this section to admit the victim's bloodstained nightgown and to allow it to be sent to the jury room when: 1) the nightgown clearly was of probative value, since available photographs failed to show the underside of the garment; 2) the article was not of a nature that would shock the sensibilities of the jury and inflame it to the prejudice of defendant; and 3) no objection was made to sending the item to the jury room. Jones v. State, 70 Wis. 2d 41, 233 N.W.2d 430 (1975).

Evidence of alcoholic degenerative impairment of the plaintiff's judgment had limited probative value, far outweighed by possible prejudice. Walsh v. Wild Masonry Co., 72 Wis. 2d 447, 241 N.W.2d 416 (1976).

The trial court did not abuse its 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 Wis. 2d 253, 249 N.W.2d 555 (1977).

When evidence was introduced for the purpose of identification, the probative value of conduct during a prior rape case exceeded the prejudicial effect. Sanford v. State, 76 Wis. 2d 72, 250 N.W.2d 348 (1977).

When the defendant was charged with attempted murder of police officers in pursuit of the defendant following an armed robbery, the probative value of evidence concerning the armed robbery and showing motive for the murder attempt was not substantially outweighed by the danger of unfair prejudice. Holmes v. State, 76 Wis. 2d 259, 251 N.W.2d 56 (1977).

If evidence of other conduct is not offered for a valid purpose under sub. (2), the balancing test under this section is inapplicable. State v. Spraggin, 77 Wis. 2d 89, 252 N.W.2d 94 (1977).

In a prosecution for possession of amphetamines, it was an abuse of discretion to admit and send to the jury room a syringe and hypodermic needles that had only slight relevance to the charge. Schmidt v. State, 77 Wis. 2d 370, 253 N.W.2d 204 (1977).

The right of confrontation is limited by this section if the probative value of the desired cross-examination is outweighed by the possibility of unfair or undue prejudice. Chapin v. State, 78 Wis. 2d 346, 254 N.W.2d 286 (1977).

The trial court abused its discretion by excluding an official blood alcohol chart offered in evidence by an accused driver. State v. Hinz, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984).

When evidence of a sexual assault was the only evidence of an element of a charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

A defendant's intoxication, for purposes of motor vehicle statutes, did not per se demonstrate that the defendant's statements were untrustworthy. State v. Beaver, 181 Wis. 2d 959, 512 N.W.2d 254 (Ct. App. 1994).

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, 549 N.W.2d 418 (1996), 94-1213.

While prior convictions are an element of drunk driving, s. 346.63 (1) (b), admitting evidence of that element may not be proper. Admitting any evidence of prior convictions and submitting the element of the defendant's status as a prior offender

to the jury when the defendant admitted to the element was an erroneous exercise of discretion. State v. Alexander, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), 96-1973.

The state, like the court, operates with the priority of searching for truth and justice. Our system depends upon all witnesses being forthright and truthful and taking seriously the oath to tell the truth when testifying in a legal proceeding. Evidence that challenges the credibility of a state's witness promotes that goal and cannot be summarily dismissed as overly prejudicial. When the jury hears all of the witnesses who can provide relevant information on the issues, it can make a fair assessment as to who is being truthful. 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, 291 Wis. 2d 466, 714 N.W.2d 595, 05-1486.

While surprise is not included in this section as a basis on which to exclude otherwise relevant evidence, testimony that results in surprise may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues. Roy v. St. Lukes Medical Center, 2007 WI App 218, 305 Wis. 2d 658, 741 N.W.2d 256, 06-0480.

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, 306 Wis. 2d 403, 743 N.W.2d 152, 06-2436.

Alexander, 214 Wis. 2d 628 (1997), is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. State v. Warbelton, 2009 WI 6, 315 Wis. 2d 253, 759 N.W.2d 557, 07-0105.

It is well established that evidence of flight has probative value as to guilt. Flight evidence is not inadmissible other acts evidence and is not inadmissible anytime a defendant points to an unrelated crime in rebuttal. Rather, when a defendant points to an unrelated crime to explain flight, the trial court must determine whether to admit the evidence by weighing the risk of unfair prejudice with its probative value. State v. Quiroz, 2009 WI App 120, 320 Wis. 2d 706, 772 N.W.2d 710, 08-1473.

The general rule is that the prosecution is entitled to prove its case by evidence of its own choice and that a criminal defendant may not stipulate or admit the defendant's way out of the full evidentiary force of the case as the government chooses to present it. State v. Conner, 2009 WI App 143, 321 Wis. 2d 449, 775 N.W.2d 105, 08-1296.

There was no blanket rule barring or limiting the admission of the type of evidence that linked the cartridge case and bullet to the gun in this case. The admission and scope of such evidence is left to the reasonable discretion of the trial courts to exercise under this section and s. 906.11 and to cross-examination by adversary counsel. State v. Jones, 2010 WI App 133, 329 Wis. 2d 498, 791 N.W.2d 390, 09-2835.

The circuit court did not err in excluding DNA evidence when questions regarding the timeframe, source of, and contributors to the DNA and the high potential for contamination of the sample source all gave the circuit court reasonable grounds to conclude that the DNA had low probative value and that the limited probative value of the unidentified DNA evidence was substantially outweighed by the dangers of confusion of the issues, misleading the jury, and waste of time pursuant to this section. State v. Gutierrez, 2020 WI 52, 391 Wis. 2d 799, 943 N.W.2d 870, 17-2364.

It is proper to exclude evidence offered under *McMorris*, 58 Wis. 2d 144 (1973), when it is too remote, or if the application of the balancing test under this section shows the evidence should be excluded. Excluding *McMorris* evidence that is irrelevant does not violate a defendant's right to present a defense. State v. Ochoa, 2022 WI App 35, 404 Wis. 2d 261, 978 N.W.2d 501, 20-1981.

The 6th amendment confrontation clause is not satisfied merely because the evidence offered by a defendant might be properly excluded under this section. The confrontation clause limits a trial court's ordinary discretion to limit cross-examination and demands careful scrutiny of the purported reason for limiting cross-examination. A trial court violates the confrontation clause when the court applies ordinary balancing under this section to limit cross-examination by a defendant on issues central to the defense without giving any special consideration to the defendant's constitutional right to confront witnesses against him. Rhodes v. Dittmann, 903 F.3d 646 (2018).

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 the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of the accused's 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. (a) *General admissibility.* Except as provided in par. (b) 2., 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.

(b) *Greater latitude.* 1. In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

History: Sup. Ct. Order, 59 Wis. 2d R1, R75 (1973); 1975 c. 184; 1991 a. 32; 2005 a. 310; 2013 a. 362 ss. 20 to 22, 38.

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 Wis. 2d 144, 205 N.W.2d 559 (1973).

Evidence of delinquency in making withholding tax payments by three other corporations of which the accused had been president was admissible to show willfulness of the accused in failing to make such payments as president of a fourth corporation. State v. Johnson, 74 Wis. 2d 26, 245 N.W.2d 687 (1976).

If a prosecution witness is charged with crimes, the defendant can offer evidence of those crimes and otherwise explore on cross-examination the subjective motives for the witness's testimony. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976).

When a defendant claims accident in shooting the deceased, the prosecution may present evidence of prior violent acts to prove intent and absence of accident. King v. State, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

The trial court did not err in refusing to grant a mistrial when police reports concerning an unrelated pending charge against the defendant and the defendant's mental history were accidentally sent to the jury room. Johnson v. State, 75 Wis. 2d 344, 249 N.W.2d 593 (1977).

Evidence of the defendant's prior sales of other drugs was admitted under sub. (2) as probative of the intent to deliver cocaine. Peasley v. State, 83 Wis. 2d 224, 265 N.W.2d 506 (1978).

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

The defendant's two prior convictions for burglary were admissible to prove intent to use gloves, a long pocket knife, a crowbar, and a pillowcase as burglarious tools. Vanlue v. State, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

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

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

Evidence of a similar killing committed 12 hours after the 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 Wis. 2d 269, 298 N.W.2d 820 (1980).

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

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

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

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

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

The admission under sub. (2) of a prowling ordinance violation by the defendant accused of second-degree sexual assault and robbery was harmless error. State v. Grant, 139 Wis. 2d 45, 406 N.W.2d 744 (1987).

Evidence of the defendant's use of an alias was relevant to show the defendant's

intent to cover up participation in a sexual assault. State v. Bergeron, 162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991).

When evidence of a sexual assault was the only evidence of an element of the charged kidnapping offense, withholding the evidence on the basis of unfair prejudice unfairly precluded the state from obtaining a conviction for the charged offense. State v. Grande, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992).

In addition to the sub. (2) exceptions, a valid basis for the admission of other crimes evidence is to furnish the context of the crime if necessary to the full presentation of the case. State v. Chambers, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992).

There is no presumption of admissibility or exclusion for other crimes evidence. State v. Speer, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993).

Evidence of other crimes may be offered in regard to the question of intent despite a defendant's assertion that the charged act never occurred. State v. Clark, 179 Wis. 2d 484, 507 N.W.2d 172 (Ct. App. 1993).

Other-acts evidence is relevant if a jury could find by a preponderance of the evidence that the defendant committed the other act. An acquittal does not prevent offering evidence of a prior crime for purposes authorized under this section. State v. Landrum, 191 Wis. 2d 107, 528 N.W.2d 36 (Ct. App. 1995).

Other-acts evidence in a child sexual assault case was admissible when the type of contact was different and the victims were of a different gender, because the prior act was probative of the defendant's desire for sexual gratification from children. State v. Tabor, 191 Wis. 2d 482, 529 N.W.2d 915 (Ct. App. 1995).

To be admissible for purposes of identity, "other-acts evidence" must have a similarity to the present offense so that it can be said that the acts constitute the imprint of the defendant. State v. Rushing, 197 Wis. 2d 631, 541 N.W.2d 155 (Ct. App. 1995), 95-0663.

Verbal statements may be admissible as other-acts evidence even when not acted upon. State v. Jeske, 197 Wis. 2d 905, 541 N.W.2d 225 (Ct. App. 1995), 95-0388.

There is not a per se rule that enables the state to always submit other-acts evidence on motive and intent. The evidence is subject to general strictures against use when the defendant's concession on the element for which it is offered provides a more direct source of proof. State v. Wallerman, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), 95-1950.

Evidence of a defendant's probation or parole status and conditions is admissible if the evidence demonstrates motive for or otherwise explains the defendant's criminal conduct. The status itself must provide the motive for the action. An action in direct violation of a condition may not be admitted to demonstrate an irresistible impulse to commit the particular crime. State v. Kourtidias, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996), 95-1073.

A three-step analysis is applied to determine the admissibility of other-acts evidence. The proponent of the evidence bears the burden of persuading the court that the three-step inquiry is satisfied. The proponent and opponent of the evidence must clearly articulate their reasons for seeking admission or exclusion and apply the facts to the analytical framework. State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), 96-2244.

Other-acts evidence is admissible: 1) if it is offered for a permissible purpose pursuant to sub. (2) (a); 2) if it is relevant under the two relevancy requirements of s. 904.01; and 3) if its probative value is not substantially outweighed by the risk or danger of unfair prejudice under s. 904.03. State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), 96-2244.

Other-acts evidence may be admitted for purposes other than those enumerated in sub. (2). Evidence of a history of assaultive behavior was properly admitted in relation to entitlement to punitive damages that rested on proof of either the defendant's intentional disregard of the plaintiff's rights or maliciousness. Smith v. Golde, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1999), 97-3404.

When a defendant seeks to introduce other-acts evidence of a crime committed by an unknown third person, a court should engage in the *Sullivan*, 216 Wis. 2d 768 (1998), three-step analysis. State v. Scheidell, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), 97-1426.

The exception to the general rule barring other-acts evidence is expanded in sexual assault cases, particularly those involving children. However the evidence must still meet the requirements of the three-step analytical framework articulated in *Sullivan*, 216 Wis. 2d 768 (1998). State v. Davidson, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, 98-0130. See also State v. Marinez, 2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399, 09-0567.

A "plan" in sub. (2) means a design or scheme to accomplish some particular purpose. Evidence showing a plan establishes a definite prior design that includes the doing of the acts charged. Similarity of facts is not enough to admit other-acts evidence. State v. Cofield, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214, 99-1387.

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.

For other-acts evidence to be admissible it must relate to a fact or proposition that is of consequence and have probative value. The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. In a sexual assault case, the age of the victim is an important condition in determining similarity. State v. Meehan, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722, 97-3807.

When other-acts evidence was erroneously allowed, additional testimony about that act was not harmless error. State v. Meehan, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722, 97-3807.

A trial court ruling that other-acts evidence is admissible does not force a defendant to enter into a *Wallerman*, 203 Wis. 2d 158 (1996), stipulation. By entering into a *Wallerman* stipulation to prevent the admission of the other-acts evidence a defendant waives the right to appeal the other acts ruling. Generally there can be no prejudicial error from a ruling that evidence is admissible if the evidence is not actually admitted. State v. Frank, 2002 WI App 31, 250 Wis. 2d 95, 640 N.W.2d 198, 01-1252.

A defendant may, subject to the court's discretion, introduce expert testimony to show that the defendant lacks the character traits of a sexual offender and is unlikely to have committed the assault in question. If the expert will testify, either explicitly or implicitly, on facts surrounding the crime charged, the court may compel the defendant to undergo a compulsory examination conducted by an expert selected by the state. State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913, 00-2916.

The state and the court are not required to agree to *Wallerman*, 203 Wis. 2d 158 (1996), stipulations. A *Wallerman* stipulation in a child sexual assault case is directly contrary to the greater latitude rule for the admission of other-acts evidence in child sexual assault cases. The state must prove all elements of a crime, even elements the defendant does not dispute. Accordingly, evidence relevant to undisputed elements is admissible. State v. Veach, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, 98-2387.

Sub. (2) will not be interpreted to admit all past conduct involving an element of the present crime. State v. Barreau, 2002 WI App 198, 257 Wis. 2d 203, 651 N.W.2d 12, 01-1828.

A circuit court does not commit reversible error if it fails to provide a detailed *Sullivan*, 216 Wis. 2d 768 (1998), analysis for admitting other-acts evidence. An appellate court is required to perform an independent review of the record for permissible bases for admitting other-acts evidence if the circuit court fails to adequately provide the *Sullivan* analysis, or alternatively states an impermissible basis for the admission of such evidence. State v. Hunt, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, 01-0272.

Inability of a victim to identify the defendant as the perpetrator of a similar uncharged crime takes the jury into the realm of conjecture or speculation and is not admissible as other-acts evidence of a crime committed by an unknown third person under *Scheidell*, 227 Wis. 2d 285 (1999). When there is a series of similar crimes, the fact that the state is unable to prove that the defendant committed all of the crimes does not tend to establish that the defendant did not commit any of the crimes. State v. Wright, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386, 03-0238.

Alsteen, 108 Wis. 2d 723 (1982), does not stand for the proposition that other-acts evidence can never be probative of the issue of consent or that the other-acts evidence is not probative of the issue of the victim's credibility. When other-acts evidence of non-consent relates not only to sexual contact but also to a defendant's modus operandi encompassing conduct inextricably connected to strikingly similar alleged criminal conduct, the evidence of non-consent may be admissible to establish motive, intent, preparation, plan, and absence of mistake or accident. State v. Ziebart, 2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369, 03-0795.

During a commitment proceeding under ch. 980, sub. (2) does not apply to evidence offered to prove that the respondent has a mental disorder that makes it substantially probable that the respondent will commit acts of sexual violence in the future. State v. Franklin, 2004 WI 38, 270 Wis. 2d 271, 677 N.W.2d 276, 00-2426.

It is well established that evidence of flight has probative value as to guilt. Flight evidence is not inadmissible other acts evidence and is not inadmissible anytime a defendant points to an unrelated crime in rebuttal. Rather, when a defendant points to an unrelated crime to explain flight, the trial court must determine whether to admit the evidence by weighing the risk of unfair prejudice with its probative value. State v. Quiroz, 2009 WI App 120, 320 Wis. 2d 706, 772 N.W.2d 710, 08-1473.

Sub. (2) does not apply in ch. 980 commitment proceedings. The *Franklin*, 2004 WI 38, court discerned an unambiguous legislative intent to restrict the application of sub. (2) to analyzing evidence used to prove past acts. The substantial probability of future conduct is the relevant question in ch. 980 proceedings. The nature of ch. 980 hearings demands the jury consider evidence that would normally be barred in a traditional criminal trial. Although *Franklin* did not discuss the due process implications of its decision, the inapplicability of sub. (2) is consistent with the demands of due process under both the U.S. and Wisconsin Constitutions. State v. Kaminski, 2009 WI App 175, 322 Wis. 2d 653, 777 N.W.2d 654, 08-2439.

When determining relevance of other acts evidence the trial court is to consider: 1) whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action; and 2) whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. This is a common sense determination based less on legal precedent than life experiences. Dalka v. Wisconsin Central, Ltd., 2012 WI App 22, 339 Wis. 2d 361, 811 N.W.2d 834, 11-0398.

Proffered evidence of other acts of a third party must do more than simply afford a possible ground of suspicion against another person; it must connect that person to the crime—either directly or inferentially. The identity exception to other-acts evidence under sub. (2) requires that similarities exist between the other act and the offense for which the defendant is being tried. The threshold measure for similarity in the admission of other-acts evidence with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. State v. Vollbrecht, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443, 11-0425.

While the defendant put the defendant's character and credibility at issue by testifying and thus invited rebuttal testimony from the state, testimony that the defendant always stuttered when he lied went too far. The witness presented herself as a human lie detector. The jury is the lie detector in the courtroom. No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth. State v. Echols, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768, 12-0422.

The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. Similarity is demonstrated by showing the nearness of time, place, and circumstance between the other act and the charged crime. It is within a circuit court's discretion to determine whether other-acts evidence is too remote. However, events that are dissimilar or that do not occur near in time may still be relevant to one another. There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis. State v. Hurley, 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174, 13-0558.

For the types of cases enumerated under sub. (2) (b) 1., circuit courts should admit evidence of other acts with greater latitude under a *Sullivan*, 216 Wis. 2d 768

(1998), analysis to facilitate its use for a permissible purpose. State v. Dorsey, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158, 15-0648.

Sub. (2) (b) 2. is constitutional. The test for whether admitting other acts evidence to prove conduct violates due process is whether the introduction of the evidence is so extremely unfair that its admission violates fundamental concepts of justice. Given Wisconsin's history of greater latitude in admitting other acts evidence in sexual assault cases, and the restrictions imposed by sub. (2) (b) 2., admitting other acts evidence under this section does not violate fundamental concepts of justice. State v. Gee, 2019 WI App 31, 388 Wis. 2d 68, 931 N.W.2d 287, 18-1069.

In this case, the other acts evidence of sexual assault was offered for the admissible purpose of proving that the defendant's motive was to intentionally touch the victim for the purpose of sexual arousal or gratification. Context and background, while not expressly listed in sub. (2) (a), can also be acceptable purposes. State v. Gutierrez, 2020 WI 52, 391 Wis. 2d 799, 943 N.W.2d 870, 17-2364.

Outside of certain constitutional commands, a circuit court's day-to-day decisions applying the rules of evidence will only rarely contain a constitutional dimension. Evidentiary questions of the type raised in this case—whether evidence is relevant or prejudicial under an other-acts inquiry—are therefore almost always properly reviewed for an erroneous exercise of discretion. State v. Johnson, 2021 WI 61, 397 Wis. 2d 633, 961 N.W.2d 18, 18-2318.

Whether evidence about the defendant's "sex drive" was considered to be character evidence generally or evidence of other crimes, wrongs, or acts, the prosecutor should not have been allowed to present evidence that the defendant was a sexual person. The "sex drive" evidence was not relevant for any permissible purpose. The only conceivable purpose of introducing it was to ask the jury to make a strained inference that, because the defendant was allegedly a very sexual person who sought sex from his girlfriend on a daily basis, the defendant was the type of person who would sexually assault a child. This is the propensity inference that is forbidden by subs. (1) and (2) alike. State v. Stroik, 2022 WI App 11, 401 Wis. 2d 150, 972 N.W.2d 640, 21-0447.

It is proper to exclude evidence offered under *McMorris*, 58 Wis. 2d 144 (1973), when it is too remote, or if the application of the s. 904.03 balancing test shows the evidence should be excluded. Excluding *McMorris* evidence that is irrelevant does not violate a defendant's right to present a defense. State v. Ochoa, 2022 WI App 35, 404 Wis. 2d 261, 978 N.W.2d 501, 20-1981.

Pictures depicting violence were offered to prove the defendant's fascination with death and mutilation, and that trait is undeniably probative of motive, intent, or plan to commit a vicious murder. Dressler v. McCaughtry, 238 F.3d 908 (2001).

Help Me Doc! Theories of Admissibility of Other Act Evidence in Medical Malpractice Cases. Gardner. 87 MLR 981 (2004).

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 the person's conduct.

History: Sup. Ct. Order, 59 Wis. 2d R1, R80 (1973); 1991 a. 32.

A detective's opinion of a drug addict's reputation for truth and veracity did not qualify to prove reputation in the community because it was based on 12 varying opinions of persons who knew the addict, from which a community reputation could not be ascertained. Edwards v. State, 49 Wis. 2d 105, 181 N.W.2d 383 (1970).

When a defendant's character evidence is by expert opinion and the prosecution's attack on the basis of the opinion is answered evasively or equivocally, then the trial court may allow the prosecution to present evidence of specific incidents of conduct. King v. State, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

In order for specific acts of violence to be admissible, character or a trait of character of a person must be an essential element of a charge, claim, or defense. In a homicide case in which a claim of self-defense is raised, character evidence may be admissible as evidence of a defendant's state of mind so long as the defendant had knowledge of the prior acts at the time of the offense. State v. Jackson, 2014 WI 4, 352 Wis. 2d 249, 841 N.W.2d 791, 11-2698.

Evidence—Self-Defense—Prior Acts of the Victim. Paulson. 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 Wis. 2d R1, R83 (1973); 1975 c. 184.

Although a specific instance of conduct occurs only once, the evidence may be admissible under sub. (2). French v. Sorano, 74 Wis. 2d 460, 247 N.W.2d 182 (1976).

Discussing use of specific instances evidence. State v. Evans, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994).

Habit evidence must be distinguished from character evidence. Character is a generalized description of a person's disposition or of the disposition in respect to a general trait. Habit is more specific denoting one's regular response to a repeated situation. However, habit need not be "semi-automatic" or "virtually unconscious." Steinberg v. Arcilla, 194 Wis. 2d 759, 535 N.W.2d 444 (Ct. App. 1995).

The greater latitude given under *Davidson*, 2000 WI 91, for allowing other acts evidence in child sexual assault cases because of the difficulty sexually abused children experience in testifying and the difficulty prosecutors have in obtaining admissible evidence in such cases was properly applied when the victim, although an adult, functioned at the level of an 18-month-old, having an inability to recount what happened. This greater latitude is not restricted to allowing evidence of prior sexual assaults and was properly applied to allow evidence of pornography viewed by the defendant that helped to demonstrate motive. State v. Normington, 2008 WI App 8, 306 Wis. 2d 727, 744 N.W.2d 867, 07-0382.

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 Wis. 2d R1, R87 (1973).

Evidence of subsequent remedial measures by the mass producer of a defective product is admissible in a products liability case if the underlying policy of this section not to discourage corrective steps is not applicable. Chart v. General Motors Corp., 80 Wis. 2d 91, 258 N.W.2d 680 (1977).

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

Although this section precludes admission of evidence of measures taken after an event if the evidence is used to prove negligence or culpable conduct, evidence of post-event remedial measures may be introduced in a case in which there are allegations of both negligence and strict liability. When a plaintiff asserts both strict liability and negligence and the evidence is not admissible under this section on the negligence theory but is admissible to prove strict liability, the defendant can request that the circuit court give an instruction limiting the evidence to the allegations of strict liability. D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

Evidence of subsequent remedial measures can be admitted under the impeachment exception when the evidence is presented to impeach specific witness testimony. Vanderventer v. Hyundai Motor America, 2022 WI App 56, 405 Wis. 2d 481, 983 N.W.2d 1, 20-1052.

904.08 Compromise and offers to compromise. 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 section 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.

History: Sup. Ct. Order, 59 Wis. 2d R1, R90 (1973); 1987 a. 355; Sup. Ct. Order No. 93-03, 179 Wis. 2d xv (1993); 1993 a. 490.

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 the settlement. Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

The plaintiff's letter suggesting a compromise between codefendants was not admissible to prove the liability of a defendant. Production Credit Ass'n of Green Bay v. Rosner, 78 Wis. 2d 543, 255 N.W.2d 79 (1977).

When a letter from a bank to the defendant was an unconditional demand for possession of collateral and payment under a lease and was prepared without prior negotiations, compromise, or agreement, the letter was not barred by this section. Heritage Bank of Milwaukee v. Packerland Packing Co., 82 Wis. 2d 225, 262 N.W.2d 109 (1978).

Bias or prejudice of a witness can be a permissible basis to admit settlement-related evidence. This can be satisfied by showing that a witness changed the witness's testimony or that the posture of a settling party is significantly different as a result of the settlement. In this case, the circuit court did not erroneously exercise its discretion when it determined that witness bias was a significant risk in light of the dramatically altered posture of the case following settlement with two central tortfeasors, and the court admitted the fact of settlement into evidence and supported that limited admission with a cautionary and clarifying instruction to the jury. Allsop Venture Partners III v. Murphy Desmond SC, 2023 WI 43, 407 Wis. 2d 387, 991 N.W.2d 320, 20-0806.

904.085 Communications in mediation. (1) PURPOSE. The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled.

(2) DEFINITIONS. In this section:

(a) "Mediation" means mediation under s. 93.50 (3), conciliation under s. 111.54, mediation under s. 111.11, 111.70 (4) (cg) or (cm) 3. or 111.87, mediation under s. 115.797, negotiation under s. 289.33 (9), mediation under ch. 655 or s. 767.405, or any similar statutory, contractual or court-referred process facilitating the voluntary resolution of disputes. "Mediation" does not include binding arbitration or appraisal.

(b) "Mediator" means the neutral facilitator in mediation, its agents and employees.

(c) "Party" means a participant in mediation, personally or by an attorney, guardian, guardian ad litem or other representative, regardless of whether such person is a party to an action or proceeding whose resolution is attempted through mediation.

(3) INADMISSIBILITY. (a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.

(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.

(4) EXCEPTIONS. (a) Subsection (3) does not apply to any written agreement, stipulation or settlement made between 2 or more parties during or pursuant to mediation.

(b) Subsection (3) does not apply if the parties stipulate that the mediator may investigate the parties under s. 767.405 (14) (c).

(c) Subsection (3) (a) does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation.

(d) A mediator reporting child or unborn child abuse under s. 48.981, reporting a threat of violence in or targeted at a school under s. 175.32, or reporting nonidentifying information for statistical, research, or educational purposes does not violate this section.

(e) In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.

History: Sup. Ct. Order No. 93-03, 179 Wis. 2d xv (1993); 1995 a. 227; 1997 a. 59, 164, 292; 2005 a. 443 s. 265; Sup. Ct. Order No. 09-12, 2010 WI 31, 323 Wis. 2d xvii; 2011 a. 32; 2017 a. 143.

Judicial Council Note, 1993: This section creates a rule of inadmissibility for communications presented in mediation. This rule can be waived by stipulation of the parties only in narrow circumstances [see sub. (4) (b)] because the possibility of being called as a witness impairs the mediator in the performance of the neutral facilitation role. The purpose of the rule is to encourage the parties to explore facilitated settlement of disputes without fear that their claims or defenses will be compromised if mediation fails and the dispute is later litigated.

The focus of sub. (3) (a) is on the courts and on judicial proceedings. It directs the courts not to admit certain communications into evidence and excludes those same communications from discovery. The statute is applied when the communications are sought to be introduced or discovered in court, not when they are originally made during mediation. Dyer v. Blackhawk Leather LLC, 2008 WI App 128, 313 Wis. 2d 803, 758 N.W.2d 167, 07-1400.

"Otherwise discovered" in sub. (4) (c) means discovered outside of mediation, not discovered outside the bounds of formal civil discovery. By its terms, sub. (4) (c) is intended to prevent a party from making pre-existing, unprivileged information privileged, simply by communicating in the course of a mediation. Dyer v. Blackhawk Leather LLC, 2008 WI App 128, 313 Wis. 2d 803, 758 N.W.2d 167, 07-1400.

Sounding the Depths of Wisconsin's Mediation Privilege. La Fave. Wis. Law. July/Aug. 2016.

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 Wis. 2d R1, R93 (1973).

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 the person's 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 Wis. 2d R1, R94 (1973); 1991 a. 32.

When an accused entered into a plea agreement and subsequently testified at the trials of other defendants, and when the accused later withdrew the guilty plea and was tried, prior trial testimony was properly admitted for impeachment purposes. State v. Nash, 123 Wis. 2d 154, 366 N.W.2d 146 (Ct. App. 1985).

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, 393 N.W.2d 102 (Ct. App. 1986).

A defendant's agreement to sign a written confession, after being told by the district attorney that the state would stand silent regarding sentencing if the defendant gave a truthful statement, was not the result of plea negotiations but negotiations for a confession, and therefore was not inadmissible under this section. State v. Nicholson, 187 Wis. 2d 688, 523 N.W.2d 573 (Ct. App. 1994).

This section does not apply to offers of compromise made to the police. State v. Pischke, 198 Wis. 2d 257, 542 N.W.2d 202 (Ct. App. 1995), 95-0183.

A no contest plea in a criminal case cannot be used collaterally as an admission in future civil litigation. Kustelski v. Taylor, 2003 WI App 194, 266 Wis. 2d 940, 669 N.W.2d 780, 02-2786.

Section 908.01 (4) (b) deals with admissions by a party as a general rule, but 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 therefor. This section trumps s. 908.01 (4) (b) because it excludes only this particular category of party admissions and therefore is more specialized than the latter statute. State v. Norwood, 2005 WI App 218, 287 Wis. 2d 679, 706 N.W.2d 683, 04-1073.

This section prohibits the use of incriminating testimony a defendant gave in order to keep the possibility of a plea bargain open. The state's assertion that this section does not apply when, as here, a prosecutor offers to allow the defendant to plead guilty, failed. Not only does this ignore the basic principle that a defendant can plead guilty with or without the prosecutor's consent, but it would require adding the words "to allow" to the statute. State v. Myrick, 2014 WI 55, 354 Wis. 2d 828, 848 N.W.2d 743, 12-2513.

904.11 Liability insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person 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 Wis. 2d R1, R97 (1973); 1991 a. 32.

This section excludes evidence of insurance to pay punitive damages. City of West Allis v. Wisconsin Electric Power Co., 2001 WI App 226, 248 Wis. 2d 10, 635 N.W.2d 873, 99-2944.

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 the person's personal representative, furnish the person who made such statement or the person's 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 the person's 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 Wis. 2d R1, R99 (1973); 1991 a. 32.

The rule on the admissibility of statements made or writings signed by an injured party within 72 hours of an accident under sub. (1) does not to apply to releases. The supreme court's interpretation of the predecessor statute to sub. (1) in *Buckland*, 160 Wis. 484 (1915), that the legislature did not intend the prohibition on such writings to apply to a release of claims is controlling. Hart v. Artisan & Truckers Casualty Co., 2017 WI App 45, 377 Wis. 2d 177, 900 N.W.2d 610, 16-1196.

Postaccident Statements by Injured Parties. La Fave. Wis. Law. Sept. 1997.

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. 938 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; 1995 a. 77.

904.14 Inadmissibility of statement by health care provider of apology or condolence. (1) In this section:

(a) "Health care provider" has the meaning given in s. 146.81 (1) and includes an ambulatory surgery center, an adult family home as defined in s. 50.01 (1), and a residential care apartment complex, as defined in s. 50.01 (6d), that is certified or registered by the department of health services.

(b) "Relative" has the meaning given in s. 106.50 (1m) (q).

(2) A statement, a gesture, or the conduct of a health care provider, or a health care provider's employee or agent, that satisfies all of the following is not admissible into evidence in any civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration regarding the health care provider as evidence of liability or as an admission against interest:

(a) The statement, gesture, or conduct is made or occurs before the commencement of the civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration.

(b) The statement, gesture, or conduct expresses apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or his or her relative or representative.

History: 2013 a. 242.

904.15 Communication in farmer assistance programs. (1) Except as provided under sub. (2), no oral or written communication made in the course of providing or receiving advice or counseling under s. 93.51 or in providing or receiving assistance under s. 93.41 or 93.52 is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.

(2) (a) Subsection (1) does not apply to information relating to possible criminal conduct.

(b) Subsection (1) does not apply if the person receiving advice or counseling under s. 93.51 or assistance under s. 93.41 or 93.52 consents to admission or discovery of the communication.

(c) A court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice.

History: 1997 a. 264.

904.16 Health care reports. (1) In this section:

(a) "Health care provider" has the meaning given in s. 146.38 (1) (b).

(b) "Regulatory agency" means the department of safety and professional services or the division within the department of health services that conducts quality assurance activities related to health care providers.

(2) Except as provided in sub. (3), the following may not be used as evidence in a civil or criminal action brought against a health care provider:

(a) Reports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency.

(b) Statements of, or records of interviews with, employees of a health care provider related to the regulation of the health care provider obtained by a regulatory agency.

(3) This section does not prohibit the use of the reports, statements, and records described in sub. (2) in any administrative proceeding conducted by a regulatory agency. This section does not apply to reports protected under s. 146.997.

History: 2011 a. 2; 2013 a. 166.