CHAPTER 6
General Evidence

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I. Introduction

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

II. Washington Rape Shield Law

A. Background

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.[1] Before the legislature enacted this statute, defendants had routinely produced evidence of victims' prior sexual conduct to prove a "logical nexus between chastity and veracity."[2]

B. Statute

1. Evidence of past sexual behavior

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 that is offered to prove credibility or consent. Evidence of a victim's past sexual behavior offered for any other purpose is not covered by the rape shield statute and is subject only to the general relevancy requirements of ER 403.[3] 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…."[4]

2. Evidence of a victim's past sexual behavior is not admissible to challenge a victim's credibility[5]

[1] *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006)
[2] *State v. Peterson*, 35 Wn. App. 481, 667 P.2d 645 (1983)
[3] *State v. Harris*, 97 Wn. App. 865, 871, 989 P.2d 553 (1999)
[4] RCW 9A.44.020(3) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020
[5] RCW 9A.44.020(2)

3. Admissibility of evidence of a victim's past sexual behavior as to the issue of consent.

Evidence of a victim's past sexual intercourse with the defendant, if material to the issue of consent, is admissible as to the issue of consent.[6]

Evidence of other past sexual behavior of a victim is admissible if (a) the defendant submits a pretrial motion for an offer of proof of such evidence and supporting affidavits; (b) the court finds the offer of proof to be sufficient for a hearing outside the presence of the jury; and (c) after hearing the matter, the court finds that the proffered evidence is relevant to the issue of the victim's consent, its probative value is not 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. [7]

4. 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.[8] 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.[9] The State retains the burden of proof on the issue of consent.[10].

C. Case Law

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

a. Relevance of evidence of past sexual behavior

In *State v. Hudlow,*[11] 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 defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401.

In *State v. Gregory* [12] 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."[13] The court held that evidence that a victim had engaged in prostitution was inadmissible to

[6] Id.
[7] RCW 9A.44.020(3)
[8] RCW 9A.44.020(4)
[9] *State v. Sheets*, 128 Wn.App. 149, 155, 115 P.3d 1004 (2005)
[10] *State v. Kalamarski*, 27 Wn.App. 787, 791, 620 P.2d 1017 (1980)
[11] 99 Wn.2d 1, 11, 659 P.2d 514 (1983)
[12] 158 Wn.2d 759 (2006)
[13] Id. at 785

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.[14]

Once the court has found that the evidence is relevant, the probative value must be balanced against the potentially prejudicial effect.[15]

b. Prejudicial effect of evidence of past sexual behavior

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.[16]

c. Probative value of evidence of past sexual behavior

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."[17]

In *State v. Jones* [18] 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 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.'"

[14] Id.
[15] 99 Wn.2d at 12
[16] Id. at 13
[17] Id. at 15
[18] 168 Wn.2d 713, 717, 230 P.3d 576 (2010)

2. Electronic mail evidence

In *State v. Posey*,[19] 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.[20] 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.*[21] 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. Evidence of the Defendant's Past Physical Abuse of the Victim

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*,[22] 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.

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[19] 161 Wn.2d 638, 167 P.3d 560 (2007)
[20] *State v. Gregory*, 158 Wn.2d at 787
[21] 113 Wn.2d 631, 643-44, 781 P.2d 483 (1989)
[22] 60 Wn. App. 887, 808 P.2d 754 (1991)

IV. Evidence of 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.[23] In *State v. Demos*[24] 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.

V. Hearsay Rules and Exceptions

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

1. Background

Prior to the decision in *Crawford v. Washington,*[25] the admission of witnesses' out-of-court statements had been governed by *Ohio v. Roberts.*[26] In that case, the U.S. Supreme Court held that if a witness is unavailable, the trial court may admit the unavailable witness' out of court statements through a third party if the statement "bears adequate indicia of reliability." A statement was sufficiently reliable if (1) the statement falls within a well-established hearsay exception, or (2) the statement had "particularized guarantees of trustworthiness." [27]

In *Crawford* the U.S. Supreme Court overruled *Ohio v. Roberts* 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*,[28] 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."[29]

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[23] *State v. Williams*, 9 Wn.App. 622, 623, 513 P.2d 854 (1973)
[24] 94 Wn.2d 733, 737, 619 P.2d 968 (1980)
[25] 541 U.S. 36, 124 S. Ct. 1354, 158 L Ed. 2d 177 (2004)
[26] 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980)
[27] Id. at 66
[28] 129 Wn. App. 258, 267, 118 P.3d 935 (2005)
[29] Id.

The U.S. Supreme Court provided some additional definition of "testimonial statements" in *Davis v. Washington.*[30] 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.[31]

In applying the foregoing distinction between testimonial and non-testimonial statements to the facts in *Davis,* the court noted the following factual distinctions between 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"; [32] (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;"[33] (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."[34] 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."[35]

In *State v. Ohlson,*[36] 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

[30] 547 U.S. 813, 126 S.Ct. 2266, 165 L. Ed.2d 224 (2006)
[31] Id. at 822
[32] Id. at 827
[33] Id.
[34] Id.
[35] Id. at 828
[36] 162 Wn.2d 1, 168 P.3d 1273 (2007)

> 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.[37]

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. Standards of appellate review of admissions of hearsay statements

"A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed…under an abuse of discretion standard."[38] The trial court only abuses its discretion if its decision is "manifestly unreasonable" or based on "untenable" grounds.[39]

If the admitted hearsay statement is testimonial, and also implicates the defendant's Confrontation Clause rights, appellate review applies a harmless error analysis.[40]

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."[41] A sexual assault is a "startling event."[42]

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."[43]

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

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[37] Id. at 15
[38] *State v. Woods*, 143 Wn.2d 561,595, 23 P.3d 1046 (2001)
[39] *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)
[40] *State v. Davis*, 154 Wn.2d 291, 304, 168 P.3d 1273 (2005) (aff'd by *Davis v. Washington*, 547 U.S. at 834)
[41] ER 803(a)(2) http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[42] *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)
[43] *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)

allegedly making the statement.[44] Evidence used to authenticate the voice can be direct or circumstantial.[45]

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*, [46](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*, [47] (a rape victim's statement made after hiding under a tarp in fear of the defendant for seven hours**);** *State v. Flett*,[48] (a statement by a rape victim to her daughter seven hours after the event); *State v. Fleming*,[49] (a statement by a rape victim to a friend three hours after the event, and to the police three to six hours after the event); *State v. Strauss*[50] (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 approved for admission as excited utterances

In *State v. Doe*,[51] 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*,[52] 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*, [53] 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.[54]

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[44] *State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949 (1996)
[45] Id. (citing *State v. Deaver*, 6 Wn.App 216, 219, 491 P.2d 1363 (1971))
[46] 32 Wn. App. 204, 207, 646 P.2d 135 (1982)
[47] 60 Wn. App. 289, 803 P.2d 808 (1991)
[48] 40 Wn. App. 277, 699 P.2d 774 (1985)
[49] 27 Wn. App 952, 621 P.2d 779 (1980)
[50] 119 Wn.2d 401, 832 P.2d 78 (1992)
[51] 105 Wn.2d 889, 893-94, 719 P.2d 554 (1986)
[52] 52 Wn. App. 700, 704, 763 P.2d 470 (1988)
[53] 37 Wn. App. 867, 873, 684 P.2d 725 (1984)
[54] Id. at 873-74

d. The admissibility of excited utterances containing false information

The court in *State v. Brown*[55] 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*,[56] 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.[57]

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

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."[58]

In *State v. Powell*,[59] 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…."[60]

In *Powell*, supra,[61] 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 accident or self-defense.

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

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[55] 127 Wn.2d 749, 759, 903 P.2d 459 (1995)
[56] 128 Wn.2d 908, 913, 913 P.2d 366 (1996)
[57] Id. at 913-14
[58] ER 803(a)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[59] 126 Wn.2d 244, 267, 893 P.2d 615 (1995)
[60] ER 803(a)(3)
[61] 126 Wn.2d 244, 266 (1995) (citing *State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980))

diagnosis or treatment" are admissible under this exception.[62] 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.[63]

Statements made for the purpose of, or "reasonably pertinent to," medical diagnosis or treatment, including psychological treatment, are not objectionable as hearsay.[64] 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.[65]

Statements as to causation of injuries, symptoms or pain are generally admissible under this exception, whereas statements attributing fault are generally not admissible because they are not usually pertinent to diagnosis or treatment.[66] 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*[67] 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.[68]

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."[69]

In *State v. Smith*,[70] 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.

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[62] ER 803(a)(4)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0803
[63] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn.App. 87, 92-93, 882 P.2d 1180 (1994)
[64] *State v. Woods*, 143 Wn.2d at 602
[65] *D.P. v. Dep't of Social & Health Servs.*, 76 Wn.App. 87 at 93
[66] Id.
[67] 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))
[68] *State v. Robinson*, 44 Wn. App. 611, 616 n.1, 722 P.2d 1379 (1986)
[69] ER 801(d)(1)
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0801
[70] 30 Wn. App. 251, 255, 633 P.2d 137 (1981)

In *State v. Osborn*,[71] 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*,[72] 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."[73]

And, in a federal Eighth Circuit case, *United States v. Red Feather*,[74] 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. [75]

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

1. Statute

The admission of non-testimonial[76]out-of-court statements by child victims is governed by RCW 9A.44.120. 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

[71] 59 Wn. App. 1, 7, 795 P.2d 1174 (1990)
[72] 38 Wn. App. 841, 845, 690 P.2d 1182 (1985)
[73] Id. at 844-45
[74] 865 F.2d 169, 171 (8th Cir. 1989)
[75] *State v. Ackerman*, 90 Wn. App. 477, 953 P.2d 816 (1998)
[76] See the discussion of "non-testimonial" statements under *Crawford v. Washington* in section V. A of this chapter

(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 provide the adverse party with a fair opportunity to prepare to meet the statement. [77]

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.[78] *State v. Ryan*[79]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."[80] The trial court has considerable discretion in determining if a statement is reliable.[81]

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.[82] 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.[83] Further, non-testimonial hearsay statements may still be reliable, and admissible, even if the court has found that the child is incompetent.[84]

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[77] 9A.44.120 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120
[78] Id.
[79] *State v, Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (citing *State v. Parris*, 98 Wn.2d 140, 146 (1982))
[80] Id. at 176
[81] *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990)
[82] *State v. Ryan*, 103 Wn.2d 165 at 170
[83] *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765 (2003)
[84] Id.

VI. Expert Testimony

Expert testimony is often essential to challenge rape myths in the courtroom. For an explanation of the rules governing the admission of scientific evidence, please refer to Chapter 7. Experts must be qualified, which usually means they have academic experience with the subject or extensive direct experience with sexual assault victims. Experts may not testify that they do or do not believe a sexual assault took place.

Qualified experts can testify to explain delays in reporting or recantation. In *State v. Ciskie*,[85] expert testimony about battered women's syndrome was held admissible to help the jury understand why the victim had waited to report the sexual assault and to explain why the victim had not ended her relationship with the defendant.

VII. Competency of Witnesses

A. Statute

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."

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.[86] The court does not need to question the child about the actual events at issue in the case.[87] If a child is deemed incompetent to testify, out of court statements may still be admissible under a hearsay exception.[88] See, e.g., *State v. Tate*,[89] (competency established by psychiatric testimony); *State v. Leavitt*,[90] (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).

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[85] 110 Wn.2d 263, 279, 751 P.2d 1165 (1988); and see, e.g., *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (rape trauma syndrome)**;** *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199 (1994) (social worker could testify that child sexual abuse victim suffered from PTSD, but could not testify that trauma was caused by sexual abuse)

[86] *State v. Tuffree*, 35 Wn. App. 243, 246-47, 666 P.2d 912 (1983)

[87] *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)

[88] *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)

[89] 74 Wn.2d 261, 266, 444 P.2d 150 (1968)

[90] 111 Wn.2d 66, 70, 758 P.2d 982 (1988)

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.[91]

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.[92] The party opposing the witness has the burden of proving that the witness is incompetent.[93]

A person with a history of mental disorders is not *per se* incompetent.[94] 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.[95] In *State v. Smith*, the court 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."[96]

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.[97]

IX. Privileged Communications and Records

A. Communications

1. Marital privilege

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

[91] *State v. Foster*, 135 Wn.2d 441, 451, 957 P.2d 712 (1998)
[92] *McCutcheon v. Brownfield*, 2 Wn. App. 348, 354-55, 467 P.2d 868 (1970)
[93] *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982) (per curiam)
[94] *State v. Watkins*, 71 Wn. App. 164, 169, 857 P.2d 300 (1993)
[95] Id. (citing *State v. Allen*, 67 Wn.2d 238, 241, 406 P.2d 950 (1965))
[96] 30 Wn. App. at 254
[97] RCW 9A.44.020(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020

partnership.[98] This privilege does not apply to quasi-marriages or meretricious relationships.[99]

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. [100]

2. Sexual assault advocate privilege

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.[101]

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."[102] The court shall presume that the advocate who disclosed the confidential communication acted in good faith.[103]

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 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.[104]

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."[105] The court shall presume that the domestic violence advocate acted in good faith in disclosing the confidential communication.[106]

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[98] RCW 5.60.060(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060
[99] *State v. Cohen*, 19 Wn. App. 600, 609, 576 P.2d 933 (1978)
[100] RCW 5.60.060(1)
[101] RCW 5.60.060(7)(a)
[102] RCW 5.60.060(7)(b)
[103] Id.
[104] RCW 5.60.060(8)(a)
[105] RCW 5.60.060(8)(b)
[106] Id.

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, is discoverable and setting forth the basis for that finding.[107]

In *State v. Espinosa*,[108] 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*,[109] the Washington State Supreme Court found that the trial court acted within its discretion in deciding not to 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 *Pennsylvannia v. Richie*,[110] 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

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[107] RCW 70.125.065
[108] 47 Wn. App. 85, 90, 733 P.2d 1010 (1987)
[109] 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)
[110] 480 U.S. 39, 61, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)

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

4. **Medical records, health care information access & disclosure - 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

X. Evidence of Character and Other Crimes, Wrongs or Acts

A. Admissibility Generally

1. Character evidence

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.[111]

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

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.

2. Evidence of other crimes, wrongs, or 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."[112]

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 effect.[113]

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."[114]

B. Use of Evidence of Character and Other Crimes, Wrongs, and Acts in Sexual Assault Cases

The Court held, in *State v. Kilgore,*[115] that the trial court may rely upon the state's offer of proof of other wrongs in determining the admissibility of such evidence, and whether an evidentiary hearing should be held to determine if there is a preponderance of such evidence lies within the trial court's discretion.

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[112] 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."

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

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

[115] 147 Wn.2d 288, 295, 53 P.3d 974 (2002)