CHAPTER 6
Evidence

I. Introduction

This chapter addresses evidentiary issues that arise during criminal cases involving sexual offense charges. This chapter is not intended to provide a comprehensive overview of criminal evidence issues.

For a more complete discussion of general evidentiary issues, see 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence (2018-19 ed.) and Tegland, 5A Washington Practice: Evidence Law and Practice (6th ed). The volume includes many Washington statutes concerns evidence (including Sexual Assault Protection Order (RCW Ch. 7.90) and Sex Offenses (RCW Ch. 9a.44), as well as the Evidence Rules and Author's Commentary. Citations to Tegland in this Chapter of the Sexual Violence Bench Guide refer to the Courtroom Handbook above.

II. Washington Rape Shield Law

As is discussed in Chapter 1 of this Bench Guide, sexual violence is dramatically underreported. A significant barrier to victims reporting is concern for their privacy.[1] This is particularly critical in the age of the Internet, where access to information about legal cases is readily available.

Rape shield protections play a critical role in the criminal justice system by protecting sexual assault victims' privacy and encouraging the reporting and prosecution of sexual assault cases.[2] The state legislature enacted the rape shield statute to encourage victims to report sexual assault and to ensure that the jury is not unduly influenced by a victim's irrelevant prior sexual history.[3] Before the legislature enacted this statute, defendants had routinely produced evidence of victims' prior sexual conduct to prove the false premise of a "logical nexus between chastity and veracity."[4]

A. Rape Shield Statute

Washington's rape shield law is codified as RCW 9A.44.020 and addresses the admissibility of evidence of a victim's past sexual behavior to challenge credibility or show consent. ER 412(a) essentially restates the rape shield law and includes useful case law

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[1] Nat'l Victim Ctr & Crime Victim Research & Treatment Ctr., *Rape in America: A Report to the Nation*, 5 (1992)

[2] *People v. Bryant*, 94 P.3d 624, 636 (Colo. 2004); Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. Rev. 271, 275 (1986)

3 *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006)

[4] *State v. Peterson*, 35 Wn. App. 481, 667 P.2d 645 (1983)

summaries within the Author's Commentary. The rule has been applied somewhat differently in civil and criminal cases.[5]

Evidence of a victim's past sexual behavior offered for any other purpose is not covered by the rape shield statute, but is still subject to the general relevancy requirements of ER 403.[6] Past sexual behavior includes, "but [is] not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards…."[7]

1. Evidence of victim's past sexual behavior inadmissible to challenge credibility

"Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is *inadmissible on the issue of credibility*…"[8] [Emphasis added].

2. Evidence of the victim's past sexual behavior to show consent

Evidence of the victim's past sexual behavior *may* be admissible on the issue of consent when "the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent…"[9]

Before admitting evidence of a victim's past sexual behavior offered to prove consent, the court must determine that the probative value substantially outweighs the probability that its admission will "create a substantial danger of undue prejudice." This rule applies to any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime. In this context, a victim's past sexual behavior includes but is not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards."[10]

The process the court must follow to make this determination is mandated by the statute and necessarily quite formal:[11]

> a. A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual

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[5] *Tegland*, supra.
[6] *State v. Harris*, 97 Wn. App. 865, 871, 989 P.2d 553 (1999) (For example, in *State v. Harris*, the victim's past sexual behavior was offered to show non-paternity on the part of the defendant.)
[7] RCW 9A.44.020(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[8] RCW 9A.44.020(2) https://app.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[9] Id.
[10] RCW 9A.44.020(3) https://app.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[11] Id.

behavior proposed to be presented and its relevancy on the issue of the consent of the victim.
b. The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
c. If the court finds that offer of proof is sufficient, the court shall order a hearing outside of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
d. At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

3. Opening the door to evidence of a victim's past sexual behavior

When the state presents evidence tending to prove the nature of the victim's past sexual behavior the defendant may cross-examine the victim regarding such behavior.[12] This statute excludes evidence that may be prejudicial to the victim and has little or no relevance, but does not exclude such evidence if it is highly relevant.[13] The state retains the burden of proof on the issue of consent.[14]

C. Case Law

1. Balancing the rape shield statute with constitutional rights to present a defense

a. Relevance of evidence of past sexual behavior

The court must first determine if the evidence of past sexual behavior is relevant to the charge. In *State v. Hudlow,*[15] the court noted, with respect to the trial court's threshold determination of the relevance of evidence of a victim's past sexual behavior, that factual similarities between prior consensual sex acts and the questioned sex acts claimed by the

[12] RCW 9A.44.020(4) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[13] *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005)
[14] *State v. Kalamarski*, 27 Wn. App. 787, 791, 620 P.2d 1017 (1980)
[15] 99 Wn.2d 1, 11, 659 P.2d 514 (1983)

defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401.

In *State v. Gregory* [16] the court noted that "The factual similarities between the past sexual acts and the acts at issue in the case must be particularized, not general."[17] The court held that evidence that a victim had engaged in prostitution was inadmissible to prove consent because (1) the prior sexual activity was of a different character than the incident at issue in the case and (2) the prostitution, which occurred more than two years prior to the alleged rape, was remote in time.[18]

b. Prejudicial effect of evidence of past sexual behavior

Once the court has found that the evidence is relevant, the probative value must be balanced against the potentially prejudicial effect.[19] In *Hudlow,* supra, the court clarified that:

> …the balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truthfinding process itself…. The prejudice to the factfinding process itself must be considered to determine whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.[20]

c. Probative value of evidence of past sexual behavior

The case law clarifies that although balancing by the court is required, highly probative evidence will be admissible under Constitutional principles. The *Hudlow* court concluded that the state's interest in excluding evidence of past general promiscuity, to avoid distracting and inflaming the jurors, was "compelling enough to permit the trial court to exclude minimally relevant prior sexual history evidence if the introduction of such evidence would prejudice the truthfinding function of the trial."[21]

In *State v. Jones* [22]the defendants, charged with rape, sought to present evidence that the victims participated in an all-night sex party with the defendants, during which they consented to the sex acts which were the bases of the charged rapes. Although the court held that the evidence was not barred by the rape shield act because the evidence involved present, not past, sexual behavior, it also reiterated its analysis in *Hudlow* of the balancing required by the rape shield act and expressly stated what it had suggested in *Hudlow:* "If the evidence

[16] 158 Wn.2d 759 (2006)
[17] Id. at 785
[18] Id.
[19] 99 Wn.2d at 12
[20] Id. at 13
[21] Id. at 15
[22] 168 Wn.2d 713, 717, 230 P.3d 576 (2010)

is of high probative value… 'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, section 22.'"

2. Electronic mail evidence

Evidence Rule 901(10) – Authentication, Identification, and Admission of Exhibits – Electronic Mail (E-Mail) governs admissibility of electronic evidence and was amended in 2013 to suggest methods of authentication of e-mails.[23] The Author's Comments at Sec. 901.17 include recent case law and analysis.

For example, a defendant's emails were authenticated by recipients who recognized the defendant's telephone number and the substantive content of the messages. A prima facie case of authenticity was established over the defendant's argument that the messages were forgeries.[24]

In *State v. Posey*,[25] the police discovered an email on the victim's computer that suggested the victim would have consented to violent sexual acts. In the email, the victim wrote that she would "enjoy" being raped and that she wanted a boyfriend who would "choke" and "beat" her. The Supreme Court of Washington held that this e-mail was inadmissible to rebut the state's theory that the juvenile defendant, who was 16 years old, was violent and abusive. Under the rape shield statute, the email was inadmissible because (1) the victim had not addressed or sent the email to the defendant; and (2) the victim only discussed possible sexual misconduct, not prior sexual abuse, in the email.

3. "Opening the door" to evidence of the victim's past sexual conduct

If the state "opens the door" to evidence of the victim's past sexual conduct during its case-in-chief, the defendant may introduce that evidence.[26] The state only "opens the door" to evidence of the victim's prior sexual conduct if the state introduces evidence that casts the victim's sexual history in a favorable, but false, light. If the state does so, the defendant can introduce evidence to rebut that favorable impression about the victim's sexual past. *State v. Camara.*[27] In *Camara* the victim testified that he had not wanted to have anal sex with the defendant because anal sex was unsafe and not pleasurable. This testimony did not "open the door" to evidence of the victim's past sexual conduct because (1) the testimony did not cast his sexual history in a favorable light and (2) evidence that the victim had engaged in anal sex with other men would not rebut the substance of the victim's direct testimony.

III. Privileged Communications and Records

A. Communications

[23] *Tegland*, supra.
[24] *State v. Young*, 192 Wn.App. 850, 369 P.3d 205 (2016) and subsequent determination, 198 Wn.App. 797, 296 P.3d 386 (2017).
[25] 161 Wn.2d 638, 167 P.3d 560 (2007)
[26] *State v. Gregory*, 158 Wn.2d at 787
[27] 113 Wn.2d 631, 643-44, 781 P.2d 483 (1989)

For discussion and case law as to all statutory privileges, see generally Tegland at Part 5, ER 501 and 502.[28]

1. Marital privilege – RCW 5.60.060(1)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

RCW 5.60.060(1) provides that a spouse or domestic partner cannot, without the consent of the other spouse or domestic partner, be examined for or against the other or be examined about communications made during the marriage or domestic partnership by one to the other. This privilege applies both during and after the marriage or domestic partnership.[29] This privilege does not apply to quasi-marriages or meretricious relationships.[30]

The privilege does not apply to a criminal proceeding (a) for a crime committed by one against the other; (b) if the marriage or partnership began after the filing of formal charges; or (c) if the crime was committed against a child of whom the spouse or domestic partner is the parent or guardian.[31]

2. Sexual assault advocate privilege – RCW 5.60.060(7)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

RCW 5.60.060(7) provides that a sexual assault advocate may not, without the consent of a victim, be examined regarding communications between the advocate and victim. A "sexual assault advocate" is an employee or volunteer from a rape crisis center, victim assistance unit, or any other program that provides information, advocacy, and counseling to a sexual assault victim.[32]

A sexual assault advocate may disclose a confidential communication without the victim's consent if the failure to disclose that communication "is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person."[33] The court shall presume that the advocate who disclosed the confidential communication acted in good faith.[34]

3. Domestic violence advocate privilege - RCW 5.60.060(8)
http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

A "domestic violence advocate" is an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to

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[28] *Tegland*, supra.
[29] RCW 5.60.060(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060
[30] *State v. Cohen*, 19 Wn. App. 600, 609, 576 P.2d 933 (1978)
[31] RCW 5.60.060(1)
[32] RCW 5.60.060(7)(a)
[33] RCW 5.60.060(7)(b)
[34] Id.

victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.[35]

A domestic violence advocate may disclose a confidential communication without the consent of the victim if the failure to disclose that communication "is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person."[36] The court shall presume that the domestic violence advocate acted in good faith in disclosing the confidential communication.[37]

4. **Mental health therapist and client privilege - RCW 18.225.105**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=18.225.105

5. **Psychologist - patient privilege - RCW 18.83.110**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=18.83.110

6. **Clergyman or priest privilege - RCW 5.60.060(3)**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060

B. Records

1. **Confidentiality of rape crisis center records - RCW 70.125.065**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065

RCW 70.125.065 protects records maintained by a community sexual assault program from discovery by the defense in a sexual assault case. Such records may only be disclosed if: (a) the defense makes a written pretrial motion to request the discovery; (b) the defense provides an affidavit or affidavits setting forth the specific reasons why the defense is requesting the records; and (c) the court reviews the requested records in camera to determine (1) whether the records are relevant and (2) whether the probative value of the records outweighs the victim's privacy interest in keeping the records confidential. The court must also take into account what further trauma the victim may suffer if the records are disclosed to the defense, and enter an order stating whether the records, or any part of the records, are discoverable and setting forth the basis for that finding.[38]

In *State v. Espinosa*,[39] the appellate court found that the trial court acted within its discretion in refusing to order disclosure of certain information to defense counsel, who argued that the privilege had been waived because a police officer was present during the rape counselor's interview with the victim. And, in *State v. Kalakosky*,[40] the Washington State Supreme Court found that the trial court acted within its discretion in deciding not to

[35] RCW 5.60.060(8)(a)
[36] RCW 5.60.060(8)(b)
[37] Id.
[38] RCW 70.125.065 http://apps.leg.wa.gov/RCW/default.aspx?cite=70.125.065
[39] 47 Wn. App. 85, 90, 733 P.2d 1010 (1987)
[40] 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)

review rape crisis center records *in camera* when there was no affidavit that established the specific reasons why such review was appropriate.

The U.S. Supreme Court observed, in *Pennsylvania v. Richie*,[41] that records that are conditionally privileged should be reviewed by the court *in camera* when the appropriate showing of potential materiality has been made.

2. **Client records of domestic violence programs - RCW 70.123.075**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.123.075

3. **Washington State Criminal Records Privacy Act - chapter 10.97 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97

4. **Washington Uniform Healthcare Information Act - chapter 70.02 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=70.02

5. **Public Disclosure Act - RCW 50.13.015**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=50.13.015

6. **Address confidentiality for victims of domestic violence, sexual assault and stalking - chapter 40.24 RCW**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=40.24

7. **Child victims of sexual assault, identification confidential - RCW 10.97.130**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97.130

8. **Victim polygraphing - RCW 10.58.038**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=10.58.038

9. **Interpreter in legal proceeding - RCW 2.42.160**
   http://apps.leg.wa.gov/rcw/default.aspx?cite=2.42.160

10. **Federal HIPAA regulations (Health Insurance Portability and Accountability Act of 1996.** See *Tegland* at 501:36 (Author's Commentary).

IV. Evidence of a Victim's Prior Complaint of Sexual Assault

The trial court has the discretion to limit the defendant's cross-examination of the victim regarding prior false rape complaints.[42] In *State v. Demos*[43] the court found that the trial court acted within its discretion by denying admission of evidence that the victim had filed two prior, and arguably false, rape complaints, holding that the evidence did not tend to prove any issue in dispute and was highly prejudicial.

[41] 480 U.S. 39, 61, 107 S. Ct. 989, 94 L. Ed.2d 40 (1987)
[42] *State v. Williams*, 9 Wn.App. 622, 623, 513 P.2d 854 (1973)
[43] 94 Wn.2d 733, 737, 619 P.2d 968 (1980)

V. Character Evidence and Prior Bad Acts of the Defendant

A. Generally

The admissibility of general character evidence is governed by ER 404(a):

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; (2) Character of Victim. 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; (3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.[44]

ER 607 permits the impeachment of witnesses by any party. ER 608 provides for the admission of evidence referring to a witness' character for truthfulness. ER 609 governs the admission of evidence of a witness' criminal conviction for purposes of impeachment.

B. Evidence of Prior Bad Acts

The admissibility of evidence of other crimes, wrongs or acts is governed by ER 404(b), which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[45]

To admit such evidence the trial court must 1) find by a preponderance of the evidence that the misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against its prejudicial

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[44] ER 404(a) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0404

[45] ER 404(b) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0404; see *State v. Gresham*, 173 Wn.2d 405,428, 269 P.3d 207 (2012), in which the court ruled unconstitutional RCW 10.58.090, which provided for the admission, in sex offense cases, of evidence of the defendant's prior sex offenses "notwithstanding Evidence Rule 404(b) if the evidence is not inadmissible pursuant to Evidence Rule 403."

effect.[46] The Washington Supreme Court held, in *State v. Kilgore*,[47]that the trial court may rely upon the state's offer of proof of other wrongs in determining the admissibility of such evidence. The trial court has discretion to decide whether an evidentiary hearing should be held to determine if there is a preponderance of such evidence.

If evidence of a defendant's prior crimes, wrongs, or acts is admitted, the trial court must, if requested by the defendant, give a limiting instruction that informs the jury of the purpose for which the evidence is admitted and that "the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character."[48]

A trial court may admit evidence that the defendant has physically assaulted the victim in the past, even if those physical assaults did not happen at the same time as the alleged sexual assault. In *State v. Wilson*,[49]the trial court's admission of evidence of past physical assaults was upheld because that evidence (1) illustrated why the victim may not have reported the sexual assault; (2) demonstrated the defendant's intent to dominate and control the victim; and (3) rebutted the implication that the defendant did not molest the victim.

VI. Hearsay Rules and Exceptions

A. Hearsay and the Confrontation Clause: *Crawford v. Washington*

1. Background

Part XII of *Tegland*, supra, is an extensive examination of the Sixth Amendment Right to Confrontation in light of the evolving case law since the decision in *Crawford v. Washington*.[50]

The U.S. Supreme Court has held that a defendant's right to confront the witnesses and evidence against them may only be restricted if: 1) the purpose of the Confrontation Clause is "otherwise assured"; and 2) the "denial of such [face-to-face] confrontation is necessary to further an important public policy." The Court articulated this proposition in *Maryland v. Craig*,[51] finding that Maryland's law permitting victims of sexual abuse to testify against their abusers via closed-circuit television did not violate a defendant's right to confront witnesses under the Confrontation Clause.[52]

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[46] *State v. Pirtle*, 127 Wn.2d 628, 428, 904 P.2d 245 (1995)

[47] 147 Wn.2d 288, 295, 53 P.3d 974 (2002)

[48] *State v. Gresham*, 173 Wn.2d at 423-24

[49] 60 Wn. App. 887, 808 P.2d 754 (1991)

[50] 41 U.S. 36, 124 S. Ct. 1354, 158 L Ed. 2d 177 (2004), 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence (2018-19 ed.) and Tegland, 5A Washington Practice: Evidence Law and Practice (6th ed).

[51] *Maryland v. Craig*, 497 U.S. 836, 837, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)

[52] Id.

Washington State provides a hearsay exception to child victims of sexual abuse "where non-testimonial hearsay statements of a child are at issue."[53] A child victim-witness's hearsay statements can be testimonial when made to a detective or a Child Protective Services investigator.[54] In Washington, if a child witness recants or cannot remember his or her initial testimony on the stand, he or she is still considered "available" for purposes of the Confrontation Clause.[55]

In addition to complying with the provisions of RCW 9A.44.120, set forth in subsection C below, non-testimonial statements of child victims are admissible if there is compliance with the factors to determine reliability of such statements, articulated in *State v. Ryan*.[56] These include:

1. whether there is an apparent motive to lie
2. the general character of the declarant
3. whether more than one person heard the statements
4. whether the statements were made spontaneously
5. the timing of the declaration and the relationship between the declarant and the witness
6. whether the statement contains an express assertion about a past fact
7. whether cross-examination could show the declarant's lack of knowledge
8. the possibility that the declarant's faulty recollection is remote
9. the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement[57]

Before applying the hearsay exception under RCW 9A.44.120, the state must attempt to procure the child's testimony by other means.[58] For example, as in *Maryland v. Craig*, testimony by child abuse victims under the age of ten may be presented by closed-circuit television, when determined to be necessary and presented in accordance with the provisions of RCW 9A.44.150 (testimony of child by closed-circuit television). The court must find that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably

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[53] *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006)

[54] *State v. Beadle*, 173 Wn.2d 97, 119, 265 P.3d 863 (2011)

[55] *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (holding that child was not "effectively unavailable" for confrontation clause purposes because the child was "not only sworn in as a witness at trial, asked about the alleged incidents, and provided answers to the questions put to her, but she was actually cross-examined. She was not only available but was probably the best witness for the defense"); *State v. Price*, 158 Wn.2d 630, 651, 146 P.3d 1183 (2006) (holding that "because all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall, an inability to remember does not render a witness unavailable for confrontation clause purposes")

[56] 103 Wn. 2d 165, 691 P.2d 197 (1984)

[57] Id. at 175-76.

[58] *State v. Smith*, 148 Wn.2d 122, 130, 59 P.3d 74 (2002) (even though trial court had no closed-circuit television, court should have at least investigated the cost of renting a closed-circuit television system for defendant's trial); 5C *Wash. Prac., Evidence Law and Practice* § 1300.22 (5th ed.)

communicating at the trial.[59] In *State v. Foster*[60] the Washington Supreme Court held that the closed-circuit testimony hearsay exception for child witnesses does not violate a defendant's rights under either the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, or article 1, section 22 of the Washington State Constitution. Washington State has yet to directly apply *Crawford*'s holding to its closed-circuit television testimony statute.

In *Crawford v. Washington* the U.S. Supreme Court overruled *Ohio v. Roberts*[61] and shifted the trial court's analysis from the reliability of a hearsay statement to whether that statement was "testimonial." The Supreme Court held that a trial court may not admit testimonial statements unless (1) the declarant is unavailable and (2) the defendant had an opportunity to cross-examine the declarant. After *Crawford*, the reliability of such testimonial statements plays no role in determining their admissibility.

2. "Testimonial" statements

In *State v. Walker*,[62] the Washington Court of Appeals noted that testimonial statements may include "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" or "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[63]

The U.S. Supreme Court provided some additional definition of "testimonial statements" in *Davis v. Washington.*[64] In that case, the Court held that the statements made in a 911 call were not "testimonial" and were therefore not inadmissible under *Crawford.* The Court explained that

> …statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[65]

In applying the foregoing distinction between testimonial and non-testimonial statements to the facts in *Davis,* the court noted the following factual distinctions between

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[59] RCW 9A.44.150(1)(c) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.150
[60] 135 Wn.2d 441, 467, 957 P.2d 712 (1998)
[61] 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980)
[62] 129 Wn. App. 258, 267, 118 P.3d 935 (2005)
[63] Id.
[64] 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006)
[65] Id. at 822

that case and *Crawford*: (a) in *Davis* the declarant was speaking about events while they were happening, in contrast to *Crawford,* in which the declarant's statement was given "hours after the events she described had occurred";[66] (b) the declarant in *Davis,* unlike the declarant in *Crawford,* was facing an on-going emergency and calling for help; (c) "the nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past;"[67] (d) "the difference in the level of formality between the two interviews….*Crawford* was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers;" the declarant's statements in *Davis* "were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[68] The court in *Davis* cautioned, however, "that a conversation which begins as an interrogation to determine the need for emergency assistance" could become testimonial "once that purpose has been achieved."[69]

In *State v. Ohlson,*[70] decided subsequent to the *Crawford* and *Davis* decisions, the Washington Supreme Court summarized *Davis* as follows:

> *Davis* announced that whether statements made during police interrogation are testimonial or nontestimonial is discerned by objectively determining the primary purpose of the interrogation. If circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency, the elicited statements are nontestimonial. If circumstances indicate that the primary purpose is to establish or prove past events, the elicited statements are testimonial. Characteristics to consider when objectively assessing the circumstances of the interrogation include the timing of the statements, the threat of harm, the need for information to resolve a present emergency, and the formality of the interrogation.[71]

If a party seeks to admit a statement the court determines is not testimonial, the court must then determine if the statement is sufficiently reliable to be admissible consistent with the hearsay rule and the exceptions thereto.

B. Hearsay Exceptions

1. Standard of appellate review of admissions of hearsay statements

[66] Id. at 827
[67] Id.
[68] Id.
[69] Id. at 828
[70] 162 Wn.2d 1, 168 P.3d 1273 (2007)
[71] Id. at 15

"A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed…under an abuse of discretion standard."[72] The trial court only abuses its discretion if its decision is "manifestly unreasonable" or based on "untenable" grounds.[73]

If the admitted hearsay statement is testimonial, and also implicates the defendant's Confrontation Clause rights, appellate review applies a harmless error analysis.[74]

2. Excited utterances (ER 803(a)(2))

An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[75] A sexual assault is a "startling event."[76]

To be an excited utterance, the declarant must make the statement while "under the influence of external physical shock" and must not have had time to "calm down enough to make a calculated statement based on self-interest."[77]

a. Voice on 911 tape must be authenticated

If an excited utterance is contained in a 911 tape, the proponent of its admission must lay the proper foundation by establishing the authenticity of the voice of the person allegedly making the statement.[78] Evidence used to authenticate the voice can be direct or circumstantial.[79]

b. Approved time frames for admission as excited utterances

In several cases, the Washington courts have upheld the admission as excited utterances of statements made hours after the "exciting event": *State v. Woodward*,[80] (a child's statement that the defendant had sexual intercourse with her, made 20 hours after the incident, in response to her mother's question); *State v. Guizzotti*,[81] (a rape victim's statement made after hiding under a tarp in fear of the defendant for seven hours**);** *State v. Flett*,[82] (a statement by a rape victim to her daughter seven hours after the event); *State v. Fleming*,[83] (a statement by a rape victim to a friend three hours after the event, and to the

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[72] *State v. Woods*, 143 Wn.2d 561,595, 23 P.3d 1046 (2001)
[73] *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)
[74] *State v. Davis*, 154 Wn.2d 291, 304, 168 P.3d 1273 (2005) (aff'd by *Davis v. Washington*, 547 U.S. at 834)
[75] ER 803(a)(2)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[76] *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)
[77] *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)
[78] *State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949 (1996)
[79] Id. (citing *State v. Deaver*, 6 Wn. App 216, 219, 491 P.2d 1363 (1971))
[80] 32 Wn. App. 204, 207, 646 P.2d 135 (1982)
[81] 60 Wn. App. 289, 803 P.2d 808 (1991)
[82] 40 Wn. App. 277, 699 P.2d 774 (1985)
[83] 27 Wn. App 952, 621 P.2d 779 (1980)

police three to six hours after the event); *State v. Strauss*[84](a rape victim's statement three-and-a-half hours after the assault when she encountered a policeman at a gas station).

c. Statements not considered excited utterances

In *State v. Doe*,[85] the Washington Supreme Court ruled that a child victim's description of the incident to her foster mother three days afterward was inadmissible as an excited utterance, noting that no Washington court had ever allowed such a long period of time to lapse between event and statement.

In *State v. Bargas*,[86] the victim's statements to police one day after the rape were ruled inadmissible as excited utterances. The court noted that statements by rape victims are only admissible while the victim is in a "state of emotional turmoil," and found it dispositive that the victim had made the statements after going to sleep, taking a shower, and talking to a friend.

In *State v. Dixon*,[87] a rape victim's four-page written statement was ruled inadmissible as an excited utterance because the statement was so lengthy and comprehensive that it was indistinguishable from the statements that police regularly collect from crime victims. A crime victim's statement is not an "excited utterance" merely because the victim is upset.[88]

d. The admissibility of excited utterances containing false information

The court in *State v. Brown*[89]held that the trial court abused its discretion in admitting as an excited utterance a statement in which the declarant had intentionally included a false claim that she had been kidnapped.

In *State v. Owens*,[90] a child's statements about her sexual abuse in response to her mother's and grandmother's lengthy questioning were not considered excited utterances because they differed from her earlier statements to a physician, and indicated that "a declarant…has necessarily reflected upon the previous response." These statements were still admitted, as they were deemed harmless.[91]

3. Present sense impressions (ER 803 (a)(1))

[84] 119 Wn.2d 401, 832 P.2d 78 (1992)
[85] 105 Wn.2d 889, 893-94, 719 P.2d 554 (1986)
[86] 52 Wn. App. 700, 704, 763 P.2d 470 (1988)
[87] 37 Wn. App. 867, 873, 684 P.2d 725 (1984)
[88] Id. at 873-74
[89] 127 Wn.2d 749, 759, 903 P.2d 459 (1995)
[90] 128 Wn.2d 908, 913, 913 P.2d 366 (1996)
[91] Id. at 913-14

A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[92]

In *State v. Powell*,[93] a victim's statement that the defendant was "drinking, drugging, and getting violent" was not a present sense impression exception to the hearsay rule because the defendant was not present when she made the statements.

4. Then-existing mental, emotional, or physical condition (ER 803(a)(3))

A statement of then-existing mental, emotional or physical condition is "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed…."[94]

In *Powell*, supra,[95] the victim's statements also did not fall under this exception because it is generally only applicable where the state of mind of the victim is at issue, such as during an accident or in a self-defense case.

5. Statements made for the purpose of medical diagnosis or treatment (ER 803(a)(4))

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible under this exception.[96] Therapy for sexual abuse, as far as it is intended to help the healing process, does not differ from other medical treatment for the purposes of this rule.[97]

Statements made for the purpose of, or "reasonably pertinent to," medical diagnosis or treatment, including psychological treatment, are not objectionable as hearsay.[98] To be admissible, such statements must (1) be consistent with the purposes of promoting the treatment; and (2) be of the kind "reasonably relied on" by the person giving the medical diagnosis or treatment.[99]

Statements as to causation of injuries, symptoms or pain are generally admissible under this exception, whereas statements attributing fault are generally not admissible

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[92] ER 803(a)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[93] 126 Wn.2d 244, 267, 893 P.2d 615 (1995)
[94] ER 803(a)(3)
[95] 126 Wn.2d 244, 266 (1995) (citing *State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980))
[96] ER 803(a)(4)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[97] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994)
[98] *State v. Woods*, 143 Wn.2d at 602
[99] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn. App. 87 at 93

because they are not usually pertinent to diagnosis or treatment.[100] However, in sexual abuse cases the identity of the perpetrator will sometimes be admissible because it is relevant to prevent future injury. In *State v. Bouchard*[101] a child sexual abuse victim's statements to a doctor that "grandpa did it," are admissible because they are relevant to the "cause or external source of the injury and necessary to proper treatment." This exception applies to statements made to health professionals, including physicians and others, such as emergency room nurses.[102]

6. When prior statements by a witness are not hearsay (ER 801(d)(1))

A prior statement by a witness who testifies and is subject to cross examination regarding the statement is not hearsay if (a) the statement is inconsistent with the witness' testimony and was given under oath at a trial or hearing or in a deposition; (b) the statement is consistent with the witness' testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive; or (c) the statement "is one of identification of a person made after perceiving the person."[103] It is also not hearsay if the witness's prior statement is not offered to prove the truth of the matter asserted.[104]

In *State v. Smith,*[105] the court held that defense counsel's cross-examination of a witness, including questions suggesting that the victim had falsely accused the defendant of misconduct before, justified the admission of the victim's prior consistent statements to other individuals about the alleged incident involving the defendant.

In *State v. Osborn,*[106] prior consistent statements of a victim were held admissible even though the defendant had attempted to reveal the victim's alleged conspiracy to falsely accuse the defendant on cross-examination of her mother, not the victim. The appellate court saw "no problem" with the fact that the prior consistent statements were offered to rebut inferences during the cross-examination of a different witness.

In *State v. Walker,*[107] the trial court properly allowed six different witnesses to relay the child victim's story about the assault, even though those witnesses were one step removed from hearing the child's recital of the event. The testimony of these witnesses was not hearsay, but was "admissible as proof of the fact recited by the declarant to the witness."[108]

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[100] Id.
[101] 31 Wn. App. 381, 384, 639 P.2d 761 (1982) (abrogated as to a different issue by *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 1379 (2009))
[102] *State v. Robinson*, 44 Wn. App. 611, 616 n.1, 722 P.2d 1379 (1986)
[103] ER 801(d)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0801
[104] ER 801(c)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0801
[105] 30 Wn. App. 251, 255, 633 P.2d 137 (1981)
[106] 59 Wn. App. 1, 7, 795 P.2d 1174 (1990)
[107] 38 Wn. App. 841, 845, 690 P.2d 1182 (1985)
[108] Id. at 844-45

And, in a federal Eighth Circuit case, *United States v. Red Feather*,[109] the prosecution was allowed to introduce a rape victim's diary to corroborate her testimony after the defendant implied on cross that the victim's testimony had been coached.

7. Complaint of sexual abuse

Washington recognizes the common law "fact of complaint" rule that an out-of-court complaint of a sexual offense is admissible, although the details of the offense and the identity of offender are not.[110] This is an uncodified exception to the hearsay rule.[111] INSERT FN: ER 807; Tegland supra at Author's Commentary 807:8.

C. Out-of-Court Statements of Child Victims - RCW 9A.44.120

1. Statute

The admission of non-testimonial[112] out-of-court statements by child victims is governed by RCW 9A.44.120.[113] That statute provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110 is admissible, even if inadmissible under any other court rule, if:
> (1) The court finds that the "time, content, and circumstances" of the non-testimonial statement "provide sufficient indicia of reliability" and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to

[109] 865 F.2d 169, 171 (8th Cir. 1989)
[110] *State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816 (1998)
[111] ER 807; *Tegland* supra at Author's Commentary 807:8.
[112] See the discussion of "non-testimonial" statements under *Crawford v. Washington* in section V. A of this chapter.
[113] See ER 601 and 807, *Tegland*, supra.

provide the adverse party with a fair opportunity to prepare to meet the statement.[114]

2. "Reliability" test for non-testimonial hearsay

For child witnesses in sexual abuse cases, the court must find that the "time, content, and circumstances" of the statement provide sufficient indicia of reliability before admitting the statement.[115] *State v. Ryan*[116]sets forth nine factors the trial court should weigh to determine if a child's non-testimonial statement is reliable: (1) whether there is motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statements contain any express assertions about past fact; (7) whether cross examination could not show the declarant's lack of knowledge; (8) whether the possibility of the declarant's faulty recollection is remote; and (9) whether "the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement."[117] The trial court has considerable discretion in determining if a statement is reliable.[118]

Although RCW 9A.44.120 has withstood constitutional challenge, the Washington Supreme Court has clarified that it does not waive the requirement that the child be unavailable to testify.[119] As long as a child's non-testimonial statements have satisfied the requirements of reliability and corroboration, the child does not have to be competent to testify.[120] Further, non-testimonial hearsay statements may still be reliable, and admissible, even if the court has found that the child is incompetent.[121]

VII. Competency of Witnesses

A. Statute and Rules

RCW 5.60.050(2) establishes the legal standard for witness competency by defining incompetence: "The following persons shall not be competent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."

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[114] 9A.44.120 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120
[115] Id.
[116] *State v, Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (citing *State v. Parris*, 98 Wn.2d 140, 146 (1982))
[117] Id. at 176
[118] *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990)
[119] *State v. Ryan*, 103 Wn.2d 165 at 170
[120] *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765 (2003)
[121] Id.

Evidence Rule 601 provides a presumption of competency. There are exceptions to ER 601 that have grown from case law that are discussed below and at greater length within *Tegland*, supra. Evidence Rule 807 refers to the statute concerning Child Victims or Witnesses and provides substantial discussion and case law analysis in the context of the Hearsay Rules.

B. Competency of Minor Witnesses

1. Trial court analysis

The party calling a child witness has the burden to establish competency. The child should be examined out of the presence of the jury.[122] The court does not need to question the child about the actual events at issue in the case.[123] If a child is deemed incompetent to testify, out of court statements may still be admissible under a hearsay exception.[124] See, e.g., *State v. Tate*,[125] (competency established by psychiatric testimony); *State v. Leavitt*,[126] (competency of child established when child responded to prosecutor's questions by whispering answers to social worker, who then relayed those answers to the court).

2. Testimony via closed circuit television

RCW 9A.44.150 authorizes the trial court to permit child victims to testify by closed circuit television in cases where the child is testifying concerning an act or attempted act of "sexual contact" or "physical abuse" on that child. There must be substantial evidence that testifying in the presence of the defendant will cause the child severe emotional or mental distress that will prevent the child from reasonably communicating at trial.[127]

C. Competency of Witnesses with Mental Disabilities

RCW 5.60.020 provides that a witness cannot testify if not "of sound mind and discretion." "Unsound mind" refers only to witnesses with "no comprehension at all, not to those with merely limited comprehension.[128] The party opposing the witness has the burden of proving that the witness is incompetent.[129]

A person with a history of mental disorders is not *per se* incompetent.[130] A witness is competent to testify if: (1) the witness understands the nature of the oath; and (2) the witness is capable of giving a "correct account" of what was witnessed.[131] In *State v. Smith*, the court

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[122] *State v. Tuffree*, 35 Wn. App. 243, 246-47, 666 P.2d 912 (1983)
[123] *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)
[124] *State v. Robinson*, 44 Wn. App. 611, 616 (1986); *State v. Justiniano*, 48 Wn. App. 572, 574, 740 P.2d 872 (1987); *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006)
[125] 74 Wn.2d 261, 266, 444 P.2d 150 (1968)
[126] 111 Wn.2d 66, 70, 758 P.2d 982 (1988)
[127] *State v. Foster*, 135 Wn.2d 441, 451, 957 P.2d 712 (1998)
[128] *McCutcheon v. Brownfield*, 2 Wn. App. 348, 354-55, 467 P.2d 868 (1970)
[129] *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982) (per curiam)
[130] *State v. Watkins*, 71 Wn. App. 164, 169, 857 P.2d 300 (1993)
[131] Id. (citing *State v. Allen*, 67 Wn.2d 238, 241, 406 P.2d 950 (1965))

held that a witness alleged to be of unsound mind was competent when the witness "was able to understand the obligation to tell the truth on the witness stand, and . . . was able to relate the basic facts of the incident."[132]

VIII. Corroboration of Victim's Testimony in Sexual Assault Cases Not Required

The testimony of a victim of a sex offense defined in chapter 9A.44 RCW does not need to be corroborated to convict the defendant.[133]

IX. Expert Testimony

Expert testimony is often essential to challenge rape myths in the courtroom. Pursuant to Evidence Rule 702, a witness may qualify as an expert by their knowledge, skills, experience, training, or education. An expert witness' "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue."[134] Expert testimony is admissible under Evidence Rule 702 "if the matter at issue is beyond the common knowledge of the average layman, the witness has sufficient expertise, and the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion."[135]

A. *Frye* Rule

1. General acceptance test

The *Frye* general acceptance test,[136] rather than the *Daubert* standard,[137] is used by Washington courts in determining the admissibility of scientific testimony.[138] The "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis.[139] If there is a significant dispute among experts in the relevant scientific community as to the validity of the scientific evidence, it is not admissible.[140] If expert testimony does not concern novel theories or sophisticated and technical matters, it need not meet stringent requirements for general scientific acceptance.[141]

2. Evidence considered by the court

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[132] 30 Wn. App. at 254
[133] RCW 9A.44.020(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[134] Id.
[135] *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984) citing McCormick's Handbook of the Law of Evidence, Sec. 13 at 29-31 (E. Cleary 2d ed. 1972)
[136] *Frye v. United States*, 293 F. 1034 (D.C. Cir. 1923)
[137] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)
[138] *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996)
[139] *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)
[140] Id.
[141] *State v. Ortiz*, 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992)

In determining whether scientific evidence meets the *Frye* test, the court may consider, in addition to materials presented to it, sources outside the record such as scientific literature, law articles, and decisions in other jurisdictions.[142] However, the relevant inquiry by the court is whether there is acceptance by scientists, not by courts or legal commentators.[143]

3. Standard of proof for the *Frye* test

Whether the *Frye* test is met is initially a question of preliminary fact decided by the trial court according to ER 104(a) and the preponderance of the evidence standard.[144] Note, however, that the preponderance standard, as it is applied in the application of the *Frye* test, requires a higher degree of certainty than the concept of probability used in civil matters, as the Washington Supreme Court explained in *Anderson v. Akzo Nobel Coatings, Inc.*[145] In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance of the evidence" standard, or more likely than not, or more than 50 percent[146]. In contrast, "[f]or a scientific finding to be accepted, it is customary to require a 95 percent probability that is not due to chance alone."[147] The difference in degree of confidence to satisfy the *Frye* "general acceptance" standard and the substantially lower standard of "preponderance" required for admissibility in civil matters has been referred to as "comparing apples to oranges."[148]

The *Anderson* court noted:

> This court has consistently found that if the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation. *See, e.g., Gregory*, 158 Wn.2d at 829, 147 P.3d 1201; *Copeland*, 130 Wn.2d at 255, 922 P.2d 1304; Reese, 128 Wn.2d at 309, 907 P.2d 282; *Cauthron*, 120 Wn.2d at 887, 846 P.2d 502. Of course, the evidence must also meet the other evidentiary requirements of competency, relevancy, reliability, helpfulness, and probability.[149]

Once the *Frye* standard is satisfied, the evidence must still satisfy the two-part inquiry under ER 702. The expert witness must qualify as an expert and the testimony must be

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[142] *State v. Cauthron, supra*, at 888
[143] Id.
[144] *State v. Carlson* 80 Wn. App. 116, 125, 906 P.2d 999 (1995) (in reference to *Daubert v. Merrell Dow Pharmaceuticals, Inc. supra*)
[145] 171 Wn.2d 593, 260 P.3d 857 (2011)
[146] See Lloyd L Wiehl., "Our Burden of Burdens," 41 *Wash. L. Rev*. 109, 110 & n.4
[147] Marcia Angell, *Science on Trial: The Clash of Medical Evidence and The Law in The Breast Implant Case* 114 (W.W. Norton, 1997)
[148] *Anderson v. Akzo Nobel Coatings, Inc*., 171 Wn.2d 593, 608, 260 P.3d 857 (2011)
[149] Id. at 609

helpful to the trier of fact.[150] Expert testimony will be helpful to a jury only if its relevance has been established.[151]

4. Appellate review is de novo

Questions as to the admissibility of scientific evidence under *Frye* are reviewed de novo.[152]

B. Child Sex Abuse Syndrome

Evidence of a child sex abuse profile or syndrome through expert testimony that behaviors of the victim are common behaviors of sexually abused children, has been ruled inadmissible on grounds that it has not been shown to be supported by accepted medical or scientific opinion.[153] It may, nevertheless, be admitted to explain the victim's reluctance to report abuse or to rebut a defense theory that the victim's behavior was inconsistent with sexual abuse by the defendant, so long as the expert does not offer an opinion that the victim has been abused by the defendant or that the defendant is guilty.[154] An observation that a victim exhibits behavior typical of a group constitutes neither a direct inference of the guilt of the defendant nor a conclusion that the child was in fact sexually abused, and thus does not invade the province of the jury.[155]

C. Victim Responses to Trauma

1. Rape Trauma Syndrome

The Supreme Court, in *State v. Black,*[156] held that the state may not present expert testimony that a victim is suffering from rape trauma syndrome because it is not established as a reliable means to prove rape occurred; however, the court expressed that its holding applied only to expert testimony. Thus, a lay witness may testify that an alleged rape victim exhibited signs of emotional or psychological trauma following the alleged rape.

In *Carlton v. Vancouver Care LLC,*[157] the Court of Appeals held that expert testimony concerning the rape trauma syndrome was admissible under ER 702 as relevant to a determination about whether rape caused a victim with dementia to experience psychological harm when the defendant had already admitted rape, and that the expert's testimony was beyond the experience of the common person and would assist the jury.

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[150] *State v. Cauthron,* 120 Wn.2d 879, 889 (1993)
[151] *State v. Riker,* 123 Wn.2d 351, 364, 869 P.2d 42 (1994) (in reference to *State v. Petrich,* 101 Wn.2d 566, 575, 683 P.2d 173 (1984))
[152] *State v. Copeland,* 130 Wn.2d 244, 255, 922 P.2d 1304 (1996)
[153] 13B *Wash.Prac., Criminal Law §2414*
[154] Id.
[155] Id.
[156] 109 Wn.2d 336, 745 P.2d 12 (1987)
[157] 155 Wn. App.151, 231 P.3d 1241 (2010)

D. Battered Woman Syndrome

In Washington, the battered woman syndrome defense is not codified but is approved in case law.[158] Evidence relating to the syndrome is generally admissible if it is both relevant and not unfairly prejudicial. However, there are limitations to the use of this evidence.[159]

In *State v. Allery*[160] the court ruled that expert testimony on the battered woman syndrome was admissible when offered by the defendant, charged with murdering her husband, to explain the syndrome generally, "to provide a basis from which the jury could understand why defendant perceived herself in imminent danger at the time of the shooting," and to explain why a battered woman would stay in a physically and psychologically dangerous relationship.[161] However, while expert testimony on the battered woman syndrome is admissible to support a woman's claim of self-defense against her batterer, it is not admissible if it is being offered to explain the defendant's actions against a person outside the battering relationship.[162]

The defendant in *Allery* did not put her character in issue by introducing evidence of battered woman syndrome. Accordingly, such evidence does not "open the door" to evidence of the defendant's bad reputation or specific instances of misconduct.[163]

In *State v. Ciskie,*[164] a rape case, the court held that expert testimony on battered woman syndrome is admissible to assist the jury in understanding the victim's delays in reporting the alleged rape and failing to discontinue her relationship with the defendant. It also held, however, that under ER 403, the trial court properly refused to allow the expert to express an opinion on the ultimate issue of whether the victim had been raped.

Despite the name, evidence of battered woman syndrome is not restricted to women. In particular, a child who is abused by a parent may exhibit the same behavior patterns. If the child assaults or kills the abuser, evidence of this "battered child syndrome" is admissible for the same purposes as evidence of battered woman syndrome.[165]

E. Delayed Reporting

Expert witnesses may testify that sexually abused victims delay reporting rapes in order to rebut a defense argument that the alleged victim's delay in reporting the incident

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[158] See WPIC 17.02 and Comment.
[159] See 30 *Wash. Prac., Motions in Limine §5.33*
[160] 101 Wn.2d 591, 682 P.2d 312 (1984)
[161] Id. at 597
[162] *State v. Riker*, 123 Wn.2d 351 (1994)
[163] 13B *Wash. Prac., Criminal Law §3311*
[164] 110 Wn.2d 263, 751 P.2d 1165 (1988)
[165] *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993)

demonstrates that the defendant did not rape the victim.[166] See also discussion of *State v. Ciskie*, in Subsection D above.

F. Victim Grooming

In child sex abuse cases, expert testimony relating to the "grooming process" has been held unduly prejudicial when the evidence implies that the crime was in fact committed because the defendant engaged in similar behaviors.[167] However, the Court of Appeals has suggested that such testimony might be admissible to rebut a defense claim that the defendant's conduct was inconsistent with the behavior of those who commit child sex offenses.[168]

G. Examining Physician

Although a doctor or other expert may not diagnose sexual abuse based only on the victim's statements, a physician who has examined the victim of a sexual offense may testify that a victim's physical condition is consistent with sexual abuse.[169]

X. Testimony of Witnesses Who Have Been Hypnotized

A person, once hypnotized, is barred from testifying concerning information recalled while under hypnosis or testifying as to a fact which became available following hypnosis.[170] Accordingly, the testimony of a witness who has been previously hypnotized is limited to facts and events recalled before undergoing the hypnosis, and a party seeking to admit such testimony has the burden of establishing what the witness remembered prior to the hypnosis (e.g., providing some independent verification of the pre-hypnotic memory, such as a record preserved prior to hypnosis).[171] Any uncertainties in testimony of a witness as to facts that occurred before hypnosis should be resolved in the opponent's favor.[172]

If the court admits testimony as to what a witness remembers before hypnosis, the opponent must be given the opportunity to show the manner in which the hypnosis was conducted and the possible effect of hypnosis on the witness' testimony. Special jury instructions regarding hypnosis may also be warranted.[173]

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[166] *State v. Graham*, 59 Wn. App. 418, 798 P.2d 314 (1990) (the court held that expert testimony that sexually abused girls often delay up to one year before reporting the abuse is admissible on the grounds that the testimony was not offered to prove that the defendant committed the rape, but rather to rebut the defense theory that the delay was inconsistent with rape)
[167] See 13B *Wash. Prac., Criminal Law §2414*
[168] *State v. Braham*, 67 Wn. App. 930, 841 P.2d 785 (1992); see also *State v. Quigg*, 72 Wn. App. 828, 837, 866 P.2d 655 (1994) (qualifications of expert to give opinion on "grooming")
[169] 13B *Wash. Prac., Criminal Law §2414, 60*
[170] *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984)
[171] 13B *Wash. Prac., Criminal Law §2307*
[172] *State v. Martin*, supra at 722
[173] Id.

XI. DNA Evidence

A. Trace Analysis Requested by Convicted Felons

RCW 10.73.170(1)[174] provides that a person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

B. DNA Testing

1. CrR 4.7(b)(2)

CrR 4.7(b)(2) states:

> Notwithstanding the initiation of judicial proceedings, and subject to constitutional imitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:
> …
> (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof.

2. Search and seizure issues

The taking of DNA constitutes a search and seizure under both the United States and Washington State constitutions.[175] In *State v. Gregory*,[176] the Washington Supreme Court held that a court order issued pursuant to CrR 4.7(b)(2)(vi) for a blood draw complies with the Fourth Amendment so long as it is supported by probable cause. Citing the seminal case, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966), the *Gregory* court listed three requirements to determine whether a blood draw is reasonable: (1) there must be a clear indication that in fact the desired evidence will be found; (2) the chosen test must be reasonable; and (3) such test must be performed in a reasonable manner.[177] While the determination of historical facts relevant to the establishment of probable cause to order blood drawn is subject to the abuse of discretion standard, the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review.

C. DNA Evidence

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[174] http://apps.leg.wa.gov/rcw/default.aspx?cite=10.73.170
[175] U.S. Const. amend IV; Wash. Const. art I, §7. See *State v. Garcia-Salgado*, 149 Wn. App. 702, 705, 205 P.3d 914 (2009)
[176] 158 Wn.2d 759, 147 P.3d 1201 (2006)
[177] Id. at 822

1. General acceptance and admissibility

The underlying theory of DNA testing and typing is generally accepted and admissible.[178]

2. Evidence required

Once a positive laboratory result is obtained, the declaration of a "match" requires statistical analysis to be meaningful. Statistical evidence of genetic profile frequency probabilities must be presented to the jury when DNA evidence is admitted, and the methodology underlying the probability estimate must satisfy the *Frye* standard.[179] Use of the "product rule" in establishing statistical probabilities of genetic profile frequency in the human population is generally accepted within the relevant scientific community, and testimony based on the rule is admissible under *Frye*.[180] Questions about the size of the database underlying genetic frequency go to weight and the admissibility rule governing expert testimony in general, and not to admissibility under *Frye*. If the principle that frequency calculations can be made from an adequate database is generally accepted, then whether the particular database is large enough is a question of application of the science to the particular case, i.e., a matter of weight.[181] Complaints about the quality of population databases, used to support genetic frequency testimony, go to weight and admissibility under ER 702, governing expert testimony in general, and not to admissibility under *Frye*.[182]

3. Evidence from other jurisdictions

Although Washington courts have not fully explored the admissibility of DNA evidence from other jurisdictions, such evidence gathered and analyzed in accordance with the law of the other jurisdiction, is admissible, even though it may not have been gathered and analyzed in accordance with Washington law. This general rule is sometimes called the "silver platter doctrine."[183]

XII. Alcohol/Drug-Facilitated Sexual Assault

In *State v. Lough*, evidence of a defendant's previous sexual assaults on other women was admissible in a prosecution for attempted rape and indecent liberties to prove that the defendant was the mastermind of an overarching plan, scheme, or design to drug and sexually abuse a series of women; the crimes were causally connected because, over period of many years, the defendant utilized his specialized knowledge and skill as a paramedic for

[178] *State v. Cauthron*, 120 Wn.2d 879 (1993)
[179] *State v. Copeland*, 130 Wn.2d 244 (1996) (in reference to *State v. Cauthron*, supra)
[180] Id at 270
[181] Id at 272
[182] Id at 273
[183] 13B *Wash. Prac., Criminal Law §2411*; see also 5B *Wash. Prac., Evidence Law and Practice §702.38*

the purpose of drugging and sexually assaulting women who knew and trusted him, thus rendering them somnolent and wholly or partially amnesiac.[184]

A. Substances

Perpetrators of sexual assault may use alcohol and/or drugs to facilitate sexual assault. RCW 9A.44.010(7) states: "Consent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." The statute defines "mental incapacity" as "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the *influence of a substance* or from some other cause."[185] (emphasis added).[186]

Below is a list of substances commonly-used to facilitate sexual assault:

1. Alcohol

2. Marijuana

3. Benedryl (Diphenhydramines) https://www.drugs.com/benadryl.html

4. Opioids
   http://www.webmd.com/pain-management/guide/narcotic-pain-medications#1

5. Opiates
   http://www.webmd.com/pain-management/opioid-analgesics-for-chronic-pain

6. Benzodiazepines https://www.drugs.com/article/benzodiazepines.html

7. GHB/GBL, aka gamma-hydroxybutyric acid, Schedule I, RCW 69.50.204(d)(1)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.204

8. Amphetamine/Methamphetamine Schedule II, RCW 69.50.206(d)(1) and (d)(2)
   http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.206

9. Ecstasy, aka 3, 4-methylenedioxy amphetamine (MDMA), Schedule I, RCW 69.50.204(c)(11)
   http://apps.leg.wa.go0v/rcw/default.aspx?cite=69.50.204

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[184] 70 Wn. App. 302, 853 P.2d 920 (1993)
[185] http://app.leg.wa.gov/RCW/default.aspx?cite=9A.44.010
[186] Id.

10. Rohypnol, aka flunitrazepam, Schedule IV, RCW 69.50.210(b)(22)
http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.210

11. Ketamine, Schedule III, RCW 69.50.208(b)(7)
http://app.leg.wa.gov/RCW/default.aspx?cite=69.50.208

12. Lysergic Acid Diethylamide (LSD), Schedule I, RCW 69.50.204(c)(21)
http://apps.leg.wa.gov/rcw/default.aspx?cite=69.50.204

B. Crimes Alternatively Charged in Alcohol/Drug-Facilitated Sexual Assault

1. Indecent Liberties RCWA 9A.44.100
http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100

> A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:
> …
> (b) when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;
> (2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

2. Rape in The Second Degree RCWA 9A.44.050
http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> ….
> (b) when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
> (2) Rape in the second degree is a class A felony.

XIII. Polygraphs

A. Generally

Washington courts limit polygraph evidence because polygraph testing has not attained general acceptance by the scientific community.[187] The Washington Supreme Court has suggested that it might reconsider whether unstipulated polygraph evidence is admissible if the proffering party demonstrates that polygraphy meets the *Frye* general acceptance

[187] *State v. Ahlfinger*, 50 Wn. App. 466, 468, 749 P.2d 190 (1988)

standard.[188] However, the court has also observed that polygraph examinations are intrusive and implicate constitutional concerns.[189] Because the polygraph measures psychophysiological response, its scientific validity is assessed by psychologists.[190]

A law enforcement officer, prosecuting attorney, or other government official may not request or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense.[191]

None of the rules discussed in this section restrict the admissibility of statements made during a polygraph test.

B. Stipulated Admissibility

Polygraph results may be admissible if both parties sign a written stipulation, providing for defendant's submission to the test and for the subsequent admission at trial, before the test is administered. The stipulation alone, however, does not assure admissibility. The trial judge has discretionary power to refuse to accept such evidence.

Once offered into evidence, the opposing party has the right to cross-examine the polygraph examiner with respect to "(a) the examiner's qualifications and training; (b) the conditions under which test was administered; (c) the limitations of, and possibilities for error in, the technique of polygraphic interrogation; and (d), at the discretion of the trial judge, any other matter deemed pertinent to the inquiry". If such evidence is admitted, the trial judge should instruct the jury that the examiner's testimony, at most, tends only to indicate that defendant was not telling the truth at the time of the examination; and that it is for the jury to determine what corroborative weight and effect such testimony should be given.[192]

C. Evidence of Administration of Test

Occasionally issues arise, not as to the admissibility of the results, but as to the admissibility of the fact that a polygraph test was or was not given, or the fact that a witness was or was not willing to submit to a test. It is prejudicial error to permit the prosecutor to cross-examine a defendant concerning his or her failure to take a polygraph test.[193] Even evidence that a party has taken a polygraph is considered prejudicial and is inadmissible.[194] The fact that the defendant was willing to take a polygraph test is irrelevant and inadmissible

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[188] Id. at 469
[189] *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 116, 821 P.2d 44 (1991)
[190] Id. at 470
[191] 5D *Wash. Prac. Courtroom Handbook on Washington Evidence, §10.58.038*
[192] *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982)
[193] *State v. Descoteaux*, 94 Wn.2d 31, 614 P.2d 179 (1980) (overruled on a different point in *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)
[194] *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990)

on behalf of the defendant.[195] A federal court has ruled that, likewise, the state is not allowed to bolster the credibility of its witness by showing that the witness is willing to take a polygraph test.[196]

XIV. Sexual Assault Nurse Examiners (SANEs)

Sexual Assault Nurse Examiners (SANEs) are registered nurses who have completed specialized education and clinical preparation in the medical forensic care of a patient who has experienced sexual assault.[197] In *State v. Hudson*,[198] Division Two of the Court of Appeals held that a sexual assault nurse examiner was properly allowed to testify regarding the extent of the victim's injuries, but that the trial court erred in allowing the SANE nurse to testify that the injuries were the result of "nonconsensual" sex, which constituted an impermissible opinion on the defendant's guilt.

[195] *State v. Rowe*, 77 Wn.2d 955, 468 P.2d 1000 (1970)
[196] *U.S. v. Herrera*, 832 F.2d 833 (4th Circ. 1987)
[197] International Association of Forensic Nurses, http://www.forensicnurses.org/?page=aboutsane
[198] 150 Wn. App. 646, 208 P.3d 1236 (2009)