CHAPTER 6
EVIDENTIARY ISSUES[1]

I. Applicability of the Rules of Evidence to Hearings on Petitions for Protection and Anti-Harassment Orders

ER 1101(c)(4) provides that the Rules of Evidence, except for the rules and statutes concerning privileges, need not be applied during hearings for protection or anti-harassment orders. *See Gourley v. Gourley*, 158 Wn.2d. 460, 145 P.3d 11835 (2006) (recognizing that ER 1101(c)(4) permits the admission of hearsay in hearings for protection orders).

A court may still require "a certain measure of reliability with respect to the admission of evidence in the proceedings specified in section (c). The court should have the discretion to require an appropriate level of formality." Comment to ER 1101(c)(1). In *Gourley*, the Court concluded that there was no due process violation in not requiring testimony or cross-examination at the hearing for protection order, but stated that such might be "appropriate in other cases."

However, if a protection order is being requested as part of another type of proceeding, such as a dissolution action, it may be appropriate to apply the rules of evidence in making any final orders. The rationale for not mandating application of the rules of evidence in protection order hearings was to further public policy in creating a simple, pro se–friendly procedure. However, when the parties are afforded a full trial with sufficient time to call witnesses and engage in discovery, such as a dissolution trial, the rationales for dispensing with the rules of evidence are less persuasive.

ER 1101(c)(4) provides that if a judge is considering information from the domestic violence database:

> …the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does *not* propose to consider. (*Emphasis added*.)

[1] For a more thorough discussion of the evidentiary issues presented here, see 5D, K. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence* (2013)

II. Privileges

A. Privileges Potentially Applicable in a Domestic Violence Case

Washington has a wide variety of privileges, some of which are potentially applicable in a domestic violence case. A partial catalog of privileges can be found in ER 501, by way of illustration, and not by way of limitation. The following are examples of privileges recognized in this state:

a. Attorney-Client. RCW 5.60.060(2).
b. Clergyman or Priest. RCW 5.60.060(3), 26.44.060, 70.124.060.
c. Dispute Resolution Center. RCW 7.75.050.
d. Counselor. RCW 18.19.180.
e. Spouse-Spouse. RCW 5.60.060(1), 26.20.071
f. Interpreter in Legal Proceeding. RCW 2.42.160, GR11.1 (e)
g. Journalist. [*See Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984).]
h. Optometrist-Patient. RCW 18.53.200, 26.44.060.
i. Physician-Patient. RCW 5.60.060(4), 26.44.060, 51.04.050, 69.41.020, 69.50.403, 70.124.060
j. Psychologist-Client. RCW 18.83.110, 26.44.060, 70.124.060.
k. Public Assistance Recipient. RCW 74.04.060.
l. Public Officer. RCW 5.60.060(5).
m. Registered Nurse. RCW 5.62.010, 5.62.020, 5.62.030. But see, *State v. Vietz*, 94 Wn. App. 870, 973 P.2d 501 (1999) (privilege does not apply to licensed practical nurses).
n. Sexual Assault Advocate. RCW 5.60.060(7).
o. Domestic Violence Advocate. RCW 5.60.060(8)

Testimonial privileges do not prevent third party testimony about extrajudicial statements. *See State v. Burden*, 120 Wn. 2d 371, 841 P.2d 758 (1992).

The discussion that follows briefly mentions issues that are of particular interest in domestic violence cases.

B. Spousal Privilege

Washington has two spousal privileges, both defined in RCW 5.60.060(1). The first protects confidential communications between spouses, forbidding one spouse from testifying about confidential communications without the consent of the other. The second prevents one spouse from testifying against the other spouse, regardless of whether the testimony relates to a confidential communication. Neither privilege applies to quasi-marriage or meretricious relationships. *State v. Cohen*, 19 Wn. App. 600, 608-9 576 P.2d 933, 938, *review denied*, 90 Wn.2d 122 (1978).

RCW 5.60.060(1) provides:

> A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. *But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other,* nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian…[emphasis added].

1. When may the marital privilege be asserted?

The confidential communication applies to communications made during the marriage and bars a former spouse from testifying concerning the content of such communications even after the marriage is terminated. *State v. Thorne*, 43 Wn.2d 47, 56, 260 P.2d 331, 336 (1953). *Compare State v. Burden*, 120 Wn.2d 371, 376-7, 841 P.2d 758, 760-1 (1992) (third party testimony about extrajudicial statements of a spouse are admissible).

In contrast, the testimonial bar applies only during the pendency of a valid marriage. Legal status is determinative. The privilege, if applicable at all, applies even after a petition for dissolution has been filed so long as the marriage has not yet been legally terminated. *State v. Moxley*, 6 Wn. App. 153,491 P.2d 1326 (1971) (*overruled on other grounds*, *State v, Thornton*, 119 Wn.2d 578 (1992).

Significantly, in *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, 1024 (1988), the court held that the trial court's decision to continue a criminal case at the request of the prosecuting attorney to permit entry of a dissolution order was not an abuse of discretion under CrR 3.3(h)(2).

2. The "personal violence" limitation

Although the language emphasized above appears to make either privilege inapplicable to any domestic violence case, until 1992,

Washington courts applied the common law rule limiting the inter-spousal crime exception only to crimes of "personal violence." *See, e.g., State v. Kephart*, 56 Wash. 561,106 P. 165 (1910). The Washington State Supreme Court overruled *Kephart* and its progeny in *State v. Thornton*, 119 Wn.2d. 578, 583, 835 P.2d 216, 219 (1992). The statutory exception for inter-spousal crimes now applies to any crime and is not limited to crimes of violence.

In a prosecution for witness tampering, neither marital privilege applies if the defendant could not have asserted the privilege at the trial of the underlying offense. *State v. Sanders*, 66 Wn. App. 878, 884, 833 P.2d 452, 456 (1992).

3. Comment on the exercise of the spousal privilege

It is misconduct for a prosecutor to comment in closing argument on the failure of the defendant's spouse to testify. *State v. Charlton*, 90 Wn.2d 657, 667, 585 P.2d 142, 147 (1978) (*distinguished from State v. Carneh*, 153 Wash.2d 274, 292, 103 P.3d 743 (2004); *State v. Smith*, 82 Wn. App. 327, 338, 917 P.2d. 1108, 1113 (1996) (*overruled by State v. Martin*, 151 Wash. App. 98, 210 P.3d 345 (2009)). Similarly, it is misconduct for the prosecutor to call the defendant's spouse to testify to force the defendant to assert the privilege in front of the jury. *State v. McGinty*, 14 Wn.2d 71, 78, 126 P.2d 1086, 1089 (1942) (*also distinguished from State v Carneh*, 153 Wash.2d 274, 292, 103 P.3d 743 (2004)).

C. Physician-Patient Privilege

RCW 5.60.060(4) provides that a physician may not testify in a civil action concerning information obtained from a patient. To some extent, that privilege has been incorporated in criminal cases by RCW 10.58.010, which provides that "[t]he rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions." When applying the privilege in the criminal context, the trial court must balance the "benefits of the privilege against the public interest of full revelation of the facts." *State v. Stark*, 66 Wn. App. 423, 438, 832 P.2d 109, 117(1992). *Accord State v. Smith*, 84 Wn. App. 813, 820, 929 P.2d 1191, 1195 *review denied*, 133 Wn.2d 1005 (1997). The privilege does not apply to statements made to a paramedic who is not acting under the direction of a physician. *State v. Ross*, 89 Wn. App. 302, 306, 947 P.2d 1290, 1292 (1997), *review denied*, 135 Wn.2d 1011 (1998).

A victim, at least in the context of a domestic violence case, cannot assert the privilege in order to prevent the State from offering evidence of his or her injuries. *State v. Boehme*, 71 Wn.2d 621, 637, 430 P.2d 527, 536-7 (1967).

In *State v. Cahoon*, 59 Wn. App. 606, 611, 799 P.2d 1191, 1194 (1990), *review denied*, 116 Wn.2d 1014 (1991), the court concluded that the privilege does not apply when the medical information is being used only to establish probable cause for a search warrant.

Discovery issues concerning medical records are discussed in Chapter 4, IV, F.

D. Psychologists

Confidential communications between a psychologist and a patient are privileged to the same extent as confidential communications between attorney and client. RCW 18.83.110.

The holder of the privilege is the patient, and the patient alone has the power to assert or waive the privilege.

The privilege is strictly construed. It is inapplicable to communications that were not intended to be confidential. *In re Henderson*, 29 Wn. App. 748, 752, 630 P.2d 944, 947 (1981). It is likewise inapplicable to forensic examinations by court-appointed psychologists. *State v. Holland*, 30 Wn. App. 366, 376, 635 P.2d 142, 148 (1981), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The privilege applies only to communications with a licensed psychologist. It does not apply to communications with other counselors or therapists. *State v. Harris*, 51 Wn. App. 807, 813, 755 P.2d 825, 829 (1988). Communications with other counselors or therapists may, however, have at least a measure of confidentiality under other statutes (see below).

E. Counselors, Social Workers, and Therapists

Under RCW 18.19, social workers, therapists, and other counselors (other than psychologists and psychiatrists) must be registered with, and certified by, the state. The same legislation creates a privilege for information acquired in a professional capacity. The statute contains a number of exceptions, including a provision for reporting child abuse, and concludes with a catch-all exception allowing disclosure "in response to a subpoena from a court of law or the Secretary." RCW 18.19.180(5).

If a litigant makes "particularized factual showing" that the records of a therapist or counselor are "likely" to contain helpful information, the court is to undertake an *in camera* review of the records. *State v. Diemel*, 81 Wn. App. 464, 468, 914 P.2d 779, 781 *review denied*, 130 Wn.2d 1008 (1996) (*quoting State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)) (defendant's declaration was insufficient to support his request for an *in camera* review of files of a counselor

who treated a rape victim). As a general matter, a request for an *in camera* review is addressed to the sound discretion of the trial court. *Diemel* at 467.

F. Sexual Assault Advocates

RCW 5.60.060(7) prohibits the discovery of the records of a rape crisis center. "A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made by the victim to the sexual assault advocate." RCW 5.60.060(7)

"Sexual assault advocate" means 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. RCW 5.60.060(7)(a). There is nothing in this definition that makes the privilege inapplicable to a victim advocate employed by a prosecuting attorney, though under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecutor has a duty to disclose materially exculpatory evidence to a defendant. Application of the privilege to prosecution-based advocates and issues of waiver if communications are disclosed by the advocate to a prosecutor will need to be resolved by the court.

Disclosure is permitted without the consent of the victim when the advocate believes the failure to disclose is likely to "result in a clear, imminent risk of serious physical injury or death" to the victim or other person. RCW 5.60.060(7)(b).

RCW 70.125.065, which has been in effect since 1981, protects the records and professional communications of a rape counselor from discovery. A court, however, may order disclosure under appropriate conditions.

Example: In *State v. Espinosa*, 47 Wn. App. 85, 90, 733 P.2d 1010, 1013 (1987), a prosecution for rape, the trial court acted within its discretion in refusing to order disclosure of certain information to defense counsel. The court rejected a defense argument that the privilege had been waived because a police officer had been present during the counselor's interview with the victim.

Example: In *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064, 1078 (1993), the court upheld the trial court's decision not to undertake an *in camera* review of the records of a rape crisis center where there was no affidavit which set forth "specifically the reasons" why such a review was appropriate. *See also Pennsylvania v. Richie*, 480 U.S. 39, 61, 107 S. Ct. 989, 1003, 94 L. Ed. 2d 40 (1987) (where records are conditionally privileged, court should undertake *in camera* review where appropriate showing of potential materiality made).

NOTE: The court in *Kalakosky* declined to address the question of whether 42 U.S.C. § 10604(d), which purports to establish an absolute privilege for the

records of a rape crisis center, preempts that part of RCW 70.125.065 which authorizes disclosure after *in camera* review.

G. Domestic Violence Advocate

RCW 5.60.060(8) provides that "a domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate."

For purposes of this section, "domestic violence advocate" means 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.

Also, confidentiality provisions in RCW 70.123 and the Violence Against Women Act (VAWA), 2013, codified at 42 U.S.C. §13925, provide protections against release of information by domestic violence programs.

With respect to domestic violence programs, courts are prohibited from compelling the disclosure of the name, address, or location of a domestic violence program in any civil or criminal case or in any administrative proceeding unless the court makes a finding by clear and convincing evidence that "disclosure is necessary for the implementation of justice after consideration of safety and confidentiality concerns of the parties and other residents of the domestic violence program, and other alternatives to disclosure that would protect the interests of the parties." RCW 26.50.250

In cases where the court orders that a domestic violence program name, address, or location be disclosed, the court must bar the parties from further disseminating the confidential information, and shall seal the portions of any records containing such confidential information. RCW 26.50.250.

NOTE: There is an *in camera* review process provided for records held by a domestic violence program, but there is also testimonial privilege.

III. Admissibility of Defendant's Prior Bad Acts Against the Victim

Issues concerning the admissibility of other acts of misconduct allegedly perpetrated by the defendant against the victim frequently arise in domestic violence cases. Such evidence is not admissible to show that the defendant had the propensity to commit acts of violence against the victim. It may, however, be admissible for other purposes such as

showing absence of accident, intent, motive, the victim's state of mind (to prove reasonable fear or reasonable apprehension of harm), or to the victim's credibility.

When deciding whether to admit ER 404(b) evidence, "the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder." *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974, 977-8 (2002). This balancing must occur on the record. *See State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

The court is not required to hold an evidentiary hearing to determine whether the proponent of the testimony can establish the existence of the prior bad act by a preponderance of the evidence, even where prior acts are specifically challenged, when the finding can be made on the offer of proof. *State v. Kilgore*, 147 Wn.2d at 295. *See also State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000).

Example: Admissible to explain delay in reporting abuse – In *State v. Baker* 162 Wn. App. 468, 474-75, 259 P. 3d 270 (2011), the defendant argued on appeal that the trial court improperly admitted evidence of prior assaults under ER 404(b). The Court disagreed, holding that the trial court properly decided that the defendant's prior acts in which he strangled the victim were admissible to assist the jury in assessing the credibility of the victim who delays in reporting domestic violence, changes her story, or minimizes the degree of violence.

Example: Admissible to help jury assess credibility of victim's recantation – In *State v. Magers*, 164 Wash.2d 174, 186 189 P.3d 126 (2008), the Supreme Court concluded that prior acts of domestic violence, involving the defendant and the victim, were admissible in order to assist the jury in judging the credibility of a recanting victim. The *Magers* court affirmed the rationale set forth in *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609, 614 (1996), in which the trial court permitted the prosecution to introduce evidence of prior assaults by the defendant against the victim. The Court of Appeals affirmed the domestic violence conviction concluding that such evidence was useful in explaining the victim's actions. *Accord State v. Nelson*, 131 Wn. App. l08 (2006); *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006).

Example: Admissible to determine credibility – In *State v. Baker*, 162 Wn. App. 468 (2011), the court held that evidence of a defendant's prior assaults on the victim were admissible to aid the jury's assessment of the victim's credibility.

Example: Admissible to explain reasonable apprehension of fear in harassment case – In *State v. Ragin*, 94 Wn. App. 407, 412-13, 972 P.2d 519, 521 (1999), the defendant was charged with felony harassment, and the court concluded that his prior bad acts were admissible to explain why the victim was placed in reasonable fear that the charged threat would be carried out. *Accord, State v. Johnson*, 172 Wn. App 112, 297 P.3d 710 (2010),

petition for review pending (evidence admissible under ER 404(b) to prove "fear of bodily injury"); *State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000);

Example: Admissible to explain motive as part of "res gestae" – In *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615, 625 (1995), a spousal murder case, the Supreme Court concluded that evidence of prior assaults by the defendant against the victim was properly admitted to help the jury understand the defendant's motive and the entire situation. The court, however, concluded that where opportunity and intent were not at issue it was error to admit the evidence on those grounds. *Powell* at 262. *Accord*, *State v. Grier*, 168 Wn.App. 635, 278 P.3d 225 (2012) (Defendant's prior threatening acts and name-calling found admissible as part of the chain of events leading to the crime); *State v. Gresham*, 173 Wn. 2d 405, 269 P.3d 207 (2012) (finding Defendant's prior acts against four other victims admissible under ER 404(b) as common scheme, and striking down RCW 10.58.090 as conflicting with ER 404(b)); *State v. Stenson*, 132 Wn.2d 668, 708, 940 P.2d 1239, 1260(1997), *cert. denied* 523 U.S. 1008 (1998).

Limiting Instruction: Under *State v. Gresham*, 173 Wn. 2d 405, 269 P. 3d. 207, (2012), once a criminal defendant requests a limiting instruction regarding admission of prior bad acts, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction.

IV. Admissibility of Prior Misconduct by Victim to Show Self-Defense

If the defendant claims self-defense, prior misconduct by the victim may be admissible to show that the defendant had a reasonable apprehension of danger. The principal requirement is one of relevance—the victim's misconduct must have been of the sort to suggest danger, and the defendant must have been aware of that misconduct at the time the defendant claims to have acted in self-defense. *State v. LeFaber*, 77 Wn. App. 766, 769, 892 P.2d 1140, 1143 (1995), *rev. on other grounds*, 128 Wn.2d 896, 913 P.2d 369 (1996); *State v. Walker*, 13 Wn. App. 545, 550, 536 P.2d 657, 662 (1975) (acts of violence by victim inadmissible because defendant was unaware of them).

Specific acts of misconduct, if not known to the defendant, are not admissible to establish the victim's violent disposition and to prove that the victim acted in conformity with that trait. ER 404(a) and ER 405. Unless known by the defendant and offered to support self-defense, the victim's violent disposition is character evidence and may only be admitted through reputation evidence. *State v. Hutchinson,* 135 Wn. 2d 863 (1998). See also, *State v. Callahan*
87 Wn. App. 925, 943 P.3d 636 (1997) (Victim's reputation for violence was properly excluded where it was unknown to the defendant. Though the victim's reputation for violence was relevant to probability that victim was aggressor, it was excluded in case where the proffer was police officers' testimony based on their encounters).

V. Admissibility of Offers of Compromise as Proof of Guilt in Criminal Prosecutions

ER 408 prohibits evidence of "(1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount" to prove civil liability or "invalidity of the claim or its amount."

The Supreme Court held that ER 408 does not prevent the use of evidence of attempts to compromise civil claims in criminal trials "arising from the same conduct, as between the alleged offender and victim, where relevant to establishing guilt." *State v. O'Connor*, 155 Wn. 2d 235, 119 P.3d 306 (2005). In *O'Connor*, the defendant appealed a felony domestic violence conviction stemming from a tire-slashing incident. The defendant argued that ER 408 should have prevented the admission of evidence by the prosecution that he offered to pay the victim for the tire damage. The Court explained that because the defendant's criminal charge was not subject to compromise, the policy behind ER 408, encouraging out of court settlement, would not be advanced by its application to criminal prosecutions. *Id.*

VI. The Hearsay Rule and Its Exceptions/Exemptions

All of the exceptions to the hearsay rule are, of course, potentially available in a domestic violence case. In practice, however, only a handful of exceptions are normally applicable to the out-of-court statements of the victim or other witnesses.

As will be seen, Washington has a body of case law governing the availability of the normally invoked exceptions, making it somewhat easier to predict the outcome in a given factual situation. Nevertheless, the discretion inherent in the rules has afforded trial courts considerable leeway in ruling on the admissibility of such evidence.

This portion of the domestic violence manual emphasizes issues that may arise in domestic violence cases. The material in the domestic violence manual is not, however, a comprehensive discussion of all aspects of the hearsay rule, and the reader is referred to the standard evidence treatises for more detail. *See, e.g.*,
K. Tegland, 5D, *Washington Practice: Courtroom Handbook on Washington Evidence*, 4th ed., (2013).

A. Hearsay Exceptions (non-testimonial hearsay exceptions)

There is no constitutional bar to the admission of the hearsay testimony if the declarant testifies and is questioned about the incident, even if he or she recants or indicates little or no remembrance of the incident. *State v. Mobley*, 129 Wn. App. 378, 118 P.3d 403 (2005), *review denied*, 157 Wn.2d 1002 (2006) (*Child hearsay*). If a declarant is doing "precisely what a witness does on direct examination," then he or she is a witness. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2278, 165 L. Ed. 2d 224 (2006) (discussing the facts in *Hammon v. State*, 829 N.E.2d 444, 453

(Ind. 2005), *rev'd, Davis v. Washington*, 126 S.Ct. 2266 (2006). Hearsay exceptions that are otherwise supported by the record continue to apply in such a situation.

NOTE: This section provides a brief summary of hearsay issues that frequently arise in domestic violence prosecutions. In light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), care must be taken, when the declarant has not testified, in relying on this summary.

1. Hearsay Exceptions – Excited Utterance – ER 803(A)(2)

Under ER 803(a)(2), 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, is not objectionable as hearsay. The rule presumes that the element of spontaneity reduces the chance of misrepresentation to an acceptable level.

In a domestic violence case, the rule may have many potential applications when the victim or another witness is unwilling or unable to testify, or is reluctant to testify fully and openly. Prosecuting attorneys have, for example, often succeeded in using this exception to introduce statements describing an assault or sexual abuse.

Statements made while under the stress of the event may be admissible as excited utterances even though they are made sometime afterward. The statements need not be spontaneous, and may be made in response to questions, because they were "under the influence of the event." *State v. Bache*, 146 Wn. App. 897, 193 P.3d 198 (2008)

A trial court's decision to admit a statement as an excited utterance is reviewable for abuse of discretion. "[W]here the trial judge is required to assess body language, hesitation, or lack thereof, manner of speaking, and all the other intangibles that go into the evaluation which cannot be reflected on a written record, the trial judge is entitled to absolute deference." *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097, 1103 (2000).

NOTE: In domestic violence cases, the excited utterance is frequently contained on a 911 tape. In such a situation, other foundational requirements for admission—particularly authentication of the voice of the person allegedly making the statement—must be satisfied. *See State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949, 951 (1996).

Example: Admissible – A statement may qualify as an excited utterance even though the out-of-court declarant recants or otherwise disavows the statement. *State v. Magers*, 164 Wn. 2d 174, 189 P.3d 126 (2008) (statements by assault victim to officer responding to 911 call admissible as excited utterances, even though victim's statements were not consistent, and victim later recanted some of her statements).

Example: Inadmissible – In prosecution for domestic violence assault, the victim's description of the incident to a police officer did not qualify as an excited utterance. The victim made the statement approximately 45 minutes after the incident, after discussing the incident with a friend and stopping at a Safeway store to "get something to drink." The court noted that the victim and her friend had ample time to reflect on what they were going to tell the police and, in fact, decided not to mention to the police that victim's boyfriend was also present, to protect her boyfriend from being arrested on an outstanding warrant. *State v. Hochhalter*, 131 Wn. App. 506, 128 P.3d 104 (2006).

Example: Inadmissible – A statement, alleged to be an excited utterance that contains an intentional misrepresentation, is not admissible as an excited utterance. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d. 549, 564 (1995). However, the mere fact that a victim recanted after making the excited utterance does not render the original statement inadmissible as an excited utterance. *State v. Briscoeray*, 95 Wn. App. 167,174, 974 P.2d 912, 916, *review denied*, 139 Wn.2d 1011 (1999).

2. Hearsay Exceptions – State of Mind or Bodily Condition – ER 803(a)(3)

ER 803(a)(3) defines the hearsay exception in the following language:

> 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.

In a domestic violence case, the rule has many potential applications. The rule, for example, might be used by the prosecuting attorney to introduce the victim's out-of-court statements expressing fear of the defendant, or describing the pain of injuries inflicted by the defendant. The scope of the rule is developed more fully in the subsections that follow, with emphasis on issues that may arise in domestic violence cases.

a. Intent or plan

ER 803(a)(3) establishes a hearsay exception for expressions of intent or plan. Thus, a statement by A that she intends to go to Vancouver is admissible as proof that A went to Vancouver, a statement by B that he plans to talk to C is admissible as proof that B talked to C, and so forth.

In a criminal prosecution, a statement of intent by the defendant, suggesting that he planned to commit the crime charged, would be admissible on the issue of guilt.

However, it is ordinarily unnecessary to resort to the instant hearsay exception in this situation because the defendant's out-of-court statement would be party admission, excluded from the definition of hearsay altogether by ER 801(d)(2).

More often, the instant hearsay exception is invoked in an effort to introduce a statement by the victim or some other person. The victim's intentions are, of course, often irrelevant in a criminal case and may be excluded on that basis. However, in a variety of situations, prosecuting attorneys have succeeded in establishing some link between the intent of the victim or a third person and the crime charged – a link sufficient to satisfy the requirement of relevance.

Example: Admissible – In *State v. Terrovona*, 105 Wn.2d 632, 642, 716 P.2d 295, 300 (1986), a prosecution for murder, the State was properly allowed to introduce evidence that after hanging up the telephone, the victim had said that the caller was the defendant and that he, the victim, was going to go to 116th Street to meet the defendant. The court held that the evidence was admissible to implicate the defendant in the crime charged.

Example: Admissible – *State v. Alvarez*, 45 Wn. App. 407, 410, 726 P.2d 43, 46 (1986), a prosecution for being an accomplice to murder, a statement by the accused murderer, in the defendant's presence, that he and the defendant intended to kill the victim was admissible to prove the underlying offense for which the defendant was charged as an accomplice.

Example: Admissible – In *State v. Bernson*, 40 Wn. App. 729, 738, 700 P.2d 758, 766, *review denied* 104 Wn.2d 1016 (1985), a prosecution for murder in which the defendant was accused of killing a woman who applied to him for a job, the trial court properly admitted evidence that shortly before the killing, the victim said she had received a job offer to sell women's apparel.

b. Motive

In the context of assault and homicide prosecutions, statements by the defendant expressing hatred or ill-will towards the victim are clearly within the rule and relevant to the issue of guilt. The usual reasoning is that the statements show motive or intent. *See, e.g., State v. Hoyer*, 105 Wash. 160, 177 P. 683 (1919); *State v. Spangler*, 92 Wash. 636, 159 P. 810 (1916).

c. State of mind, emotion, sensation, or physical condition

ER 803(a)(3) establishes an exception to the hearsay rule for statements describing the declarant's then-existing state of mind, emotion, sensation, or physical condition. Although the rule is potentially applicable in a variety of situations, the most common use of the rule is to introduce out-of-court statements describing pain and suffering in personal injury litigation, to show the nature and extent of injury, and in prosecutions for assault and homicide.

In *State v. Johnson*, 172 Wn.App.112, 289 P.3d 662, *modified on denial of reconsideration*, 297 P.3d 710 (2012), the court of appeals held that the defendant's prior acts of domestic violence were admissible in order to show the victim's state of mind. In *Johnson*, the defendant was charged with several acts of violence against his wife over a three-day period. Formal charges included second-degree assault, felony harassment, and unlawful imprisonment. At trial, the State was allowed to present testimony regarding the defendant's coercive and controlling behavior prior to the three-day charging period, including the defendant's attempts to isolate his wife from others, his monitoring of her conversations, his accusations that his wife had been unfaithful, threats to tie her up with duct tape, and threats to kill her.

In affirming the admission of the evidence, the court determined that one of the elements of felony harassment is a showing that the defendant threatened a person with bodily harm, and that the person being threatened had a reasonable fear that the threats would be carried out. Thus in the present case, the court said, the evidence in question was directly relevant to prove the victim's state of mind relating to her reasonable fear of the defendant's threats.

In addition, the court of appeals said the victim's state of mind was similarly relevant, and thus properly admitted, on the charge of second degree assault. The court said that *assault* is defined, in part, as an act by the defendant that creates in another person a reasonable apprehension and imminent fear of bodily injury. Thus, the court said, the evidence in question was directly relevant to prove this element.

d. Limitations on the admissibility of state of mind testimony

(1) The testimony must be relevant.

A major limitation, easily overlooked, is that a statement may be within this hearsay exception and yet the statement may be inadmissible because it is irrelevant. In other words, if the state of mind of the declarant is not at issue in the case, a statement expressing the declarant's state of mind remains inadmissible.

As stated above, threats by the defendant toward the victim are generally admissible under this subsection. More troublesome issues arise with respect to the relevance of statements by the *victim*, typically expressing fear of, or anxiety about, the defendant. Is the victim's statement admissible as evidence of the defendant's guilt?

The general answer is no; the victim's statement is not admissible (even though within this exception to the hearsay rule) because the victim's state of mind is irrelevant to the issue of whether the defendant committed the act charged. The connection between the victim's fears and the defendant's guilt is too remote to justify admissibility. *State v. Parr*, 93 Wn.2d 95, 100, 606 P.2d 263, 265 (1980).

Example: Inadmissible – In *State v. Cameron*, 100 Wn.2d 520, 530, 674 P.2d 650, 655 (1983), a prosecution for murder in which the defendant claimed insanity, the trial court should not have admitted the victim's out-of-court statements to the effect that she was having problems with the defendant and that she feared him. The court rejected the State's argument that the statements were admissible to show the victim's state of mind, saying that the victim's state of mind was irrelevant because it did not relate to either premeditation or insanity, the two principal issues in the case.

However, if the defendant interposes a defense of accident or self-defense, the victim's state of mind may become relevant in the sense that suggests that the victim may not have acted as claimed by the defendant. Thus, in the leading case of *State v. Parr*, *supra*, at 106, the defendant claimed that the victim had grabbed a gun and lunged at him, and that he acted in self-defense but did not intend to actually kill the victim. The court held the victim's out-of-court statement that she feared the defendant was admissible because it was relevant to rebut the defendant's theory that the victim was the first aggressor.

Likewise, previous threats against the defendant by the victim may be offered by the defense to show that the victim was the first aggressor in support of a claim of self-defense. *State v. Reuben*, 156 Wash. 655, 661, 287 P. 887, 889 (1930).

(2) Statements about the past excluded.

It must be remembered that the instant rule is concerned with statements describing the declarant's then-existing state of mind or bodily condition. Statements describing a previous state of mind or bodily condition—termed statements of memory or belief—are not admissible under the instant rule. It has often been said that if statements of memory or belief were admissible, the hearsay rule would be virtually eliminated.

In the leading Washington case, *State v. Parr*, 93 Wn.2d 95, 106, 606 P.2d 263, 269 (1980), a prosecution for murder, a witness was allowed to recount the victim's out-of-court statement that she feared the defendant. By contrast, the witness was not allowed to recount the victim's statement that the defendant had threatened her. The latter statement was a factual assertion about something that had happened in the past and was not within this exception to the hearsay rule.

While a statement may not be barred as hearsay, a victim's out-of-court statement may be barred by the confrontation clause. *State v. Fraser,* 170 Wash. App 13, 282 P.3d 152 (2012).

(3) Statement admitted to show effect on the hearer.

An out-of-court statement offered to prove the mental or emotional effect upon the hearer or reader is not objectionable as hearsay. The result is usually based not upon the theory that the instant hearsay exception applies, but upon the theory that the statement is not offered to prove the truth of the matter asserted, *i.e., the statement is not within the definition of hearsay in the first place.*

The rule is often invoked in civil litigation to show that the hearer or reader received notice of some fact, had knowledge of some fact, or the like. Although the rule is less frequently invoked in criminal cases, some applications can be found in the case law.

Example: Admissible – In *State v. Mounsey*, 31 Wn. App. 511, 523, 643 P.2d 892, 899 (1982), the prosecution sought to prove that the defendant had entered a home with the intent to commit rape. The defendant sought to prove that he could not have intended to commit rape because he had heard from a friend that the victim was accustomed to late-night visitors and that, in fact, he expected to be welcomed. The court stated that the statement by the friend was not hearsay when offered to prove the defendant's state of mind.

Example: Admissible – In *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d. 892, 898 (1996), the prosecution was permitted to introduce a threat allegedly made by the defendant to a third party to explain why the third party had not reported the crime earlier. The statement was not hearsay because it was not being admitted to prove that the defendant intended to carry out the threat but simply to show the effect on the hearer.

However, if the out-of-court statement is offered to prove the state of mind of a third person (a person other than the declarant or the hearer or reader), the statement is hearsay.

3. Statements for Medical Diagnosis or Treatment – ER 803(a)(4)

Under ER 803(a)(4), statements made for the purpose of, and "reasonably pertinent to," medical diagnosis or treatment are not objectionable as

hearsay. This exception is "firmly rooted." *State v. Woods* 143 Wn.2d 561, 602, 23 P.3d 1046, 1069 (2001) (internal citation omitted). Unlike the hearsay exception for state of mind (above), the rule is not limited to statements describing the declarant's then-existing symptoms. The instant rule is much broader and includes statements of past symptoms as well as statements of medical history.

The rule is based upon the assumption that a person making such a statement is motivated to be truthful by the hope for an accurate diagnosis and successful treatment.

The rule is not limited to statements made to physicians. Statements made to hospital employees, ambulance drivers, and the like are included so long as the requirements of the rule are met. *In re Welfare of J.K.*, 49 Wn. App. 670, 675, 745 P.2d 1304, 1307 (1987), *review denied,* 110 Wn.2d 1009 (1988).

In a domestic violence case, the rule has many potential applications. Prosecuting attorneys have succeeded in using this exception to introduce statements by victims of assault or sexual abuse under a variety of circumstances.

Example: Admissible – *State v. Sandoval,* 137 Wn. App 532, 154 P.3d 271 (2007), in a domestic violence assault case, the victim's description to an emergency room doctor was held admissible, including statements identifying the defendant as the perpetrator.

As a general rule, statements attributing fault are not relevant to diagnosis or treatment and hence are not admissible under this rule. Thus, statements as to causation ("I was hit by a car . . .") would normally be admissible, but statements as to fault (". . . driven by John Smith") would not. *See State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505, 507, *review denied*, 112 Wn.2d 1014 (1989). . However, in a case involving an adult domestic violence victim, a statement as to fault may be admissible because it is reasonably pertinent to treatment and diagnosis. *State v. O'Cain,* 169 Wn. App 228, 279 P.3d 926 (2012) (statements by victim to medical personnel about injuries and the defendant's attempts to kill her did not violate confrontation clause). *See also, State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521, 523 (1995). Further, "a statement made by the child abuse victim identif[ying] the abuser as a member of the victim's immediate household" is admissible because it is relevant to preventing recurrence of the injury. *Butler* at 220-21.

NOTE: The record in *Sims* contains extensive testimony from the medical personnel as to why it is important to elicit the identity of the assailant

when treating a domestic violence victim. It is unclear whether, without such testimony, statements of fault or identity are admissible.

In practice, of course, statements do not fall neatly into one category or another. It is often difficult to separate statements of causation from statements attributing fault, particularly when the declarant is a young child. In this sort of situation, the courts tend to admit the evidence.

4. Prior Inconsistent Statement Given Under Oath – *Smith* Affidavits (Not Hearsay)

Under ER 801(d)(1), prior inconsistent statements of a witness are considered not to be hearsay when:

> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding . . .

In *State v. Smith*, 97 Wn.2d 856, 863, 651 P.2d 207, 211 (1982), the Supreme Court held that an affidavit sworn before a notary public fell within the "other proceeding" requirement of ER 801(d)(1)(i) and admitted the affidavit as substantive evidence after the declarant, at the subsequent trial, testified inconsistently. The court concluded that because prosecuting attorneys rely on such affidavits when deciding whether to file an information, the affidavits come within the "other proceedings" requirement of ER 801(d)(1)(i).

The *Smith* court declined to establish a bright-line rule providing for the admissibility of all such affidavits. Rather, it established a four-part test for determining whether an inconsistent statement is sufficiently reliable to be admitted as substantive evidence:

(1) Did the witness make the statement voluntarily?
(2) Were there minimal guaranties of truthfulness?
(3) Was the statement taken as standard procedure in one of the four permissible methods for determining probable cause for the instigation of a criminal proceeding?
(4) Was the witness subject to cross-examination when giving the subsequent inconsistent statement?

In *State v. White*, 152 Wn. App. 173, 215 P.3d 251 (2009), the court upheld the admission of a statement of a witness recorded by a police officer, citing other indicia of reliability, by examining the totality of the

circumstances. *See also State v. White*, 152 Wn. App 173, 215 P.3d 251(2009) (admission of testimony upheld as recorded recollection because of other indicia of reliability related to domestic violence cases).

Example: Inadmissible – In *State v. Nieto*, 119 Wn. App. 157, 163, 79 P.3d 473, 477 (2003), prosecution for rape of a child, the victim recanted a statement that she had consensual intercourse with defendant before she was sixteen. The Court held the statement was not sufficiently reliable to be admissible as a prior inconsistent statement because it was not under oath, there was no notary, no other formal procedure was followed, and the declarant testified she had not read language about perjury on the boilerplate statement form. *See also State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234, 1243 (2003) (statement was not admissible as a prior consistent statement because it was not "under oath subject to the penalty of perjury").

5. Prior Consistent Statement by Witness – ER 801(d)(1)(Not hearsay)

A statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. By its terms, the rule applies only when the declarant is present and has already testified as a witness. ER 801(d)(1).

Because the rule applies only to prior statements by a witness, the rule is unavailable to the prosecution in a domestic violence case if the victim refuses altogether to testify. The rule, however, may be useful to the prosecution when the defense claims the victim or witness is biased or has fabricated the allegations against the defendant.

Example: Admissible – In *State v. Smith*, 30 Wn. App. 251, 255, 633 P.2d 137, 140 (1981), *aff'd*, 97 Wn.2d 801, 650 P.2d 201 (1982), a prosecution for assault, defense counsel's cross-examination of the victim, designed to show that the victim had on previous occasions falsely accused the defendant of misconduct, justified the admission of the victim's prior consistent statements to other persons about the alleged incident involving the defendant.

Example: Admissible – In *State v. Osborn*, 59 Wn. App. 1, 7, 795 P.2d 1174, 1177, *review denied*, 115 Wn.2d 1032 (1990), a prosecution for statutory rape, the victim testified and was cross-examined only briefly. Defense counsel then conducted a more extensive cross-examination of the victim's mother, designed to reveal a conspiracy by the mother and the victim to falsely accuse the defendant. Thereafter, the trial court properly allowed other witnesses to reiterate the victim's out-of-court descriptions of the alleged incident. The appellate court said it saw "no problem" with

the fact that the prior statements of the victim were offered to rebut inferences raised during cross-examination of a different witness, the mother.

Example: Admissible – In *State v. Walker*, 38 Wn. App. 841, 845, 690 P.2d 1182, 1185 (1984), *review denied*, 103 Wn.2d 1012 (1985), a prosecution for statutory rape, after defense counsel asserted that a witness was biased because of a "trade-off" deal with the prosecutor, the prosecution was properly allowed to offer the prior consistent statements of the witness through the testimony of four other witnesses.

The prior consistent statement is admissible only if it is offered to rebut a charge of *recent* fabrication. The rule is inapplicable when the defendant claims that the victim's story was a fabrication from the inception.

Furthermore, the prior consistent statement is admissible only if it was made under circumstances minimizing the risk that the declarant foresaw the legal consequences of the statement (i.e., before the existence of any motive to fabricate a new story). *State v. Ellison,* 36 Wn. App 564, 568, 676 P.2d 531, 534-5, *review denied*, 101 Wn.2d 1010 (1984).

6. Prior Testimony – ER 804(b)(1)

When a declarant is unavailable for trial, prior sworn testimony of the declarant may be admissible. ER 804(a) sets forth under what situations a declarant is unavailable. These include:

(1) A witness who has been exempted from testifying on the grounds of privilege;
(2) A witness who persists in refusing to testify despite an order of the court;
(3) A witness who testifies to a lack of memory concerning the subject of the proposed testimony;
(4) A witness who is unable to be present because of "death or then-existing physical or mental illness or infirmity;"
(5) A witness who is absent from the hearing and the proponent has been unable to prosecute his attendance by "process or other reasonable means."

The proponent must establish that a "good faith" effort has been made to secure the presence of the witness. *State v. Dictado*, 102 Wn.2d 277, 287, 687 P.2d 172, 188 (1984), *rev'd on other grounds,* 244 F.3d 724 (9th Cir. 2001). The mere issuance of a subpoena is not enough. *State v. Rivera*, 51 Wn. App. 556, 560, 754 P.2d 701, 703 (1988). In *State v. Hobson*, 61 Wn. App 330, 338, 810 P.2d 70, 73-4, *review denied*, 117 Wn.2d 1029 (1991),

the court stated that under the facts of that case the State need not have moved for a material witness warrant for the now-absent witness in order to establish a "good faith" effort to secure his presence at trial.

Medical unavailability requires more than a showing of inconvenience to the witness. The medical condition must make appearance of the witness "relatively impossible." *State v. Young*, 129 Wn. App. 468, 481, 119 P.3d 870 (2005).

ER 804(b)(1) states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Depositions are discussed more fully at Chapter 4, Section IV, E.

7. Hearsay Exceptions – Complaint of Sexual Abuse

At common law, the courts made an exception to the hearsay rule to allow an out-of-court complaint of a sexual offense to be introduced as evidence. *State v. Hunter*, 18 Wash. 670, 672, 52 P. 247, 248 (1898). *See also State v. Pugh*, 167 Wash.2d 825, 841-842 225 P.3d 892 (2009). This exception, sometimes called the "fact of complaint" or "hue and cry" rule, is a relatively narrow exception in the sense that only the fact of the declarant's complaint and the general nature of the crime could be related by the witness. "Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible." *State v. Alexander*, 64 Wn. App. 147, 151, 822 P.2d 1250, 1253 (1992).

Although the common law rule is nowhere to be found in the Evidence Rules, it continues to be available. *See, e.g.*, *State v. Ackerman*, 90 Wn. App. 477, 481, 953 P.2d 816, 819 (1998).

Example: In *State v. Ferguson*, 100 Wn.2d 131,137, 667 P.2d 68, 72 (1983), a prosecution for indecent liberties, the trial court properly allowed the victim's school teacher to testify that the victim reported "some sexual advances" towards her, but the trial court should not have permitted the teacher to testify that the victim had identified the defendant as the offender.

8. Public Records Exception

RCW 5.44.040 creates a statutory exception to the hearsay rule for public records. In *State v. Phillips*, 94 Wn. App. 829, 836, 972 P.2d 932 (1999), the Court of Appeals affirmed a conviction for violation of a domestic violence protection order. The trial court had admitted a return of service, which had been filed in the court file during the protection order proceeding to establish that the respondent/defendant had been served with a copy of the protection order and thus had knowledge of its existence. The Court of Appeals concluded that this was admissible.

In *Phillips*, the return of service was admitted to corroborate defendant's admission and to establish independent proof of the *corpus delicti.* However, there is no reason to believe that the ruling is limited to this situation. It appears that, so long as the return of service had been filed in the court file in the protection order proceeding and otherwise meets the requirements of RCW 5.44.040 (no expertise or opinion), the return of service is admissible as substantive evidence in a subsequent criminal prosecution.

The confrontation clause is not at issue when the certification simply attests to the authenticity of the document. *Id. See also, State v. Jasper*, 174 Wn. 2d 96, 115-116, 271 P.3d 876 (2012) (violation of the confrontation clause found where the Department of Licensing prepared documents for the purpose of prosecution).

B. The Relationship Between the Hearsay Rule and the Confrontation Clause

The broad issue of the relationship between the Confrontation Clause contained in The Sixth Amendment to the United States Constitution and the hearsay exceptions embodied in the Rules of Evidence was defined by the United States Supreme Court in its landmark decision of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

In *Crawford*, the Supreme Court rejected its decision in *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) that an out-of-court hearsay statement was admissible and did not violate the Confrontation Clause if the statement was reliable; in other words, if it qualified for admission under a firmly rooted hearsay exception. The *Crawford* court held that the Confrontation Clause prohibits testimonial hearsay without regard to whether a firmly rooted hearsay exception applies, or whether there is adequate indicia of reliability. The "unpardonable vice of the *Roberts* test . . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the

Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. The Court held that an out-of-court testimonial statement is in admissible if the declarant is unavailable unless the defendant had a prior opportunity for cross-examination.

The type of evidence most likely to be the subject of a *Crawford* objection in a domestic violence prosecution is evidence of statements a non-testifying victim made to law enforcement. Most commonly, these statements have been admitted as present sense impressions (ER 803(a)(3)) or excited utterances ER 803(a)(2). Statements made for the purposes of medical diagnoses or treatment pursuant to ER 803(a)(4) may also present issues.

Crawford also refers to types of hearsay that are not testimonial. These include: (1) "[a]n off-hand, overheard remark;" (2) "a casual remark to an acquaintance;" (3) "business records or statements in furtherance of a conspiracy;" and (4) "statements made unwittingly to an FBI informant" by a co-conspirator.

1. Impact of *Crawford* if declarant testifies at trial

In considering the reach of *Crawford*, it must be emphasized that the prohibition against admitting evidence that falls within a hearsay exception applies only when the declarant does not testify at trial. A witness on the stand who simply refuses to answer questions has not testified within the meaning of the confrontation clause. *In re Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004) (Contrasting child who says, "I don't want to talk about it," with child who says, "I can't remember," after being questioned about the incident).

2. What is "testimonial evidence"?

The Confrontation Clause is implicated by "testimonial" statements—those that "look and feel like testimony." *Davis*, 126 S.Ct. at 2278. As summarized by the Court in *State v. Walker*, 129 Wn. App. 258, at 267, 119 P.3d 935 (2005) (most internal citations omitted):

> Various formulations of this core class of "testimonial" statements exist: "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"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "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."

Additionally, the Court determined "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard" whether or not they are sworn statements. *Id.* The Court indicated that "[p]olice interrogation" should be given its colloquial meaning and that a recorded statement "knowingly given in response to structured police questioning, qualifies [as interrogation] under any conceivable definition." *Id.* And in a subsequent case, the United States Supreme Court found that "police questioning during a Terry stop qualifies as an interrogation," and that "responses to such questions are testimonial in nature." *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 124 S. Ct. 2451, 2463, 159 L. Ed. 2d 292 (2004).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224, (2006), the court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the 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 future prosecution. *Davis,* 527 U.S. 813-814. The opinion embraced two separate cases: *Davis*, in which the trial court admitted a 911 call by a woman who claimed her former boyfriend had beaten her, and *Hammon v. Indiana*, in which the trial court admitted a wife's statements, to police who responded to the scene of a reported domestic disturbance, that her husband had assaulted her. In each case, the complainant did not appear to testify at trial.

The court determined that the statements to the 911 operator in *Davis* did not offend the confrontation clause, affirming the Washington State Court's opinion in *State v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (2005). The *Indiana* conviction was reversed because the affidavit had been improperly admitted.

a. "Primary Purpose" of a statement

Determining the primary purpose of statements is an objective inquiry that considers the questions and the answers as well as the totality of the circumstances, including elapsed time, presence of weapons, whether there is a public threat versus a private dispute, and the victim's injuries. *Michigan v. Bryant,* 131 S. Ct 1132 (2011). When the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial; therefore, statements made in such an interrogation are non-testimonial and not within the scope of the confrontation clause. *Id. See also, State v. Pugh*, 167 Wn. 2d 825, 225 P.3d 892 (2009) (emergency was ongoing where it was unclear whether

defendant had left for good); *State v. Saunders*, 132 Wn. App. 592 (Div.1, 2006) (911 recording held non-testimonial where victim called 911, crying and upset, describing assault and injury and concern that the defendant would return).

b. Statement to law enforcement officers: excited utterance

As stated above, the United States Supreme Court in *Davis v. Washington*, 547 U.S. 813,126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), concluded that a statement made to law enforcement during an existing emergency is properly admitted even when the declarant does not testify at trial. Presumably, such statements would qualify as excited utterances under ER 803(a)(2).

The standard was updated in *Michigan v. Bryant*, clarifying that statements in response to police questioning (911 or at scene) may or may not be "testimonial." Only testimonial statements violate the Confrontation Clause if the declarant is unavailable for cross-examination. If the primary purpose of questioning is to enable police to deal with ongoing emergency, statements are not testimonial. But if primary purpose of questioning is to gather evidence about the past, then statements are testimonial. Determining the primary purpose of statements is an objective inquiry that considers the questions and the answers as well as the totality of the circumstances, including elapsed time, presence of weapons, whether there is a public threat as opposed to a private dispute, and the victim's injuries. *Michigan v. Bryant*, 562 U.S. 131, 131 S.Ct. 1143 (2011).

PRACTICE TIP: Judges should consider holding a pretrial hearing to listen to the 911 tapes, and redact portions that are testimonial, and allow the other portions in.

c. Statement for the purposes of medical diagnosis

Statements that victims make to healthcare providers are not testimonial where there is no indication that the patient made statements to medical personnel, including social workers, with the belief that they would be used at a subsequent trial. *State v. Moses*, 129 Wn. App. 718, 730-731, 119 P. 3d 906 (Div. 1 2005). *See also State v. Fisher*, 130 Wn. App. 1, 108 P.3d 1262 (Div. 2 2005); *State v. Sandoval*, 137 Wn. App 532, 154 P.3d 271 (Div. 3, 2007).

However, the presence of a police officer in the examining room, even if those statements were made for treatment or diagnoses purposes, made the victim's statements to the emergency room nurse testimonial, because a reasonable person would anticipate the statements would be used in

prosecution. *State v. Hurtado,* 173 Wn. App 592, 294 P.3d 838, *rev. denied,* (Div. 1, 2013).

d. Statements to family members

Statements that victims, in particular, child victims, make to their family members are generally not testimonial and thus admissible. *State v. Hopkins* 137 Wn. App. 441, 154 P.3d 250 (2007) (in child sexual abuse case, statements to family members are not testimonial). In determining whether statements to family members are testimonial, there must be a threshold evaluation of the underlying circumstances to examine the purpose and formality of the statements. *State v. Alvarez-Abrego***,** 154 Wn. App. 351, 225 P.3d 396 (2010)

e. Governmental records

As discussed in Chapter 4, III, G, a defendant who is convicted of violating a protection or no-contact order following two prior convictions for such an offense may be charged with a felony. Admission of certified copies of the judgment and sentences from the prior convictions does not violate *Crawford. State v. Benefiel*, 131 Wn. App. 651, 128 P.3d 1251 (February 2006); *State v. Hubbard*, 169 Wn. App. 182, 279 P.3d 521 (2012) (court clerk's minute entry showing that the defendant was served with a no-contact order was not testimonial, because it was not prepared for use in a criminal proceedings); *State v. Mares*, 160 Wn. App. 558, 248 P.3d 140 (2011) (certificate authenticating DOL photo was not testimonial.); *State v. Lee,* 159 Wn. App. 795 (2011)(admission of cell phone records through affidavits, prepared in compliance with RCW 10.96.030 that attest to the authenticity of those records does not violate a defendant's Sixth Amendment right to confrontation); *State v. Iverson* , 126 Wn. App. 329 (2005)(jail booking records properly admitted to establish non-testifying DV victim's identity).

f. Statements not admitted for their truth

When a statement of a non-testifying declarant is admitted for some purpose other than its truth, there is no confrontation clause violation. *State v. Athan,* 160 Wn. 2d 354, 158 P. 3d 27 (2007) (statements of defendant's brother regarding the defendant's location were not offered for their truth, thus the confrontation clause was not implicated). *But see, State v. Mason,* 160 Wn.2d 910, 162 P.3d 396 (2007)("…[W]e are not convinced . . . that a statement . . . offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis")**.**

3. Confrontation Clause and Expert witnesses

In *State v. Lui*, 179 Wn. 2d 457, 315 P.3d 493, *cert. denied* 134 S. Ct. 2842 (2014), the Supreme Court declared a new test for the right to confront expert witnesses. An expert comes within the scope of the confrontation clause if two conditions are satisfied: (1) the person must be a "witness" by virtue of making a statement of fact to the tribunal; and (2) the person must be a witness "against" the defendant by making a statement that tends to inculpate the accused.

Under *Lui*, an expert witness may rely on technical data prepared by others, without each technician testifying as a witness. This only applies if the underlying data is not inherently inculpatory. If the data requires expert interpretation to be inculpatory, it is admissible as part of the testimony of an expert witness who provides such interpretation. If the data is inculpatory without any interpretation, it requires the testimony of the person who obtained it. Furthermore, *Lui* disallows laboratory reports to be admitted into evidence and used against a defendant without effective cross-examination.

4. Forfeiture by wrongdoing

In September 2013, the Supreme Court adopted ER 804(b)(6) which creates an exception to the hearsay rule allowing for admission of a statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The adoption of this exception clarifies that it applies not only to Confrontation Clause objections but also to hearsay rule objections. This amendment to ER 804(b) should apply to all cases, including crimes that occurred before the amendment, without violating the Ex Post Facto Clause. *See State v. Scherner*, 153 Wn. App. 621, 637, 225 P.3d 248 (2009), *affirmed on other grounds*, 173 Wn.2d 405 (2012) (stating that changes in ordinary rules of evidence do not violate the Ex Post Facto Clause).

In *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008), the U.S. Supreme Court considered the application of the forfeiture by wrongdoing exception under the Confrontation Clause, which allows an un-confronted testimonial statement to be admitted where a defendant commits a wrongful act that makes the witness unavailable to testify at trial. For testimonial statements to be admissible under the forfeiture exception to hearsay, the Court held the proponent must show the defendant intended to make the witness unavailable for trial. *Id.*, 554 U.S. at 361.

"Where there is clear, cogent and convincing evidence that the witness has been made unavailable by the wrongdoing of the defendant, and the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying, the defendant forfeits the Sixth Amendment right to confront a witness." *State v. Dobbs,* 180 Wn.2d 1 (2014) (Where evidence supported that the defendant engaged in a campaign of threats, harassment and intimidation against his ex-girlfriend, including telling her she would "get it" for calling the police, the trial court properly found by clear, cogent and convincing evidence that he intentionally caused her absence at trial and forfeited his confrontation rights and hearsay objections).

A defendant who procures a witness's absence waives his hearsay objections to that witness's out-of-court statements. *Id.* The State is not required to produce a direct statement from the witness who is intimidated into silence that the defendant's actions are the reason that the witness refuses to testify. *Id. See also, State v. Mason,* 160 Wn. 2d 910, 926, 162 P.3d 396 (2007).

VII. Children as Witnesses

The possibility of a child's testimony in a domestic violence case raises several issues. On one hand, children are often present during the violence, so their testimony may have great probative value. On the other hand, the child may suffer great trauma from testifying and may be subject to great stress from other family members for "taking sides." Continuances can cause significant distress to child witnesses. The court can prevent the child from being further traumatized by avoiding unnecessary continuances.

A. Children's Statutory Rights

In addition to the statutory rights granted to all witnesses, children are given special statutory rights tailored to their needs. RCW 7.69A.030 states that these special rights are not "substantive rights," but that "there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section."

Of particular significance in domestic violence cases are a child's right to a secure waiting area, the right to have an advocate or support person present, and the right to a measure of privacy with respect to names and addresses.

The Washington statute expressly authorizes the child's advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the

child, and to provide the court with information "to promote the child's feelings of security and safety." RCW 7.69A.030(2).

A. Competency

1. The legal standard for competency

RCW 5.60.050(2) prohibits testimony by "[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." Although the statute does not mention age as a factor, the case law makes it clear that the trial judge has considerable discretion in deciding whether a child should be permitted to testify.

Both children and adults are presumed competent until proven otherwise by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 343-45 P.3d 209 (2011). The *Brousseau* court held that age alone is insufficient to trigger a competency hearing, and further held that a child is not required to testify at a pretrial competency hearing under RCW 9.44.120 (admissibility of out-of-court statements by child sexual abuse victims). *Id.*

The following factors are to be considered in evaluating competency:

a. The child's understanding of the obligation to speak the truth on the witness stand;

b. The child's mental capacity, at the time of the events in question, to receive an accurate impression of the events;

c. Whether the child's memory is sufficient to retain an independent recollection of the events;

d. Whether the child has the capacity to express in words his or her memory of the events; and

e. Whether the child has the capacity to understand simple questions about the events.

State v. Wyse, 71 Wn.2d 434, 437, 429 P.2d 121, 123 (1967).

Each case must be judged on its own facts and on the trial court's judgment as to the competency of the particular child involved.

2. Procedure for determining competency

a. The party objecting to a child's competence bears the burden of proof. The challenger is not entitled to a competency hearing as a matter of right, but

must instead make a threshold showing of incompetency. *State v. Rousseau*, 172 Wn. 2d at 343-345.

b. In determining whether a child is competent to testify, the court may, but need not, question the child about the actual events that are at issue in the case. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203, 1205 (1987).

c. The child should be examined out of the presence of the jury. *State v. Tuffree*, 35 Wn. App. 243, 246-7, 666 P.2d 912, 914-5 (1983) (noting that in previous decisions the Court of Appeals had observed it was a "better practice" to conduct hearing out of presence of jury).

d. If the child is found competent to testify, the court should administer the usual oath or at least elicit some form of declaration from the child that he or she will testify truthfully. ER 603 gives the court discretion to fashion a procedure appropriate for the circumstances presented.

3. Relationship to hearsay rules

A child might be too overwhelmed by the courtroom setting to testify accurately, and yet the child's out-of-court statements might seem reliable. Thus, as a general rule, the fact that a child is incompetent to testify does not bar introduction of a child's out-of-court statement under an exception to the hearsay rule. *State v. Robinson*, 44 Wn. App. 611, 616, 722 P.2d 1379, 1383, *review denied*, 102 Wn.2d 1009 (1986) (excited utterance by three-year-old); *State v. Justiniano*, 48 Wn. App. 572, 574, 740 P.2d 872, 874 (1987) (statement by abused four-year-old, under RCW 9A.44.120). *See supra* Section VI. A. for a discussion of the relationship between the Confrontation Clause and the Hearsay Rule.

NOTE: RCW 9A.44.120, the "Child Hearsay Statute," was amended in 1995 to broaden its scope to include physical as well as sexual abuse of a child. The statute is not available for use when the child is testifying as a non-victim witness. The statute operates only in criminal proceedings. *See In re the Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985). The constitutionality of the statute was upheld in *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

B. Use of Closed-Circuit Television Testimony

RCW 9A.44.150, which expressly allows the use of closed-circuit television to convey the testimony of children, on its face refers only to cases in which a child is testifying concerning an act or attempted act of "sexual contact" or "physical abuse" on that child. Before closed-circuit television testimony can be used, the trial court must find by substantial evidence that "requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the

child from reasonably communicating at the trial." RCW 9A.44.150(1)(c). The constitutionality of RCW 9A.44.150 was upheld against both a state and federal constitutional challenge in *State v. Foster,* 135 Wn.2d 441, 472, 957 P.2d 712, 729 (1998).

VIII. Expert Witnesses

In both civil and criminal cases, experts on domestic violence are occasionally called to assist the jury. When an expert testifies, "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. However, this rule has a limitation in a criminal trial when expert testimony is introduced in a trial where the batterer is the defendant. Under no circumstances may an expert opine that, in the opinion of the expert, the defendant committed the act for which he or she is charged. *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12, 19 (1987) (rape trauma syndrome). In *State v. Florczak,* 76 Wn. App. 55, 74, 882 P.2d 199, 210 (1994), *review denied,* 126 Wn.2d 1010(1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo,* 72 Wn. App. 359, 365, 864 P.2d 426, 430 (1994) (drug sales case).

The following is a summary of some of the purposes for which expert testimony may be introduced.

A. Battered Women's Syndrome

The collection of specific characteristics and effects of abuse on battered women is known as the battered woman syndrome—it is sometimes also referred to as the battered person syndrome. The battered woman syndrome results in a victim's decreased ability to respond effectively to the violence. Victims may appear traumatized, withdrawn, and non-responsive. They may suffer from lowered self-esteem and may have developed coping behaviors to increase their personal safety. They may minimize and deny the danger they have endured, and at times, may rely on alcohol or drugs to cope with the severity of the violence. Testimony addressing these characteristics may be of considerable assistance to the trier of fact.

Testimony about the battered woman syndrome is generally offered by way of an expert witness. In Washington, the courts have said that the admissibility of such testimony, and testimony about related syndromes, is determined by reference to

the *Frye* rule.[2] Under *Frye*, scientific testimony is admissible only if two conditions are met: (1) the theory underlying the expert's testimony must have general acceptance in the scientific community; and (2) there must be techniques, experiments or studies utilizing the theory that are capable of producing reliable results and that are generally accepted in the scientific community.

Even if scientific testimony satisfies *Frye*, such testimony should be admitted only if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

The existence of the battered woman's syndrome—a subset of post-traumatic stress disorder—has been accepted in cases to explain victim conduct. *See, State v. Ciskie,* 110 Wn.2d, 263, 279, 751 P.2d. 1165, 1173 (1988) (prosecution for rape where battered woman syndrome testimony admissible to explain victim's failure to discontinue relationship and delay in reporting); *State v. Grant,* 83 Wn. App. 98, 105, 920 P.2d. 609, 612 (1996) (upholding admissibility of expert testimony opinion as to why the victim continued to see the defendant despite the existence of a no-contact order and why the victim minimized the extent of the violence).

1. Offered By Defendant-Victim

a. Self-Defense

If a woman is accused of assaulting or killing a man who allegedly abused her, evidence of battered woman syndrome is admissible in support of a claim of self-defense. *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984); *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984); *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d. 1194 (1996). *See also State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (battered child syndrome). This testimony is helpful to the trier of fact because it can show how "severe abuse within the context of a battering relationship affects the battered person's perceptions and reactions in ways not immediately understandable to the average juror." *State v. Riker,* 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

The presence of battered woman syndrome alone, however, is not a defense. To justify submitting the issue of self-defense to the jury, the defendant must provide at least some evidence, other than the syndrome, that she perceived imminent danger from the batterer. *State v. Walker*, 40 Wn. App. 658, 700 P.2d 1168 (1985). In *State*

[2] The rule originated in *Frye v. United States*, 293 F. 1013, 3 A.L.R. 145 (DC Cir., 1923).

v. Hanson, 58 Wn. App. 504, 793 P.2d 1001, *review denied*, 115 Wn.2d 1033 (1990), a woman was accused of murdering the man with whom she lived. She did not assert a claim of self-defense but rather claimed that the killing was an accident. The appellate court held that under this record, evidence concerning the battered woman syndrome was irrelevant. (A dissenting judge flatly disagreed, saying, "Evidence that [defendant] retrieved the gun out of fear and not anger tends strongly to make the theory that the gun discharged accidentally more probable." *Hanson* at 510 (Webster, J., dissenting). *See also State v. Callahan*, 87 Wn. App. 925, 943 P.2d 767 (1997) (self-defense available under some circumstances, even when defendant claims that act was accidental).

A defendant who testifies that she does not remember stabbing her boyfriend may still assert self-defense. In that instance, testimony concerning the battered woman's syndrome may also be appropriate. *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d 1194 (1996)

b. Duress

A battered woman who commits welfare fraud at the behest of her batterer should have been permitted to assert a defense of duress, even though the batterer was on a merchant marine vessel at the time the incident occurred.

Although the trial court permitted an expert to testify about battered woman syndrome, the court declined to instruct on duress because the defendant faced no immediate harm from her batterer. The Supreme Court reversed, stating that "the reasonableness of the defendant's perception of immediacy should be evaluated in light of the defendant's experience of abuse." *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

In contrast, in *State v. Riker*, *supra*, testimony concerning battered woman syndrome was properly excluded where the individual who allegedly placed the defendant under duress was a casual business acquaintance and was not her batterer.

2. Offered By Prosecution Against Abuser

a. Expert testimony inadmissible if invades province of jury, comments on defendant's guilt, or amounts to profile evidence.

When it is the abuser who is charged with assault or homicide, the courts have not been receptive to evidence of the battered woman

syndrome. The evidence is not admissible to corroborate the victim's allegation of abuse because the expert would simply be stating an opinion on the ultimate issue of the defendant's guilt and would thus invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (rape trauma syndrome). In *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994) (drug sales case).

B. Expert Testimony Admissible to Explain Demeanor, Delay in Reporting Domestic Violence, Recantation, or Minimizing of Incident by Victim

Expert testimony in domestic violence prosecutions is often admissible to explain the actions of the victim.

In *State v. Aguirre* 168 Wn.2d 350, 229 P.3d 669 (2010**),** the court ruled that the trial court properly permitted the testimony of an experienced investigator explaining the demeanor of victims of sexual assault and domestic violence, as well as testimony describing objective observations of this victim's demeanor during her interview as compared with observations of other victims interviewed. Because the expert did not state or imply that the victim had been a victim of domestic violence, and testified that victims respond to abuse differently, the testimony was not an opinion regarding the defendant's guilt or the victim's veracity.

In *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165, 1173 (1988), a prosecution for rape, testimony about battered woman syndrome was admissible to assist the jury in understanding the victim's delay in reporting the alleged rape and the victim's failure to discontinue her relationship with the defendant.

Similarly, in *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609, 612 (1996), the court upheld the admissibility of evidence of past acts of domestic violence perpetrated by the defendant against the victim and expert testimony intended to explain the victim's conduct. Specifically, the expert was permitted to give an opinion as to why the victim continued to see the defendant even after a no-contact order had been issued and why she minimized the extent of the violence in conversations with defense counsel. As the court stated, "[t]he jury was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a

relationship has on the victim." *Grant,* at 108. *Accord State v. Madison*, 53 Wn. App. 754, 766, 770 P.2d 662, 669 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify). *See also State v. Magers*, 164 Wash.2d 174, 184–186 189 P.3d 126 (2008). *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify).

C. In a Civil Case, Expert Testimony May Be Used to Assist the Jury in Evaluating Damages

An expert may be able to explain why the victim is unable to work in order to assist the jury in evaluating a request for special damages. Similarly, an expert may have relevant testimony on the issue of pain and suffering.

D. Family Law Cases

1. Parenting plans

As discussed in greater detail in Chapter 11, allegations of domestic violence frequently arise in family law cases. RCW 26.09.191(1) prohibits the court from ordering mutual decision-making if the court has found that one parent has a "history" of domestic violence. Similarly, residential time shall be limited where one parent has a history of domestic violence. RCW 26.09.191(2)(a). Expert testimony may assist the court in evaluating the effect of domestic violence on the children so that appropriate limitations may be put into place.

2. Scope of testimony of guardian ad litems and parenting evaluators

Although technically guardian ad litems are not experts, such persons may not only testify as to their opinions and conclusions but, pursuant to ER 703, may give the basis for such opinions. *Stamm v. Crowley*, 121 Wn. App. 830, 91 P.3d 126 (2004) (Title 11 GAL); *Fernando v. Nieswandt*, 81 Wn. App. 103, 940 P.2d 1380 (1997) (Title 26 GAL). Presumably this same logic would control when the witness is a parenting evaluator appointed pursuant to RCW 26.09.220 as opposed to a guardian ad litem appointed pursuant to RCW 26.12.175.