Domestic Violence Criminal Trial Bench Guide

For Judicial Officers

Developed for the 2019 DMCJA Spring Program

Washington State Supreme Court Gender & Justice Commission
Administrative Office of the Courts
PO Box 41170
Olympia, WA98504-1170
(360) 704-4031
www.courts.wa.gov
Published May 2019

DV CRIMINAL TRIAL BENCH GUIDE

Contents

Page

Sixth Amendment Right to Confrontation: *Crawford v. Washington* 2
Crawford Analysis – Nevin 3
Combination *Crawford* Hearsay Analysis – Tegland 4
Crawford Bench Card 5

Useful Cases to Analyze *Crawford* 6
Crawford: Is the witness unavailable? 7
Crawford: Is the statement testimonial? 8
What is *Enough* Cross-examination? 10
Special Situations 11
911 Calls 11
DOL and Contractor Registration Records 11
DNA/ Drug Identification/ DOL Record 12
Smith Affidavit Admissible Subject to Cross-Exam 12

Authentication, Foundation and Use of Evidence at Trial 13
Electronically Stored/Sourced Information (ESI) 13
Photo and Video 13
Text Messages 14
Cell Phone Records 14
Audio Evidence: Tapes and Transcripts. ER 1002 14
Social Media 14

Hearsay and Other Evidence Rules 15
Evidence of Prior Misconduct. ER 404(a) and (b) 15
Hearsay Definition. ER 801 16
Prior Written Inconsistent Statement Under Oath Not Hearsay. ER 801(d)(1) 17
Prior Written Consistent Statement Not Hearsay. ER 801(d)(1) 17
Selected Rule 803 Exceptions 18
Present Sense Impression. ER 803(a)(1) 18
Excited Utterance. ER 803(a)(2) 18
Then-existing mental, emotional or physical condition. ER 803(a)(3) 18
Purpose of Medical Diagnosis or Treatment. ER 803(a)(4) 19
Business and Public Records Exception to Hearsay Rule. ER 901 19

Witness Considerations 20
Expert Witness. ER 701-706 20
Anxious Witness 20
Child as Witness. RCW 5.60.050 20
Reluctant Victim and Remedies 21
Immigration Status Not admissible in Criminal Trial. ER 413 21
Interpreters. ER 604; WPIC 4.65 22

Jury Selection 23

Jury Instructions 24
Definition – Family or Household Member. WPIC 2.27 24
Missing Witness. WPIC 5.20 25
Oral Instruction: Evidence Limited as to Purpose. WPIC 5.30 25
Oral Instruction: Juror Rehearing Trial or Exhibit Testimony. WPIC 4.74 25
Jury Unanimity – *Petrich* Instruction. WPIC 4.25 and 36.51 26
Trial Court Determines NCO Validity. WPIC 36.51 26
Sp. Verdict Form/Instruction – Family/Household Member. WPIC 190.11, 160.00 26

THE SIXTH AMENDMENT RIGHT TO CONFRONTATION: ***Crawford v. Washington***

-- when it was announced, *Crawford* was a *game changer*

Crawford v. Washington, 541 US 36 (2004). Abrogating Ohio v. Roberts, 448 US 56 (1980), SCOTUS held that out-of-court statements by a witness are barred under the confrontation clause, UNLESS the witness is unavailable AND the defendant had prior opportunity to cross examination, regardless of other indicia of reliability (hearsay exceptions). Wife's statement to LE about stabbing by Husband were inadmissible.

> *Or, put another way*: **Testimonial hearsay is not admissible against a criminal defendant unless the out-of-court declarant is present at trial and available for cross-examination.**

State v. Hurtado, 173 Wn.App. 592 (2013). It is the State's duty to produce the declarant for trial. *But consider* Forfeiture by Wrongdoing: A defendant may forfeit the right to the protections of the hearsay rule and the right of confrontation if the defendant causes the declarant's absence. Tegland §1200:23.

> *Sixth Am. to US constitution: In all criminal prosecutions the accused shall enjoy the right…to be confronted with the witnesses against him…"*
>
> *Art. I, Sec 22 of WA State constitution: In criminal prosecutions, the accused shall have the right to … meet the witnesses against him face to face."*[1]

The right to confrontation and the hearsay rule serve similar objectives – to allow a criminal defendant to test the perception, memory, credibility, and narrative powers of the State's witnesses. But they are independent grounds for objection. A *Crawford* objection is ordinarily thought of in the context of the need for cross examination at trial. See extensive discussion at Tegland §1200:1 et seq).[2] See also discussion at DV Manual at Ch. 6, Part B, pp 6-23 to 28.[3]

---

[1] To date the WA courts have not differentiated between the two constitutional provisions. See State v. Pugh, 167 Wn.2d 825 (2009).

[2] References to "Tegland §" refers more formally to Tegland, Karl B, Courtroom Handbook on Washington Evidence 2019-2020 ed., 5D Washington Practice. Less frequent references to Tegland, Washington Evidence, 5 Washington Practice (6th Ed.) are fully cited.

[3] Reference to "DV Manual" refers more formally to DV Manual for Judges 2016, Washington Gender & Justice Commission publication. The DV Manual is available on line at http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index

Crawford Analysis: Nevin

1. **Is the witness available?**
   a. **If yes**, then no *Crawford* issue (unless witness refuses to testify or frustrates cross-examination; memory loss generally not considered frustration of cross), then go to 2.

   b. **If no**, then (1) is the witness truly "unavailable?" **and**
   (2) was there a previous opportunity for cross-examination on the statement?

   IF YES to both questions in (b) then there is no *Crawford* issue.

   IF NO to at least one question in (b), then go to 2.

AND

2. **Is the statement "testimonial"?**

Objective test: Would a reasonable person in declarant's position have an expectation that the statement would be used as evidence? Note, the analysis is from the perspective of a reasonable witness making the statement, not necessarily the witness herself. **YES or NO**

FACTORS TO CONSIDER in determining whether a statement is testimonial:

- To whom was the statement made? (LE or nongovernmental)
- In what capacity was the listener acting?
- Why did the listener hear the statement?
- Was the statement made in response to an emergency? And as to each statement, is it still an emergency?
- When was the statement taken?
- What was the effect of the statement on the listener? What did the listener do with the statement?
- How was it memorialized?
- Was the statement intended to substitute for in-court testimony?
- What was statement?
- How might the statement be reasonably interpreted?

Decision points:

If the answer to (2) is yes, *Crawford* applies, and the statement is inadmissible.

If the answer to (2) is no, then there is no *Crawford* issue and the court must then move on to analyze and rule on an objection on hearsay or other evidentiary grounds.

Combination *Crawford*/Hearsay Analysis Tegland[4]

(If the evidence is not admissible under the ER's or other evidence rules, then there is no need to analyze *Crawford*.)

1. "Is the evidence offered in a proceeding in which the right to confrontation potentially applies? If the answer is no, the right to confrontation is out of the picture, and admissibility is determined solely by the hearsay rule and the exceptions to the hearsay rule.

   If the answer is yes, proceed to step 2.

2. Assuming the statement is within the definition of hearsay, is the statement within an exception to the hearsay rule, or within a category defined as non hearsay by Rule 801? If the answer is no, the analysis is at an end. The statement is objectionable as hearsay and the Sixth Amendment is beside the point.

   If the answer is yes, the statement is admissible as far as the hearsay rule is concerned, but may still be objectionable under the Sixth Amendment. Proceed to step 3.

3. Is the statement testimonial in nature? If the answer is no, the analysis is at an end. The statement is not objectionable under the Sixth Amendment.

   If the answer is yes, proceed to step 4.

4. Has the State produced the out-of-court declarant for cross-examination, either at trial or at an earlier hearing? If the answer is no, the analysis is at an end. The statement is barred by the right to confrontation.

   If the answer is yes, proceed to step 5.

5. Has the defendant had a sufficient opportunity for cross examination? Was the declarant's in-court testimony on direct examination sufficiently substantive to permit meaningful cross-examination? If not, the analysis is at an end. The out-of-court statement is barred by the right to confrontation.

   But if the answer is yes, the statement is admissible."

[4] Tegland §1200:5. Tegland cautions that this analysis takes into account only the Confrontation Clause and the hearsay rule. Other bases for objection, such as relevance, unfair prejudice or privilege may apply.

Two Ways to Analyze Crawford

Statement testimonial?	Witness available?
No; no Crawford. Yes; following must occur:	Yes; no Crawford. No: Ask Testimonial?
Witness must testify (other admissible hearsay may then be introduced), or	If testimonial? Show witness legally unavailable and subject to prior cross. (ER's do apply)
Witness unavailable but subject to prior cross.	

USEFUL CASES TO ANALYZE *Crawford*

Crawford v. Washington, 541 US 36 (2004). Abrogating *Ohio v. Roberts*, 448 US 56 (1980), SCOTUS held that out-of-court testimonial statements by a witness are barred under the confrontation clause, UNLESS the witness is unavailable AND the defendant had prior opportunity to cross x, regardless of other indicia of reliability (hearsay exceptions). Wife's statement to LE about stabbing by Husband were inadmissible.

Who must raise this 6th Am issue? Per *Melendez-Diaz v. Massachusetts*, 557 US 305 (2009), the defendant always has the burden of raising his Confrontation Clause objection. Without objection, a defendant's right to confrontation is waived on that piece of evidence. At 313 n. 3 and at 327. Accord *State v. O'Cain*, 169 Wn.App. 228 (2012); *State v. Schroeder*, 164 Wn.App. 164 (2011). However, more recent cases hold that the Confrontation Clause objection may be raised for the first time on appeal. (Only the hearsay objection is waived by failure to object.) Tegland §1200:24. Whether the appellate court will find error depends on the quantum and quality of evidence that has been presented against the defendant outside of the disputed evidence. "The State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Jasper*, 174 Wn.2d 96, 117 (2012); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); See full discussion Tegland, 5C Washington Practice: Evidence Law and Practice §§ 1300.22 (6th ed.)

Query: Should the trial judge raise a perceived Confrontation Clause issue in the absence of an objection?

Is the witness unavailable?

If the witness is present for cross-examination, then there is no Confrontation issue and *Crawford* does not apply. *State v. Williams*, 137 Wn.App. 736 (2007); Tegland §1200:21. If the witness is unavailable as a witness at trial, and if there is no other opportunity to cross-examine the witness under oath, then the statement is inadmissible.

> "*Crawford* changed Sixth Amendment analysis in the sense that under *Crawford*, the exclusionary rule is not subject to an exception for a statement by an out-of-court declarant who is truly unavailable through no fault of the prosecution. **If the declarant's statement is testimonial hearsay, and if the declarant is not available for cross-examination, the declarant's statement is inadmissible, period.** The statement is inadmissible even if the declarant is unavailable despite the State's best efforts to secure the declarant's presence at trial, and even if the statement falls within an exception to the hearsay rule". Tegland §1200:21 [emphasis added].

State v. Hacheney, 160 Wn.2d 503 (2007). The State must show that a witness is unavailable before the State can resort to presenting the witness's prior testimony. Burden is on the State to show reasonableness and good faith. Hardship for out-of-country witness to return to the USA. Defendant had been present for deposition that included cross-x. Depositions were videotaped so jury to view demeanor of witness, and defense was aware witnesses might be out of the USA at the time of trial. The conviction did not rest entirely on the testimony of the witness.

If the witness is unavailable due to acts of the defendant, the Forfeiture by Wrongdoing Rule may apply. ER 804(b)(6) (adopted 2013). In a DV case, the defendant called the victim from jail threatening to have her killed if she testified. When she failed to appear as a witness the State was properly allowed to introduce the victim's out-of-court statements. *State v. Dobbs*, 180 Wn.2d 1 (2014). Forfeiture by wrongdoing is an equitable concept: if the defendant is responsible for a witness' unavailability at trial, the defendant forfeits his right under the Confrontation Clause to confront the missing witness. Thus, the *Smith* affidavit relating to prior kidnapping was admissible in trial of murder of same victim. *State v. Mason*, 160 Wn.2d 910 (2007). See generally Tegland §1200:23.

Is the statement testimonial?

-- Evolution of the primary purpose test

Davis v. Washington, 547 US 813 (2006). Victim statements in response to 911 operator were not testimonial when made simultaneously with NCO violation and for the primary purpose to meet ongoing emergency. Victim's later statement to LE was testimonial - primary purpose was to investigate past crime. Statements that are in part testimonial (and in part not), should be redacted so the jury only hears the admissible evidence.

State v. Pugh, 167 Wn.2d 825 (2009). Statements by wife to 911 operator were non-testimonial and federal confrontation clause is not violated. She was requesting help for an ongoing safety emergency including medical aid. The majority further held that under state law the statements fall under the res gestae rule and thus do not offend the WA State confrontation clause.

Michigan v. Bryant, 562 US 344 (2011). Established an objective evaluation standard of the circumstances, and the statements and actions of the parties. In determining the primary purpose of an interrogation, for purposes of whether testimonial, standard rules of hearsay, designed to identify some statements as reliable, are relevant. The inquiry is highly contextual. The medical condition of the declaration and the type of weapon were important factors. Here, a reasonable person would have believed the emergency was still on-going.

State v. Beadle, 173 Wn.2d 97 (2011). Applying the primary purpose test, 4-year-old victim statements to CPS were testimonial and not admissible at the pretrial child-witness hearing. See also *State v. Hopkins*, 137 Wn.App. 441 (2007). However, child statements to family members and therapists were admissible because child was found unavailable (due to serious emotional breakdown and no other remedy worked).

State v. Fraser, 170 Wn.App. 13 (2012). Murder victim's prior statement to LE about his fear of defendant, although admissible to prove the victim's state of mind, does not defeat Confrontation Clause. The statement was testimonial. With no evidence that the murder was committed to prevent declarant's testimony, forfeiture of rights by wrongdoing did not apply.

State v. Reed, 168 Wn.App. 553 (2012). Victim statements to 911 operator in several calls were parsed by the court to determine whether each statement was testimonial. The primary purpose test was applied to determine if there was an emergency and if it was ongoing. An objective evaluation of the circumstances from the point of view of everyone is required. The court should look at timing of the statements relative to the events, what is asked and answered, the threat of harm (a plain call for help against a bona fide physical threat) or whether the threat has been neutralized, the level of formality of the interrogation. Redaction is permissible if the court finds the admission would unduly prejudice the defendant.

State v. Doerflinger, 170 Wn.App. 650 (2012). Radiologist findings of a broken nose was not testimonial when entered into evidence by the treating MD. The findings were introduced by the business records exception (RCW 5.45.020) and statements made for purposes of medical diagnosis and treatment (ER 803(e)(4)).

State v. Hurtado, 173 Wn.App. 592 (2013). The correct standard, if the declarant is a nongovernmental witness, is the "declarant-centric" standard which focuses on the declarant's intent to evaluate the circumstances in which the out-of-court statements were made. The inquiry is whether a reasonable person in the declarant's position would anticipate his statement will be used against the accused in investigating and prosecution of the alleged crime. Statements to medical personnel are nontestimonial if 1) made for diagnosis/treatment, 2) where there is no indication the witness expected statements be used at trial, and 3) where the doctor is not employed by or working for the state. Victim statements to ER nurse about who hit her were testimonial (LE present for entire exam and LE also simultaneously collected evidence), but harmless considering the quantum of other evidence.

State v. Berniard, 182 Wn.App. 106 (2014). An investigating officer cannot relay nontestifying (and not a joint trial) codefendant's out-of-court testimonial statements. The trial court's attempt at a limiting instruction was misplaced. Reversed and remanded.

State v. Fisher, 184 Wn.App. 766 (2014)(aff in part and rev in part on other grounds, *State v. Fisher*, 185 Wn.2d 836 (2016). The rules are different in trial of joined codefendant who did not testify. LE relayed out of court testimonial statement which was admitted in violation of the confrontation clause. CrR 4.4(c) and the *Bruton* Rule discussed by the court. Because of substantial other evidence the error was found to be harmless.

State v. Goggin, 185 Wn.App. 59 (2014). In a trial for felony DUI (requiring proof of 4 prior offenses), proof of authenticity of 3 local offenses was established to show the person named in the proffered document was the defendant. (DOL photos, booking photos and police officers in the local prior arrests). The certified document establishing the defendant's judgment and sentence for DUI in Idaho was a nontestimonial statement and admissible under RCW 5.44.010 with proof correlating to the defendant. The defendant's identity was confirmed by the photographic DOL ID card with identifying physical information.

State v. Perez, 184 Wn.App. 321 (2014). The victim statement of an attempted murder victim was nontestimonial, and admissible under the excited utterance exception to the hearsay rule. An objective analysis must be made as to what reasonable participants would have believed was the primary purpose based on statements, actions and circumstances surrounding the statement. Questions were asked to be able to respond to the ongoing medical emergency of the prisoner injured while in custody and to identify the risk to others held in the facility. Excited utterance requires 3-prong test: 1) startling event or condition occurred; 2) declarant made statement while under stress of excitement of startling event or condition; and 3) the statement related to the startling event or condition. ER 803(a)(2).

Ohio v. Clark, 576 US___, 135 S.Ct. 2173 (2015). Three-year old's statements to preschool teachers identifying defendant as person who caused injuries were not testimonial. Using the primary purpose test, SCOTUS stated trial court should look at formality of interrogation setting and then standard rules of hearsay to determine reliability. Here the primary purpose was not law enforcement to gain evidence, but teacher to stop ongoing child abuse.

State v. Robinson, 189 Wn.App. 877 (2015). Bystander call to 911 reporting a fight was non-testimonial.

State v. Wilcoxon, 185 Wn.2d 324, 328-36 (2016). Where an out-of-court statement made by a nontestifying codefendant is not testimonial, it is outside the scope of the confrontation clause. The statement in Wilcoxon was a casual remark made to a friend with no expectation of prosecution as a result. See also US v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010).

State v. Streepy, 199 Wn.App. 487 (2017). Seven-year old's statements to LE were not testimonial where made at home just moments after viewing assault of his mother.

State v. Scanlan, 2 Wn.App.2d 715 (2018). Statements to medical providers were not testimonial. Statements to LE were testimonial. Primary purpose test was applied. (Pet for rev granted #95971-4).

State v. Burke, 6 Wn.App.2d 950 (2018). Victim was not available at trial. Statements made by victim to sexual assault nurse examiner (SANE) were testimonial. The court enunciated the primary purpose test: "a declarant's statements are testimonial if they are made under circumstances that objectively demonstrate that the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution." At 968. "The court must objectively evaluate the circumstances of the encounter and the statements in context, including, but not limited to, whether there was an ongoing emergency, where the interview took place, the formality or informality of the interrogation, and the identity of the person to whom the declarant was speaking." At 969. Whether the examiner is law enforcement or is a person not *principally* charged with uncovering and prosecuting criminal behavior is significant. In Burke, the evidence showed the exam was both medical and forensic. There was no ongoing emergency and the victim signed a written consent to SANE "forensic exam" to include “documentation of the assault and the collection of evidence".

What Is *Enough* Cross-Examination?

See generally ER 611 -- Mode and Order of Interrogation and Presentation. See also Tegland §611:1, 8, and 9; Tegland §1200:22.

State v. Hacheney, 160 Wn.2d 503 (2007). Demonstrated hardship for out-of-country witness to return to the USA. Defendant and counsel had been present for deposition that included cross-examination. Admitted depositions were videotaped so jury could view demeanor of witness, and defense was aware witnesses might be out of the USA at the time of trial. The conviction did not rest entirely on the testimony of the witness.

State v. Mason, 160 Wn.2d 910 (2007). Forfeiture by wrongdoing is an equitable concept: if the defendant is responsible for a witness' unavailability at trial, the defendant forfeits his right under the Confrontation Clause to confront the missing witness. Smith affidavit relating to prior

kidnapping was admissible in trial of murder of same victim. [See also Forfeiture by Wrongdoing, ER 804(b)(6) adopted 2013.]

State v. Dye, 170 Wn.App. 340 (2012). Presence of facility dog during testimony does not foil the mission of cross examination. The Confrontation Clause is normally satisfied "if defense counsel receives wide latitude at trial to question witnesses." At 346. The court balanced the need of the witness with any potential prejudice and read a limiting instruction to the jury "not to make any assumptions or draw any conclusions based on the presence of this service dog." At 348.

State v. Kinzle, 181 Wn.App. 774 (2014). The prosecutor must ask the difficult questions: When prosecutor did not directly ask child witness whether the defendant or anyone else touched the victim's private parts, the defendant's right to confrontation and cross-examination was violated. The defense was caught in a constitutionally impermissible situation of himself calling victim for direct exam or waiving his constitutional right to full and effective cross-examination. Accord *State v. Price*, 158 Wn.2d 630 (2006); *State v. Rohrich*, 132 Wn.2d 472 (1997).

Special Situations

911 Calls. The testimonial question revolves around the on-going emergency. Each question and answer should be considered using the objective primary purpose test. See cases above; See discussion at Tegland §1100:10.

DOL AND CONTRACTOR REGISTRATION RECORDS

State v. Jasper, 174 Wn.2d 96 (2012). Citing Crawford, WA Supreme Court held that affidavit from legal custodian of driving records stating that custodian performed diligent search of records, and that records indicated that defendant's driver's license was Suspended 1st degree, why suspended, and on date certain was all testimonial. In the case joined on appeal, a certified letter from DSHS about status of a defendant's contractor registration was testimonial. Admission of affidavit without determination that custodian was unavailable and without opportunity to cross-examine custodian violated defendant's right of confrontation in each instance. (Overruling several older Washington cases, *Kronich* and *Kirkpatrick*.) The court expressly stated the right to confrontation is not cured by having a clerk sign a records search under the business records or public records exceptions to the hearsay rule. These affidavits are not authentication of otherwise admissible public record, but evidence of the clerk's interpretation of what the record shows.

State v. Rainey, 180 Wn.App. 830 (2014). The State conceded error on appeal. A certified copy of the defendant's driving record in a DWLS3 case is testimonial. The hearsay rule permitting a business or public record does not overcome the right to confrontation.

DNA/ Drug Identification/ Defendant Driving Record

Melendez-Diaz v. Massachusetts, 557 US 305 (2009). SCOTUS 5-4, held toxicology certificates of analysis were affidavits subject to Confrontation clause. Identification of seized property as Cocaine was made by state lab analysts. Sole purpose of the affidavits was to provide evidence for the criminal trial. Not obviated by business record rule nor merely routine science.

Bullcoming v. New Mexico, 564 US 647 (2011). Defendant had right to confront DUI BAC test analyst. Report from state lab was testimonial and created for the purpose of evidentiary use. If authoring analyst is unavailable, testimony of a surrogate is usually not permitted.

Williams v. Illinois, 567 U.S. 50 (2012). Bench trial. SCOTUS opinion split. DNA profile expert permitted to testify there was a DNA match. The primary purpose of the DNA profile in semen was to catch a dangerous rapist still at large, not to obtain evidence for use against the named defendant, who was not yet in custody nor under suspicion.

State v. Lui, 179 Wn.2d 457 (2014). Analysts extracting DNA samples for testing thru a machine were not expert witnesses and confrontation clause does not apply. (Not until the samples are linked to the named defendant.) Taking temperature at crime scene was not inculpatory act and does not implicate the confrontation clause. Medical examiner's statements of fact recited from autopsy and toxicology reports authored by third persons, did violate ER 703 and confrontation clause.

***Smith* Affidavit admissible if declarant subject to cross-examination.**

State v. Smith, 97 Wn.2d 856 (1982). Prior inconsistent statement made under oath is not hearsay if declarant testifies and is subject to cross-examination. Indices of reliability is the key concern.

State v. Thach, 126 Wn.App. 297 (2005). Prior inconsistent written statement under oath (Smith affidavit) was admissible when declarant subject to cross. ER 801(d)(1)(i). Character/reputation evidence of peace and non-violence in the family was not admissible. ER 608(a).

State v. Otton. 185 Wn.2d 673 (2016). Asked to define “other proceeding” in ER 801(d)(1)(i), the Supreme Court held that a prior out-of-court statement may include police interview arising from a similar prior allegation. At issue was a Smith affidavit by the same victim signed some years before. Victim was available for cross in most recent case. ER 801(d)(1)(i) is applied using a 4-part test: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure for determining probable cause, (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement.

AUTHENTICATION, FOUNDATION AND USE OF EVIDENCE AT TRIAL

Electronically Stored/Sourced Information (ESI) (Text, email, social media and other electronic communications and data) – ER 901 (10). For purposes of the crime of Cyberstalking, see 9.61.260 and WPIC 36.86 for definition of electronic communication.

Washington, like most courts addressing the question, concludes that the same evidentiary considerations apply to ESI as apply to other evidence. See Tegland §901.17. ER 901 (10) establishes a suggested non-exclusive method of authenticity for emails. See the application in *State v. Young*, 192 Wn.App. 850 (2016). Tegland suggests the email authenticity checklist can generally be used for text messages; however, applicability to social media may be made more difficult by issues related to forgery by anonymous posting. Tegland §901.17.

> Test: The leading trial court case of *Lorraine v. Markel Insurance*, 241 F.R.D. 534 (2007), in over 50 pages, held that admissibility of ESI can be broken down into "a series of hurdles to be cleared by the proponent of the evidence."
>
> The *Lorraine* hurdles are: (1) Is the ESI relevant under Rule 401?; (2) Is the ESI authentic under Rule 901?; (3) Is the ESI hearsay or subject to an exception under Rules 801-807?; (4) Is the form of ESI an original or duplicate under Rules 1001-1008?; and, (5) Is the probative value of the ESI substantially outweighed by the danger of unfair prejudice under rule 403?

State v. Hummel, 165 Wn.App. 749 (2012). Evidence of computer searches conducted by children of murder defendant and by others to try to locate victim did not violate 6th amendment. The persons who conducted the searches were available at trial for cross examination on issue of reliability.

State v. Wade, 186 Wn.App. 749 (2015). Investigator testimony regarding the date on which the last debit card transaction on murder victim's bank account occurred was testimonial and in violation of the Confrontation Clause. She admitted that she got the information about delay in computer posting dates from another investigator. This explanation was needed for her to testify as to the actual date of the transaction. Overwhelming evidence of guilt enabled the court to find harmless error.

Photo and video. ER 901 -- Authentication of a Photograph/Video. See Tegland §901:14. Does the photograph reasonably accurately portray the subject depicted? Is the witness able to make this statement? The witness does not have to be the actual photographer, nor have an exact date or time.

State v. Sapp, 182 Wn.App. 910 (2014). Authentication of photos and videos depicting defendant committing a crime permitted even though the witness had no personal knowledge of the events themselves. (Grandmother recognized the defendant, the victim and age, as well as the location in the evidence.)

Text messages. ER 1002. See also checklist in Tegland -- MCL 8 at pp 532-33 (Video images – Text messages, Caller ID, Internet-based information displayed on computer monitor).

State v. Bradford, 175 Wn.App. 912 (2013). Content of the messages themselves indicated that the defendant authored the text messages. ER 901(a).

Cell phone. *State v. Fraser*, 170 Wn.App. 13 (2012). Admission of cell phone records without authentication and compliance with Confrontation Clause was upheld because defendant did not object.

Audio Evidence: Tapes and Transcripts – ER 1002. Authentication of Audio record (ER 901(b)(5) and (6)); Tegland §901.10. See also Tegland §901:8 Voice identification, generally. See ER 1002 –Contents of Writings, Recordings, and Photographs. See also checklist in Tegland MCL 7 at p. 532 (Audio recordings).

Jury may hear a replay of audio or video evidence. It is error to refuse a jury's request to rehear –at least once – a 911 tape. *State v. Oughton*, 26 Wn.App. 74 (1980). Several procedures have been approved. See *State v. Smith*, 85 Wn.2d 840 (1975); *State v. Frazier*, 99 Wn.2d 180 (1983)(child witness testimony by video); *State v. Koontz*, 145 Wn.2d 650 (2002)(jury replay of audio tape). See also DV Manual Ch. 5, Part XI, p. 5-13. See *Juror Rehearing Trial or Exhibit Testimony, WPIC 4.74* discussion below.

Jury may receive a transcription of audio evidence. In the discretion of the court, a transcript may be a helpful listening aid for the jury. See *State v. Clapp*, 67 Wn.App. 263 (1992); *State v. Castellanos*, 132 Wn.2d 94 (1997); see discussion Tegland §1002:4 – Transcript as Listening Aid.

> *Practice tip*: A transcript marked as an exhibit can be of substantial help to the court as it rules on evidentiary or constitutional objections. Whether or not the exhibit goes to the jury (after appropriate deletions of non-admissible material) is discretionary.

US v. McMillan, 508 F.2d 101 (1974). The standard for admissibility of an opinion as to the ID of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time. Use of transcript and whether to furnish copies to jurors is within discretion of the court. A process for use of a transcript and a limiting instruction is described carefully by the court.

State v. Reed, 168 Wn.App. 553 (2012). Victim statements to 911 operator in several calls was analyzed by the court to determine whether each statement was testimonial. The primary purpose test was applied. Redaction is permissible if the court finds the admission would unduly prejudice the defendant.

Social Media. *Tienda v. Texas*, 358 SW 3rd 633 (2012). Court inquiry: are the facts sufficient to support a reasonable jury determination that the evidence is authentic. ER 901. Content of the webpage showing authorship included photos of defendant, his music, condition of his mother's house and other personal identifying info.

Parker v. Delaware, 85 A.3d 682 (2014). Detailed and useful discussion of the judicial gate-keeping function. Rule 901(a) applies to social media. Preliminary inquiry whether there is evidence sufficient to support a finding that the matter in question is what its proponent claims. Might include testimony of witness who states that or the distinctive characteristics of the evidence itself, or evidence that shows accurate production through a process or system. Once meets preliminary inquiry and admitted, the jury decides weight to be given.

HEARSAY AND OTHER EVIDENCE RULES

Evidence of prior misconduct. ER 404(a) and (b).

Although character evidence is never admissible for the purpose of proving a defendant is a criminal or dangerous propensity, and thus more likely to have committed the charged offense, it may be admissible in specific situations such as: Self-defense, first aggressor or reasonable apprehension. See generally DV Manual Ch 6, Part III. Tegland §404:29 -31 describes the necessary preliminary hearing procedures to be followed.

Evidence of a defendant's prior acts of DV should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *State v. Acosta*, 123 Wn.App. 424 (2004). See detailed discussion about the intersection of ER 404 and DV cases at Tegland §404:25 and Tegland, 5 Washington Practice: Evidence §404:30 (Sixth Ed).

If the defendant alleges self-defense, ER 404(a)(2) allows the defendant to show the victim's reputation for quarrelsome or violent disposition. The state may be entitled to rebuttal. Tegland §404:5; see also DV Manual Ch 6, Part IV.

To rebut a defense claim that the victim fabricated the charge, the court in *State v. Nelson*, 131 Wn.App. 108 (2006) permitted admission of defendant's previous acts of violence against that victim.

Nonetheless 404(b) evidence has been admitted for the limited purpose of showing the victim's state of mind. See *State v. Johnson*, 172 Wn.App. 112 (2012)(rev. in part on other grounds, *State v. Johnson*, 180 Wn.2d 295 (2014))(to show victim's fear); *State v. Baker*, 162 Wn.App. 468 (2011)(to evaluate victim credibility with full knowledge of the dynamics of a relationship marked by DV); and *State v. Nelson*, 131 Wn.App. 108 (2006)(to show victim's fear and to rebut defendant's claim that she fabricated claim). Tegland suggests recent split decisions in Supreme Court opinions have not clarified all the questions. See *State v. Magers*, 164 Wn.2d 174 (2008); *State v. Gunderson*, 181 Wn.2d 916 (2014); and *State v. Ashley*, 186 Wn.2d 32 (2016). Tegland §404:24-25.

In addition, ER 404(b) evidence may be admissible for a variety of other reasons, including, according to Tegland at 404:12-28:

- Inseparable part of crime charged (res gestae)
- Circumstantial evidence of crime charged
- To show a common scheme or plan
- To show knowledge
- To rebut claim of mistake or accident
- To establish identity
- To show distinctive modus operandi
- To show motive
- To show intent
- To show sexual contacts with the same victim
- To show consciousness of guilt
- To rebut material assertion by the defendant
- To explain victim's delay in reporting crime, or recantation
- To show sexual motivation
- To show pretext for discrimination.

A limiting instruction should be given for limited purpose evidence. *State v. Gresham*, 173 Wn.2d 405 (2012). WPIC 5.30; Tegland §404:32.

Hearsay Definition. ER 801.

ER 801 defines Hearsay (a)-(c):

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

A statement is *not hearsay* at all if the declarant testifies at the trial and is subject to cross-examination and the statement is (i) inconsistent with the declarant's prior testimony; or (ii) is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive or (iii) the statement is one of identification of a person made after perceiving the person. ER 801(d).

A declarant is defined as a 'person', not a label on a can, license plate, gas receipt, video-only recording or time on a digital clock. Tegland §801:1; §1200:8.

A statement is an oral or written assertion and may include nonverbal conduct if intended as an assertion. Generally, a statement refers to an assertion of fact as opposed to the witness's own observations. Tegland §801:2.

If declarant testifies, a prior written *inconsistent* statement given under oath is not hearsay. ER 801(d)(1).

The rule has been interpreted broadly to include sworn complaint is given to law enforcement. State v. Smith, 97 Wn.2d 856 (1982). The statement must be written and under oath or affirmation; even a statement recorded by law enforcement electronically is not admissible under ER 801. *State v. McComas*, 186 Wn.App. 307 (2015). A declaration under penalty of perjury may be substituted for an affidavit, but not an unsworn declaration. GR 13; Tegland §801:12.

In 2016 the Washington Supreme Court rejected a defense argument to abolish the Smith affidavit. *State v. Otton*, 185 Wn.2d 673 (2016). The *Otton* court was also asked to define "other proceeding" in ER 801(d)(1)(i), the Supreme Court held that a prior out-of-court statement may include police interview arising from a similar prior allegation. At issue was a *Smith* affidavit by the same victim signed some years before. Victim was available for cross in most recent case. ER 801(d)(1)(i) should be applied using a 4-part test: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure for determining PC, (4) whether the witness was subject to cross-x when giving the subsequent inconsistent statement. *Otton, supra*.; Tegland §801:12.

If declarant testifies, a prior written *consistent* statement is admissible to rebut an express or implied charge against the declarant of recent fabrication or improper motive. ER 801(d)(1)

Vigorous cross-examination implying bias or fabrication usually will trigger ER 801(d)(1). The prior consistent statement is admissible only if made before there is a motive to fabricate the new story. *State v. Ellison*, 36 Wn.App. 564 (1984). Tegland §801:13

Although it need not be under oath, the prior consistent statement must be written; even an electronically recorded statement is not admissible under ER 801. *State v. McComas*, 186 Wn.App. 307 (2015).

Selected Rule 803 Exceptions: ER 803 provides that, whether or not a declarant is available as a witness, the hearsay rule does not exclude the following: (1) Present Sense Impression, (2) Excited Utterance, (3) Then Existing Mental, Emotional or Physical Condition, or (4) Statements for Purposes of medical Diagnosis or Treatment.

> 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. ER 803(a)(1).

This rule presumes that the element of spontaneity reduces the chance of misrepresentation. The rule does not require that the statement be in response to a starting or exciting event. Ordinarily a response made to a question will not qualify. Tegland §803:2.

> 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. ER 803(a)(2).

The statement must be made relating to a sufficiently startling event and a showing that the declarant was still under the influence of it. The key is spontaneity. State v. Ross, 42 Wn.App. 806 (1986); State v. Dixon, 37 Wn.App. 867 (1984). The time between the statement and the event is relevant but not determinative. Tegland §803:3. See also Tegland §803:5 for a discussion of excited utterance statements in several cases involving assault or sexual assault.

The statement of a DV victim to a 911 operator may qualify even though the statement is later recanted in part. State v. Magers, 164 Wn.2d 174 (2008).

State v. Perez, 184 Wn.App. 321 (2014). The victim statement of an attempted murder victim was nontestimonial, and admissible under the excited utterance exception to the hearsay rule. An objective analysis must be made as to what reasonable participants would have believed was the primary purpose based on statements, actions and circumstances surrounding the statement. Questions were asked to be able to respond to the ongoing medical emergency of the prisoner injured while in custody and to identify the risk to others held in the facility. Admissibility of the excited utterance requires 3-prong test: 1) startling event or condition occurred; 2) declarant made statement while under stress of excitement of startling event or condition; and 3) the statement related to the startling event or condition.

> The **then-existing mental, emotional or physical condition exception** is sometimes referred to as the **"state of mind" exception.** To be admissible requires 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 unless it relates to the execution, revocation, identification, or terms of declarant's will. ER 803(a)(3).

The rule is concerned only with the statement describing the declarant's then-existing state of mind or bodily condition. Expressions of intent, plan or motive may be admissible; however past state of mind (also called statements of memory or belief) are not included within the rule. *State v. Parr*, 93 Wn.2d 95 (1980). If the declarant's state of mind is not relevant, it may be excluded. An expression of fear might become relevant if the defendant interposes a defense of accident or self-defense. Tegland §803:8.

A **statement for purposes of medical diagnosis or treatment** is a statement 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. ER 803(a)(4).

The rule is broadly worded to allow statement of past and present symptoms. The rule also permits at least some statements relating to causation (but not fault) if reasonably pertinent to the symptoms complained of. The rule is based upon the assumption that a person making such a statement wants to have an accurate diagnosis and treatment. Tegland §803:12, 16.

The rule also applies to medical providers. The radiologist's finding of a broken nose was not testimonial when entered into evidence by the treating physician. The findings were introduced through the business records exception (RCW 5.45.020) and statements made for purposes of medical diagnosis and treatment under ER 803(e)(4). *State v. Doerflinger*, 170 Wn.App. 650 (2012).

The rule was originally written with physicians in mind and has been broadly applied to other medical providers who are an essential part of the medical team, including counselors and therapists or others treating psychological issues. However, cases are less clear where the medical personnel are acting less as a therapist and more as an investigator. Tegland §803:15.

Appellate courts are inconsistent in result if the court finds that a child is too young to be competent to testify or too young to have a treatment motive as she makes a statement to a medical caregiver. Tegland §803:17.

Business and Public Records Exception to Hearsay Rule. ER 901

Business and public records are non-testimonial under *Crawford* if prepared for public or business purposes and *not prepared for use as evidence*. See cases cited above; also see

ER 901; CR 44; RCW 5.44.040; Tegland §1200:15. For example, the following documents have generally been found to be nontestimonial: Certified copies of convictions offered in trial for escape; court order for next hearing offered in trial for failure to appear; video recording of the court proceeding when the NCO was entered offered in a trial for Violation of NCO; and in a prosecution for theft of furniture, business records showing cost. Tegland, supra.

WITNESS CONSIDERATIONS

Expert Witness. ER 701-706 and WPIC 6.51. In the court's discretion, an expert may be offered to support a claim of self-defense by explanation of the Battered Person Syndrome. ER 702. *State v. Green*, 182 Wn.App. 133 (2014); *Saldivar v. Momah*, 145 Wn.App. 365 (2008). Test for court to exercise discretion: (1) is the witness qualified to testify as expert, (2) is the expert's theory based on theory generally accepted in scientific community, and (3) would testimony be helpful to fact finder. Saldivar at 397-99. Generally see Tegland at 702:18; See also DV Manual, Ch 6, Part VIII, pp 6-33.

An expert may be offered by the defense to explain demeanor, delay in reporting, recantation or minimizing of the incident. DV Manual, Ch 6, Part VIII at 6-35.

Anxious Witness. *State v. Dye*, 170 Wn.App. 340 (2012). Presence of facility dog during testimony does not foil the mission of cross examination. The Confrontation Clause is normally satisfied "if defense counsel receives wide latitude at trial to question witnesses." At 346. The court balanced the need of the witness with any potential prejudice and read a limiting instruction to the jury "not to make any assumptions or draw any conclusions based on the presence of this service dog." At 348.

See SB 5551 (Ch. 398, Laws of 2019, eff. 7-28-2019) -- Courthouse dog must be permitted for a witness under the age of 18 or a person with a developmental disability. The new statute establishes dog and handler requirements and specifies discretionary factors for the court to consider concerning other witnesses. The legislation recognizes that courts may establish additional rules.

Child as Witness. Competency of child to testify. See RCW 5.60.050. The test is whether the child understands the obligation to speak truth on the witness stand, mental capacity at the time of the occurrence concerning which the child is to testify, capacity to express in words the child's memory and the capacity to understand simple questions about the occurrence. *State v. Allen*, 70 Wn.2d 690 (1967). There is a rebuttable presumption that all witnesses, including children, are competent to testify. A child psychologist who examined the witness concluded that the child was competent to testify, therefore no pretrial competency hearing was required. *State v. Brousseau*, 172 Wn.2d 331 (2011).

No specific script or formula for an oath or affirmation is required. The witness must give some indication of truthful intent. The trial court properly allowed an eight-year old to testify without a formal oath, where the prosecuting attorney asked the child a series of questions designed to demonstrate the child's intent to testify truthfully. *State v. Dixon*, 37 Wn.App. 867 (1984); ER 603. See Tegland §603:2

If a child is testifying about physical or sexual abuse to himself by another, see RCW 9A.44.120 [5]; ER 807 and Tegland at §807:1-8. See generally DV Manual at Part VII, Page 6-29.

The statute was drafted with the confrontation clause in mind. The child's statements are testimonial; however, an opportunity for cross-examination either at trial or pre-trial is a prerequisite to admissibility. If a child is unavailable (due to young age or otherwise), a hearing is required. Tegland §807:1-4.

The court may protect a child under age 14 who is a victim of physical or sexual abuse or attempted abuse by permitting testimony over closed circuit tv so long as cross examination is available and certain factors are met. RCW 9A.44.150. See DV Manual at Ch 5, Part VII.

ER 611 provides that the court has discretion to control courtroom proceedings and witness examination. *State v. Dye*, 170 Wn.App. 340 (2012). In *State v. Hakimi* , 124 Wn.App. 15 (2004) a child was permitted to hold a doll while testifying. Presence of facility dog during testimony does not foil the mission of cross examination. The Confrontation Clause is normally satisfied "if defense counsel receives wide latitude at trial to question witnesses." At 346. The court balanced the need of the witness with potential prejudice and read a limiting instruction to the jury "not to make any assumptions or draw any conclusions based on the presence of this service dog." At 348.

See SB 5551 (Ch. 398, Laws of 2019, eff. 7-28-2019) -- Courthouse dog must be permitted for a witness under the age of 18 or a person with a developmental disability. The new statute establishes dog and handler requirements and specifies discretionary factors for the court to consider concerning other witnesses. The legislation recognizes that courts may establish additional rules.

The Reluctant Victim, Research, Remedies, Continuances and Compelled Testimony.

See extensive discussion in DV Manual, Ch 5, Part I-IV. See also Ch. 5, Part XI, Attachment 1: Victim Reluctance or Refusal to Testify: Recommended Practices.

RCW 7.69.030(10) provides that a victim of violent or sex crime has the right to a crime victim advocate or other support person present at any prosecutorial or defense interview and at any judicial proceeding related to the acts committed against the victim. The right is available where practical and if presence of the advocate does not cause unnecessary delay in the process. See also Washington State Const. Art I, §35 (Victims of Crimes – Rights).

[5] New legislation amended 9A.44.120 to allow hearsay statements of a child up to the age of sixteen when the statement describes specified trafficking or sexual abuse of a minor. SSB 5885 (Ch. 90, Laws of 2019, eff. 7-28-19).

Immigration status generally not admissible in a criminal trial. ER 413. (effec. 9-1-18).

ER 413 (effective 9-1-18) provides that **evidence of a party or a witness' immigration status *shall not* be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607.** *The rule mandates the timing and format for a written pretrial motion to raise the issue.* As of this date, there are no reported cases in Washington expressly discussing ER 413, but non-reported cases may be instructive to the court as to issues anticipated to be raised in jury selection or presentation of evidence. Tegland §413:1 and 2.

State v. Romero-Ochoa, ____Wn.2d____(#95905-6 decided 6-16-19)(rev. 2017 unpublished Div 2 opinion-#48454-4-II). The Supreme Court recognized that "a prosecution witness's U visa application could, given the right set of facts, support a defense theory milder than outright fraud." In this case however, the defendant either committed rape 1 predicate on burglary or at most was invited into the house and committed rape 2. The case did not depend only on testimony of the victim. After close scrutiny of all of the untainted evidence, the Court found the evidence of guilt to be overwhelming and harmless beyond a reasonable doubt. All convictions reinstated. (Facts: victim applied to the prosecutor for a U visa seeking immigration relief based on cooperation. The prosecutor's office does not process such a visa until the case is concluded. Defense sought to impeach the victim based on the application. Trial court excluded the U visa evidence finding probative value overwhelmed by prejudicial effect.)

State v. Streepy, 199 Wn.App. 487 (2017). The trial court properly denied impeachment of victim based upon her immigration status and lack of)knowledge of opportunity for a U visa.

The First Amendment of the US Constitution prohibits a court from prohibiting any person from reporting information to law enforcement, including immigration authorities. *In re Marriage of Meredith*, 148 Wn.App. 887 (2009).

RPC 4.4 provides that no lawyer may assert or inquire about a third person's immigration status when the lawyer's purpose is to intimidate, coerce or obstruct that person from participating in a civil matter. RPC 8.4(d) further prohibits a lawyer from conduct toward parties and witnesses (and others named) that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status.

RCW 10.40.200 At the time of the plea no defendant may be required to disclose his or her legal status to the court.

Interpreters. GR 11, 11.1, 11.2; ER 604; RCW 2.43; WPIC 4.65.

In Washington state the use of certified or registered interpreters is required when available. RCW 2.43; GR 11, 11.1, 11.2; ER 604. Extensive information is available through the *Deskbook on Language Access in Washington Courts*, June 2017. The Deskbook is available at the Washington State Administrative Office of the Courts website:

http://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf

Communications through an interpreter are themselves privileged and remain subject to other privileges that apply. RCW 2.42.160.

To avoid the appearance of bias and uphold neutrality, care should be taken to avoid having an interpreter provide services for both parties to the domestic violence proceeding, and to avoid service in a matter in which the interpreter has a potential conflict of interest. An interpreter who has acted in an investigative capacity for any party or if the interpreter has been retained by a law enforcement agency to assist in case preparation, should not serve at trial. GR 11.2 and Comments thereto.

WPIC 4.65 is an oral instruction intended for use when an interpreter is needed for a witness or party on the witness stand. The instruction may need to be revised if an interpreter is needed for a party throughout the proceedings. WPIC 4.65 and Comment thereto.

JURY SELECTION

Discrimination in jury selection is prohibited. GR 37 (adopted 4-24-18); *City v. Erickson*, 188 Wn.2d 721 (2017) and cases cited therein. Although the rule concerning jury selection was first announced in *Batson v. Kentucky*, 476 U.S. 79 (1986) as an Equal Protection right of a criminal defendant relating to race, it has evolved as the right of a citizen to serve on a civil or criminal jury panel. In Washington state, GR 37 is more broadly protective of the juror's right to serve than the old *Batson* Rule or the preexisting case law in Washington:

> ***GR 37:*** **If the objection to the challenge is based on GR 37, the judge must determine if an "objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge". If so, the objection SHALL be denied. An objective observer is defined: "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." A record should be made by the judge.**

See also *State v. Jefferson*, 192 Wn.2d 225 (2018).

Most of the reported cases rise out of a discriminatory purpose alleged to relate to race or ethnicity; however, the *Batson* rule is relevant to other protected classes, including gender. Wash. Const. art. XXXI, Sex Equality –Rights & Responsibilities: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex"; *State v. Burch*, 65 Wn.App. 828 (1992); *State v. Beliz*, 104 Wn.App. 206 (2001). Peremptory challenges based on sexual orientation is also prohibited. *SmithKline Beecham Corp v. Abbott Laboratories*, 740 F.3d 471 (2014)(rehearing *en banc den*. 759 F.3d 990 (2014). A peremptory challenge based on religion is invalid in Washington. Wash. Const. art. I, Sec.11, Religious Freedom: "…nor shall any person be incompetent as a … juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

This case law in this area is continuing to evolve. Care should be taken before relying on older decisions.

JURY INSTRUCTIONS

PRACTICE TIP – For quick research, consider accessing the Pattern Jury Instructions. Washington Practice Volumes 11 and 11 A contain the Criminal Pattern Jury Instructions (WPIC's) as well as Notes on Use and Comments. The Comments are a convenient way to introduce current law. The WPIC's are updated regularly. The *most recent version* of the Pattern Jury Instructions is available free and electronically at the public website for the Washington Administrative Office of the Courts (AOC).
http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=PatternJuryInstructio ns

Hyperlinked Word format versions of the WPIC's (sometimes slightly less current because of the hyperlink service) are available at the Inside Courts website maintained by the Washington Administrative Office of the Courts (AOC). You must log-in for this service which is available only for judges and staff – look under "Judges' Resources" for "Jury Instructions".
https://inside.courts.wa.gov/index.cfm?fa=controller.showPage&folder=judgesResources&file=juryI nstructions

For substantive charges of Assault and Violation of Court Orders the court should look to Washington Pattern Jury Instructions-Criminal (WPIC) Part VI, Chapter 35, Assault and Reckless Endangerment and Chapter 36, Harassment and Domestic Violence (including Violation of Court Orders).

The Comment to WPIC 36.51 contains a useful discussion about violation of protection orders of all types (including harassment, DV protection order, vulnerable adult protection order, foreign protection order, and order to protect a sexual assault victim).

What follows are selected WPICs that might be helpful in a criminal case involving Domestic Violence.

Definition of Family or Household Member – Definition: WPIC 2.27.

WPIC 2.27 mirrors the statutory definition of family or household members as of changes to the statutes in 2008 and 2009. RCW 10.99.020(3); RCW 26.50.010(2). Caution must be taken as to the date of the charged offense. The statutory definition of Family or Household Member (colloquially referred to as a Special Allegation of Domestic Violence or DV) was refined in the 2019 legislative session. 2019 Sess. Laws Ch 263, effect. 7/28/2019. The definition is not intended to be a substantive change but does create a statutory subsection to distinguish intimate partner violence. As of June 2019, Pattern Jury Instructions have not yet been published reflecting this 2019 change.

The special allegation of Domestic Violence or DV must be specifically plead and proven. The

jury instructions themselves will not refer to the offense as one of domestic violence, but as an offense against an intimate partner or other family or household member.

The special allegation of DV may append to all types of offenses, including Theft, Harassment, Malicious Mischief and others. The practical effect is that victim protections may be enhanced (such as DV treatment, protection orders, firearms restrictions, DNA testing), and the ability for future charges or sentencing may be enhanced.

Missing Witness Instruction: WPIC 5.20. A missing witness instruction informs the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would logically have called that witness. The relationship between the witness and that party is critical to the determination. *State v. Flora*, 160 Wn.App. 549 (2011); *State v. Davis*, 73 Wn.2d 271 (1968) (overruled on other grounds); *State v. Blair*, 117 Wn.2d 479 (1991).

State v. Reed, 168 Wn.App. 553 (2012). Not entitled to WPIC 5.20 where victim had no special relationship to prosecutor, defendant's influence over victim appeared to have exceeded that of the prosecutor, in that defendant maintained contact with victim throughout his time in jail, and on more than one occasion, convinced victim to engage in conduct that would benefit his cause. It was reasonable to believe that victim's absence at trial was a product of defendant's influence.

Oral instruction: Evidence Limited as to Purpose. WPIC 5.30. This oral instruction must be given if the party against who evidence is admitted for a limited purpose requests it and the instruction is a correct statement of the law. The Comment to WPIC 5.30 gives examples and case law on the topic.

In a DV case, the need for an instruction under WPIC 5.30 may arise if there is a prior inconsistent statement by a witness, ER 404(b) evidence of prior bad conduct admitted to show a common scheme or plan, or hearsay mentioned by an expert admitted to explain the reasons for the expert opinion, but not to prove the truth of the matter asserted. The trial court has no responsibility to give a limiting instruction if neither side requests it. The trial court usually asks the requesting party to draft the instruction. See *State v. Gresham*, 173 Wn.2d 405 (2012); Tegland §404:32.

Oral instruction: Juror Rehearing Trial Exhibit or Testimony. WPIC 4.74. See ER 901(b)(5). Jury may hear a replay of audio or video evidence. It is error to refuse a jury's request to rehear –at least once – a 911 tape. *State v. Oughton*, 26 Wn.App. 74 (1980). Several procedures have been approved. See *State v. Smith*, 85 Wn.2d 840 (1975); *State v. Frazier*, 99 Wn.2d 180 (1983)(child witness testimony by video); *State v. Koontz*, 145 Wn.2d 650 (2002)(jury replay of audio tape). See *Audio Evidence, Tapes and Transcripts* discussion above.

Caution should be used before allowing witness testimony to be repeated. See Comment to WPIC 4.74.

Jury Unanimity- Several Distinct Criminal Acts – *Petrich* Instruction. WPIC 4.25 and Comment to WPIC 36.51.

In cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all jurors must agree that the same criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566 (1984). Failure to give a Petrich instruction is error.

In a DV case the defendant may be charged with violating multiple orders by the commission of one act of violation. In this situation, jury unanimity is required as to which order was violated. The WPI committee recommends use of a modified *Petrich* instruction if there is more than one violation of court order:

> "The State alleges that the defendant committed an act that violates more than one court order. To convict the defendant [on any count] of violation of a court order, the violation of one particular order must be proved beyond a reasonable doubt, and you must unanimously agree as to which order has been violated. You need not unanimously agree that the defendant violated all of the orders." Comment to WPIC 36.51.

Trial Court Determines Validity of NCO, Restraining or Protection Order. WPIC 36.51. The trial court must determine the validity of the no contact order as a matter of law. THE TEST is spelled out as the gatekeeping function of the court: 1) An order is not applicable to the charged crime if it is not issued by a competent court, 2) is not statutorily sufficient, 3) is vague or inadequate on its face, or 4) otherwise will not support a conviction of violating the order. *State v. Miller*, 156 Wn.2d 23, 31 (2005). A NCO may not be collaterally attacked after the alleged violation of the order. *Seattle v. May*, 171 Wn.2d 847 (2011). See WPIC 36.51 and Comments thereto; see also DV Manual at Ch. 5, Part X.

Special Verdict Form – Family or Household Member. WPIC 190.11 . In order to support the collateral consequences related to a DV conviction (exceptional sentence, firearms and immigration consequences), a finding of domestic violence (family or household member) must be made by the jury. It is a best practice to give WPIC 190.11. In some circumstances the finding may be made by the court to support the entry of a no-contact order for example. See Comment to WPIC 190.11 and cases cited there. The Concluding Instruction, WPIC 160.00 should also be provided to the jury with the appropriate interlineation. Because a single NCO order violation is a predicate offense to the felony, and because of the increased supervision and protections available for the victim, a limited jurisdiction court should follow this practice for all types of DV offenses.

Prepared by Judge Marilyn Paja and Judge Anita Crawford-Willis
obo the **Washington State Gender & Justice Commission** for sponsored program: *Evidence Issues in DV Criminal Trial* presented by Judge Jack Nevin