CHAPTER 901

EVIDENCE — GENERAL PROVISIONS

901.01 Scope.
901.02 Purpose and construction.
901.03 Rulings on evidence.
901.04 Preliminary questions.
901.05 Admissibility of certain test results.
901.06 Limited admissibility.
901.07 Remainder of or related writings or recorded statements.

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.

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 W (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 W (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 W (2d) R1, R9 (1973); 1991 a. 32.

Plain error rule discussed. Virgil v. State, 84 W (2d) 166, 267 NW (2d) 852 (1978).

In order for an error to be "plain error" it must be so fundamental that a new trial must be granted not to deny a defendant a basic constitutional right. State v. Vinson, 183 W (2d) 297, 515 NW (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. Diehl, 205 W (2d) 1, 555 NW (2d) 174 (Ct. App. 1996).

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 or 948.095, 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 W (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.

See note to art. I, sec. 8, citing State v. Ewald, 63 W (2d) 165, 216 NW (2d) 213.

Statements given police, without Miranda warnings, while defendant was injured and in bed, that he was the driver and had been drinking, while voluntary, were inadmissible, since at that time accusatorial attention had focused on him. Scales v. State, 64 W (2d) 485, 219 NW (2d) 286.

Discussion of totality of circumstances test as to a confession. Brown v. State, 64 W (2d) 581, 219 NW (2d) 373.

Stipulation to admissibility of polygraph examiner's opinion made before test does not foreclose challenge of manner of testing and sufficiency of data supporting opinion. State v. Mendoza, 80 W (2d) 122, 258 NW (2d) 260.

Court's refusal to permit defendant's experts to impeach polygraph examiner at admissibility hearing was reversible error. McLemore v. State, 87 W (2d) 739, 275 NW (2d) 692 (1979).

See note to 907.02, citing State v. Dalton, 98 W (2d) 725, 298 NW (2d) 398 (Ct. App. 1980).

Defendant had no confrontation clause rights as to hearsay at pretrial motion hearing; trial court could rely on hearsay in making its decision. State v. Frambs, 157 W (2d) 700, 460 NW (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 W (2d) 247, 481 NW (2d) 649 (Ct. App. 1992).

See note to 906.09, citing 63 Atty. Gen. 424.

In making preliminary factual determinations, courts may examine the very evidence, including hearsay statements, sought to be admitted. Bourjaily v. United States, 483 US 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 a test or tests for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV and the fact that a person has been ordered or required to submit to such a test or tests under s. 938.296 (4) or 968.38 (4) 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 admissi-

ble 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 968.38 (4) and the fact that a person has been ordered to submit to such a test or tests under s. 938.296 (4) or 968.38 (4) 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.

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 W (2d) R1, R21 (1973).

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

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 W (2d) R1, R22 (1973); 1991 a. 32.

The rule of completeness requires a statement, including otherwise inadmissible evidence, be admitted in its entirety when necessary to explain an admissible portion of the statement. The rule is not restricted to writings or recorded statements. State v. Sharp, 180 W (2d) 640, 511 NW (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 W (2d) 391, 579 NW (2d) 642 (1998).

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