CHAPTER 901

EVIDENCE — GENERAL PROVISIONS

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

901.01 Scope. Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973).

Evidence: A collection of rules not in the statutes. Marion, WBB July, 1985.

901.02 Purpose and construction. Chapters 901 to 911 shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973); 1981 c. 390.

901.03 Rulings on evidence. (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

(2) RECORD OF OFFER AND RULING. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form.

(3) HEARING OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

History: Sup. Ct. Order, 59 Wis. 2d R1, R9 (1973); 1991 a. 32.

An offer of proof must be made as a necessary condition precedent to review of any alleged error in the exclusion of evidence, because without such an offer there is no way to determine whether the exclusion was prejudicial. State v. Moffett, 46 Wis. 2d 164, 174 N.W.2d 263.

The plain error rule is discussed. Virgil v. State, 84 Wis. 2d 166, 267 N.W.2d 852 (1978).

In order for an error to be "plain error" it must be so fundamental that a new trial must be granted so as not to deny a basic constitutional right. State v. Vinson, 183 Wis. 2d 297, 515 N.W.2d 314 (Ct. App. 1994).

Not all constitutional errors are plain errors. Some may be harmless errors. The state has the burden of showing that an error is harmless beyond a reasonable doubt. State v. Diehl, 205 Wis. 2d 1, 555 N.W.2d 174 (Ct. App. 1996).

901.04 Preliminary questions. (1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) HEARING OUT OF THE PRESENCE OF A JURY. Hearings on any of the following shall be conducted out of the presence of the jury:

(a) Admissibility of confessions.

(b) In actions under s. 940.22, admissibility of evidence of the patient's or client's personal or medical history.

(c) In actions under s. 940.225, 948.02, 948.025 or 948.095, admissibility of the prior sexual conduct or reputation of a complaining witness.

(cm) Admissibility of evidence specified in s. 972.11 (2) (d).

(d) Any preliminary matter if the interests of justice so requires.

(4) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross−examination as to other issues in the case.

(5) WEIGHT AND CREDIBILITY. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

History: Sup. Ct. Order, 59 Wis. 2d R1, R14 (1975); 1975 c. 184, 421; 1985 a. 275; 1987 a. 332 s. 64; 1991 a. 32, 269; 1993 a. 97, 227; 1995 a. 456.

While witnesses may be questioned regarding their mental or physical condition when such matters have bearing on their credibility, evidence that a witness was subject to epilepsy did not warrant disregarding his testimony in the absence of showing what effect the epilepsy had on his memory. Sturdevant v. State, 49 Wis. 2d 142, 181 N.W.2d 523.

A voluntary confession is not rendered inadmissible although the arrest was made outside the statutory jurisdictional limits of the arresting officer. State v. Ewald, 63 Wis. 2d 165, 216 N.W.2d 213.

A stipulation to the admissibility of a polygraph examiner's opinion made before the test does not foreclose a challenge of the manner of testing and the sufficiency of data supporting the opinion. State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260.

A court's refusal to permit a defendant's experts to impeach a polygraph examiner at an admissibility hearing was reversible error. McLemore v. State, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

A psychiatric witness whose qualifications as expert were conceded had no scientific knowledge on which to base an opinion as to the accused's lack of specific intent to kill. There was no basis for a finding under subs. (1) or (2) to admit the testimony. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

A defendant has no confrontation clause rights as to hearsay at a pretrial motion hearing. The trial court could rely on hearsay in making its decision. State v. Frambs, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990).

Sub. (1) permits an out−of−court declaration by a party's alleged co−conspirator to be considered by the trial court in determining whether there was a conspiracy. State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992).

Before a demonstrative videotape may be admitted there must be a foundation that it is a fair and accurate reproduction of what was seen and was produced under conditions reasonably similar to conditions of the actual event. Even with the foundation established the evidence may be excluded on a finding that its probative value is outweighed by its prejudicial effect. State v. Peterson, 222 Wis. 2d 449, 588 N.W.2d 84 (Ct. App. 1998).

In making preliminary factual determinations, courts may examine the very evidence, including hearsay statements, sought to be admitted. Bourjaily v. United States, 483 US 171 (1987).

901.05 Admissibility of certain test results. (1) In this section, "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(2) Except as provided in sub. (3), the results of a test or tests for the presence of HIV, antigen or nonantigenic products of HIV

or an antibody to HIV are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding, as evidence of a person's character or a trait of his or her character for the purpose of proving that he or she acted in conformity with that character on a particular occasion unless the evidence is admissible under s. 904.04 (1) or 904.05 (2) and unless the following procedures are used:

(a) The court may determine the admissibility of evidence under this section only upon a pretrial motion.

(b) Evidence which is admissible under this section must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(3) The results of a test or tests under s. 938.296 (4) or (5) or 968.38 (4) or (5) and the fact that a person has been ordered to submit to such a test or tests under s. 938.296 (4) or (5) or 968.38 (4) or (5) are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding.

History: 1987 a. 70; 1989 a. 201 ss. 34, 36; 1991 a. 269; 1993 a. 32; 1995 a. 77; 1999 a. 188.

901.055 Admissibility of results of dust testing for the presence of lead. The results of a test for the presence of lead in dust are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding unless the test was conducted by a person certified for this purpose by the department of health and family services.

NOTE: This section is created eff. 9−1−01 by 1999 Wis. Act 113.

History: 1999 a. 113.

901.06 Limited admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

History: Sup. Ct. Order, 59 Wis. 2d R1, R21 (1973).

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

901.07 Remainder of or related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

History: Sup. Ct. Order, 59 Wis. 2d R1, R22 (1973); 1991 a. 32.

The rule of completeness requires a statement, including otherwise inadmissible evidence, be admitted in its entirety when necessary to explain an admissible portion of a statement. The rule is not restricted to writings or recorded statements. State v. Sharp, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993).

A party's use of an out−of−court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

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