**User Name:** Jeremy Bass
**Date and Time:** Sunday, December 1, 2024 5:30:00 PM PST
**Job Number:** 239806968

## Documents (85)

1. *Order Adopting New Rules of Evidence*
   **Client/Matter:** -None-
2. *Rule 414. Expressions of Condolence or Sympathy.*
   **Client/Matter:** -None-
3. *Rule 302. Applicability of Federal Law in Civil Cases.*
   **Client/Matter:** -None-
4. *Rule 409. Offers to Pay Medical and Similar Expenses.*
   **Client/Matter:** -None-
5. *Rule 506. Political Vote.*
   **Client/Matter:** -None-
6. *Rule 519. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege.*
   **Client/Matter:** -None-
7. *Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.*
   **Client/Matter:** -None-
8. *Rule 604. [Reserved.]*
   **Client/Matter:** -None-
9. *Rule 512. Comment Upon or Inference From Claim of Privilege; Instruction.*
   **Client/Matter:** -None-
10. *Rule 410. Pleas, Plea Discussions, and Related Statements.*
    **Client/Matter:** -None-
11. *Rule 516. School Counselor-Student Privilege.*
    **Client/Matter:** -None-
12. *Rule 508. Secrets of State and Other Official Information; Governmental Privileges.*
    **Client/Matter:** -None-
13. *Rule 514. Parent-Child; Guardian or Legal Custodian-Ward Privilege.*
    **Client/Matter:** -None-
14. *Rule 515. Accountant-Client Privilege.*
    **Client/Matter:** -None-
15. *Rule 501. Privileges Recognized only as Provided.*
    **Client/Matter:** -None-
16. *Rule 405. Methods of Proving Character.*
    **Client/Matter:** -None-
17. *Rule 513. Lawyer May Exercise Claim of Privilege.*
    **Client/Matter:** -None-
18. *Rule 413. Proceedings of Medical Malpractice Screening Panels.*

**Client/Matter:** -None-

19. *Rule 411. Liability Insurance.*

**Client/Matter:** -None-

20. *Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.*

**Client/Matter:** -None-

21. *Rule 303. Presumptions in Criminal Cases.*

**Client/Matter:** -None-

22. *Rule 301. Presumptions in Civil Cases Generally.*

**Client/Matter:** -None-

23. *Rule 101. Title and Scope.*

**Client/Matter:** -None-

24. *Rule 504. Husband-Wife Privilege.*

**Client/Matter:** -None-

25. *Rule 603. Oath or Affirmation to Testify Truthfully.*

**Client/Matter:** -None-

26. *Rule 518. Licensed Social Worker-Client Privilege.*

**Client/Matter:** -None-

27. *Rule 106. Remainder of or Related Writings or Recorded Statements.*

**Client/Matter:** -None-

28. *Rule 408. Compromise Offers and Negotiations.*

**Client/Matter:** -None-

29. *Rule 608. A Witness's Character for Truthfulness or Untruthfulness.*

**Client/Matter:** -None-

30. *Rule 614. Court's Calling or Examining of Witnesses.*

**Client/Matter:** -None-

31. *Rule 104. Preliminary Questions.*

**Client/Matter:** -None-

32. *Rule 406. Habit; Routine Practice.*

**Client/Matter:** -None-

33. *Rule 407. Subsequent Remedial Measures.*

**Client/Matter:** -None-

34. *Rule 402. General Admissibility of Relevant Evidence.*

**Client/Matter:** -None-

35. *Rule 610. Religious Beliefs or Opinions.*

**Client/Matter:** -None-

36. *Rule 605. Judge's Competency as a Witness.*

**Client/Matter:** -None-

37. *Rule 102. Purpose and Construction.*

**Client/Matter:** -None-

38. *Rule 613. Witness's prior statement.*

**Client/Matter:** -None-

39. *Rule 602. Need for personal knowledge.*

**Client/Matter:** -None-

40. *Rule 606. Juror's Competency as a Witness.*

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**Client/Matter:** -None-

41. *Rule 517. Licensed Counselor-Client Privilege.*

**Client/Matter:** -None-

42. *Rule 510. Waiver of Privilege by Voluntary Disclosure.*

**Client/Matter:** -None-

43. *Rule 520. Medical Malpractice Screening Panel Privilege.*

**Client/Matter:** -None-

44. *Rule 502. Lawyer-Client Privilege.*

**Client/Matter:** -None-

45. *Rule 615. Excluding witnesses.*

**Client/Matter:** -None-

46. *Rule 201. Judicial notice of adjudicative facts.*

**Client/Matter:** -None-

47. *Rule 601. Competency to Testify in General.*

**Client/Matter:** -None-

48. *Rule 412. Sex crime cases; Relevance of alleged victim's past sexual behavior.*

**Client/Matter:** -None-

49. *Rule 505. Religious Privilege.*

**Client/Matter:** -None-

50. *Rule 507. Conduct of Mediations.*

**Client/Matter:** -None-

51. *Rule 509. Identity of Informer.*

**Client/Matter:** -None-

52. *Rule 609. Impeachment by Evidence of a Criminal Conviction.*

**Client/Matter:** -None-

53. *Rule 503. Physician and Psychotherapist-Patient Privilege.*

**Client/Matter:** -None-

54. *Rule 607. Who May Impeach a Witness.*

**Client/Matter:** -None-

55. *Rule 706. Court-Appointed Expert Witnesses.*

**Client/Matter:** -None-

56. *Rule 612. Writing or Object Used to Refresh a Witness's Memory.*

**Client/Matter:** -None-

57. *Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.*

**Client/Matter:** -None-

58. *Rule 704. Opinion on an Ultimate Issue.*

**Client/Matter:** -None-

59. *Rule 103. Rulings on Evidence.*

**Client/Matter:** -None-

60. *Rule 701. Opinion Testimony by Lay Witnesses.*

**Client/Matter:** -None-

61. *Rule 903. Subscribing Witness's Testimony.*

**Client/Matter:** -None-

62. *Rule 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.*

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**Client/Matter:** -None-

63. Rule 101. Title and Scope._Attachment1
**Client/Matter:** -None-
64. *Rule 401. Test for Relevant Evidence.*
**Client/Matter:** -None-
65. *Rule 806. Attacking and Supporting the Declarant's Credibility.*
**Client/Matter:** -None-
66. *Rule 1007. Testimony or Statement of a Party to Prove Content.*
**Client/Matter:** -None-
67. *Rule 1003. Admissibility of Duplicates.*
**Client/Matter:** -None-
68. *Rule 805. Hearsay Within Hearsay.*
**Client/Matter:** -None-
69. *Rule 1001. Definitions That Apply to This Article.*
**Client/Matter:** -None-
70. *Rule 611. Mode and order of examining witnesses and presenting evidence.*
**Client/Matter:** -None-
71. *Rule 902. Evidence That Is Self-Authenticating.*
**Client/Matter:** -None-
72. *Rule 802. Hearsay Rule.*
**Client/Matter:** -None-
73. *Rule 1008. Functions of the Court and Jury.*
**Client/Matter:** -None-
74. *Rule 1005. Copies of Public Records to Prove Content.*
**Client/Matter:** -None-
75. *Rule 1002. Requirement of Original.*
**Client/Matter:** -None-
76. *Rule 1006. Summaries to Prove Content.*
**Client/Matter:** -None-
77. *Rule 1004. Admissibility of Other Evidence of Content.*
**Client/Matter:** -None-
78. *Rule 901. Authenticating or Identifying Evidence.*
**Client/Matter:** -None-
79. *Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Unavailable as a Witness.*
**Client/Matter:** -None-
80. *Rule 703. Bases of an Expert's Opinion Testimony.*
**Client/Matter:** -None-
81. *Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.*
**Client/Matter:** -None-
82. *Rule 801. Definitions that apply to this article; Exclusions from hearsay.*
**Client/Matter:** -None-
83. *Rule 404. Character Evidence; Crimes or Other Acts.*
**Client/Matter:** -None-

84. *Rule 803. Exceptions to the rule against hearsay -- Regardless of whether the declarant is available as a witness.*

**Client/Matter:** -None-

85. *Rule 702. Testimony by Expert Witnesses.*

**Client/Matter:** -None-

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# Order Adopting New Rules of Evidence

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# *I.R.E. Rule 101*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 101. Title and Scope.

**(a) Title.** These rules are titled and should be cited as the Idaho Rules of Evidence, or abbreviated I.R.E.

**(b) Scope.** These rules govern all cases and proceedings in the courts of the State of Idaho and all cases and proceedings to which rules of evidence are applicable, except as otherwise provided in this rule.

**(c) Rules of Privilege.** The rules on privileges apply to all stages of a case or proceeding.

**(d) Rules Inapplicable in Part.** These rules apply in the following proceedings, subject to the enumerated exceptions:

**(1)** preliminary hearings except as modified by Rule 5.1 (b) of the Idaho Criminal Rules;

**(2)** proceedings under the Juvenile Corrections Act except as modified by the Idaho Juvenile Rules;

**(3)** masters proceedings unless the appointing court directs otherwise in the order of appointment pursuant to Rule 53 of the Idaho Rules of Civil Procedure;

**(4)** proceedings under the Uniform Post-Conviction Procedure Act except as modified by *Idaho Code § 19-4907*;

**(5)** proceedings for suspension of driver's license for failure to take an evidentiary test for alcohol concentration except as modified by Rule 9.2 (b) of the Idaho Misdemeanor Criminal Rules;

**(6)** proceedings conducted under the Idaho Rules of Family Law Procedure, except as modified by I.R.F.L.P. 102;

**(7)** restitution hearings except as modified by I.C. *§ 19-5304(6)*.

**(e) Rules Inapplicable.** These rules, except for those on privilege, do not apply to the following:

**(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

**(2)** Special Inquiry Judge proceedings;

**(3)** the following miscellaneous criminal proceedings: extradition or rendition; sentencing; granting or revoking probation; issuing an arrest warrant, criminal summons, or search warrant; considering whether to release on bail or otherwise;

**(4)** contempt proceedings in which the court may act summarily;

**(5)** in the small claims department of the district court;

**(6)** hearings conducted under the Child Protective Act, I.C. *§ 16-1601*, et seq., except that these rules apply at adjudicatory hearings conducted under I.C. *§ 16-1619* and in termination of parental rights cases under I.C. *§ 16-1624*;

**(7)** informal hearings for emergency medical treatment pursuant to I.C. *§ 16-1627*;

**(8)** hearings conducted under I.C. *§ 18-609A* on a request for judicial authorization for performance of an abortion on a minor.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 7, 1993, effective July 1, 1993; amended March 1, 2000, effective July 1, 2000; amended December 26, 2002, effective February 1, 2003; amended March 21, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008; amended February 9, 2012, effective July 1, 2012; amended March 26, 2018, effective July 1, 2018; amended and effective May 28, 2019.)

Annotations

## Commentary

### STATUTORY NOTES

**Compiler's Notes.**

The Juvenile Corrections Act, referenced in (d)(2), is found at *§ 20-501* et seq., Idaho Code, and was effective October 1, 1995.

## Case Notes

Application.
Child Protective Act Proceedings.
Prison Administrative and Disciplinary Proceedings.

**Application.**

Rules of Evidence do not apply to proceedings for revoking probation. *State v. Tracy, 119 Idaho 1027, 812 P.2d 741 (1991)*.

The judicial power to control the admission of evidence in court does not apply in administrative license suspension proceedings, pursuant to *§ 67-5251* and subsection (b) of this rule. *Wood v. Idaho Transp. Dep't, -- Idaho --, 532 P.3d 404 (2023)*.

**Child Protective Act Proceedings.**

This rule modifies I.J.R., Rule 10 by making the Rules of Evidence applicable in all Child Protective Act proceedings except temporary shelter care hearings; hence, subsection (b) of former § 16-1608 (now *§ 16-1619*), providing that hearings shall be conducted in an informal manner, is no longer governing. *Idaho Dep't of Health & Welfare v. Syme, 110 Idaho 44, 714 P.2d 13 (1986)*.

**Prison Administrative and Disciplinary Proceedings.**

Prison administrative and disciplinary proceedings are subject neither to the Rules of Evidence nor the provisions of the Administrative Procedure Act; therefore, the process due in a prison classification hearing does not preclude hearsay evidence which the State Correctional Institution Classification Committee reasonably deems to be reliable. *Wolfe v. State, 114 Idaho 659, 759 P.2d 950 (Ct. App. 1988)*.

**Cited in:**

*State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989)*; *State v. Peters, 119 Idaho 382, 807 P.2d 61 (1991)*; *State v. Farmer, 131 Idaho 803, 964 P.2d 670 (Ct. App. 1998)*; *State v. Murillo, 135 Idaho 811, 25 P.3d 124 (Ct. App. 2001)*; *State v. Nunez, 138 Idaho 636, 67 P.3d 831 (2003)*; *State v. Goodlett, 139 Idaho 262, 77 P.3d 487 (Ct. App. 2003)*; *State v. Martin, 142 Idaho 58, 122 P.3d 317 (Ct. App. 2005)*; *State v. Rose, 144 Idaho 762, 171 P.3d 253 (2007)*; *Doe v. Doe, 146 Idaho 386, 195 P.3d 745 (2008)*; *State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009)*; *State v. Bitkoff, 157 Idaho 410, 336 P.3d 817 (2014)*; *State v. Hess, 166 Idaho 707, 462 P.3d 1171 (2020)*; *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

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# *I.R.E. Rule 102*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 102. Purpose and Construction.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Cited in:**

*State v. Chambers, 166 Idaho 837, 465 P.3d 1076 (2020)*.

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# *I.R.E. Rule 103*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 103. Rulings on Evidence.

**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

**(1)** if the ruling admits evidence, a party, on the record:

**(A)** timely objects or moves to strike; and

**(B)** states the specific ground, unless it was apparent from the context; or

**(2)** if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

**(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record -- either before or at trial -- a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form. If requested in an action tried without a jury, an offer of proof in the form of a full presentation of the evidence must be allowed and reported unless the evidence plainly is not admissible on any ground or the evidence is privileged.

**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Admission of Evidence.**

Even if admission of expert testimony regarding post-traumatic stress disorder in a rape trial was an abuse of discretion it did not constitute fundamental error. *State v. Roles, 122 Idaho 138, 832 P.2d 311 (Ct. App. 1992)*.

District court's initial confusion regarding the law of the case doctrine was not error, and a basis for reversal, where the appellant failed to identify any instance in the record where the district court refused to admit evidence that would have affected a substantial right of hers. *Read v. Harvey, 147 Idaho 364, 209 P.3d 661 (2009)*.

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010)*.

**--Error.**

**-- --Harmless.**

The erroneous admission of a duplicate tape recording of a conversation between buyer and seller had no significant effect on the district court's determination of buyer's credibility. Thus, error in the admission of the duplicate tape was harmless. *Christensen v. Ransom, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992)*.

The outer boundary of the admissibility of conduct offered to prove a plan is whether that plan is a fact of consequence to the determination of the action. The facts of consequence in the action were the elements of first-degree kidnapping and there is no plan element in a first-degree kidnapping. The existence of facts that supported an inference that defendant has a plan to pick up young girls was irrelevant to any issue in dispute. Therefore, the court exceeded the bounds of its discretion when it chose to apply the legal standard of "common scheme or plan" to facts that were not relevant to any disputed issue. However, other evidence in the case was sufficient for a jury to conclude that defendant had committed first-degree kidnapping and therefore the error of admitting the two girls' testimony was harmless error. *State v. Medrano, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992)*.

Where testimony of officer was notably repetitive of victim's testimony at trial, the information elicited from the officer regarding the attack was already before the jury and court was convinced that the jury would have reached the same decision absent that portion of the officer's testimony as such, any error was harmless error and not grounds for reversal. *State v. Woodbury, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995)*.

In view of the considerable amount of independent evidence, essentially unrebutted by the defense, that identified defendant as the second man who fled from officer, and in view of the district court's directive to the jury to disregard officer's testimony that was designed to convey hearsay, court held that the misconduct of the prosecutor was harmless beyond a reasonable doubt. *State v. Agundis, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995)*.

Where the court was convinced, beyond a reasonable doubt, that the result in the case would have been the same despite inappropriate testimony admitted in error, the error was judged not to warrant remand for a new trial as it was held to be harmless under this rule. *State v. Carsner, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995)*.

In a criminal case where trial court overruled defendant's hearsay objection under I.R.E. 801(c), but the Court of Appeals noted that the trial court should have sustained the objection until the proponent made an offer of proof that the statement was not hearsay, under this rule, the testimony was harmless error because other non-hearsay evidence amply proved fact related by the objectionable testimony. *State v. Gomez, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995)*.

In defendant's robbery trial, the State's presentation of evidence of pre-arrest, pre-Miranda silence constituted harmless error. In light of strong circumstantial evidence, the jury would have

found defendant guilty if the court had excluded the testimony regarding his silence when he was initially detained. *State v. Kerchusky, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003)*.

Where injured parties brought suit against a cow owner, pasture owners, and the state when their vehicle struck a cow carcass on an interstate highway, the trial court did not abuse its discretion in allowing the pasture owners' expert to testify as to why the cows might have broken down a pasture gate and gone out onto the highway. *Karlson v. Harris, 140 Idaho 561, 97 P.3d 428 (2004)*.

In a criminal prosecution for forgery, the trial court erred by admitting a reclamation document advising the bank that the payee's social security check had been forged since there was no testimony presented by any witness familiar with the system used to create the document; however, the error was harmless because the reclamation document did not present the jury with any information that had not already been introduced through the testimony of other witnesses. *State v. Hill, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004)*.

In a controlled substances prosecution, an officer's insufficient testimony that a digital scale used to weigh the substance in question was self-calibrating did not cause the admission of testimony of the substance's weight to be reversible error because (1) the subsequent admission of testimony that the substance weighed exactly the same when weighed on a second scale cured the error, and (2) the scale's accuracy was not as critical as if the weight of the substance had barely exceeded the statutory threshold. *State v. Barber, 157 Idaho 822, 340 P.3d 471 (2014)*.

**--Not Error.**

Note written by defendant's co-conspirator to the co-conspirator's girlfriend, showing that the co-conspirator was attempting to cover up the crime by dissuading his girlfriend from divulging information to police, was not hearsay; although the note was offered in error under I.R.E. 801(d)(2)(E), such error was harmless because the note was admissible on other grounds. *State v. Harris, 141 Idaho 721, 117 P.3d 135 (Ct. App. 2005)*.

District court properly affirmed defendant's conviction for misdemeanor driving under the influence because she did not show error in the admission of a forensic scientist's testimony hearsay testimony regarding the foundation for admission of defendant's breath test results where the state police posted its standard operating procedures and analytical methods on its website and the testimony was presented to show that the accuracy of the breath testing equipment had been timely verified. *State v. Swenson, 156 Idaho 633, 329 P.3d 1081 (2014)*.

**Cross-Examination.**

**--By Prosecutor.**

Where defendant testified as part of the self-defense argument that he was not in a position to be able to fight because of health problems, and that was part of the reason why he thought he

had to defend himself with a gun which led to the victim's death, the cross-examination by the prosecutor about defendant's history as boxer and being involved in fist fights clearly was designed to provide a basis upon which the jury ultimately could reach a conclusion whether to believe defendant's version of his reason for killing and there was no error in the admission of the evidence and the trial court did not err in denying the motion for mistrial and motion for a new trial. *State v. Babbitt, 120 Idaho 337, 815 P.2d 1077 (Ct. App. 1991)*.

**--Determination of Harm.**

In determining whether an error has affected substantial rights or is harmless, the inquiry is whether it appears from the record that the error contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the error not occurred. *State v. Woodbury, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995)*.

**Evidence Not Prejudicial.**

Testimony by a social worker, upon cross-examination, that the defendant's wife told the social worker that she suspected her husband of having an affair with the babysitter was not prejudicial to the defendant who was on trial for lewd and lascivious conduct with his eight-year-old stepdaughter, where the wife had already testified without objection that she suspected defendant of having an affair and the basis of defendant's objection to the social worker's testimony was that it was cumulative and irrelevant. *State v. Cliff, 116 Idaho 921, 782 P.2d 44 (Ct. App. 1989)*.

At a hearing on applicant's petition for habeas corpus, which he filed seeking release from commitment on the ground that he was no longer mentally ill, it was not harmful error to admit into evidence a risk assessment document that detailed applicant's history of dangerous behavior and assessed his potential for similar behavior in the future. *Henry v. State, 127 Idaho 349, 900 P.2d 1360 (1995)*.

**Exclusion of Evidence.**

Where, in a medical malpractice action, defendant doctor was allowed to testify as to his referrals of plaintiff to other doctors, and where the medical charts of the doctor concerning his treatment of plaintiff were admitted in evidence and indicated that the doctor had suggested consultations with others, including a neurological consultation if the patient would agree, in light of this evidence the exclusion of evidence of defendant's habit of referring patients to other doctors was not inconsistent with substantial justice and did not affect the substantial rights of the doctor; accordingly, such an exclusion did not warrant a new trial. *Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)*.

The erroneous exclusion of evidence justifies setting aside a jury verdict only if substantial rights of the parties were affected by the error. *Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995)*.

Where court excluded a witness on defendant's witness list and defendant had informed plaintiff that it reserved the right to call anyone on the witness list, error occurred; however, it was harmless because excluding the witness' testimony did not affect defendant's substantial rights as defendant presented other direct evidence and the excluded witness' testimony was cumulative and inadmissible in part. *Bailey v. Sanford, 139 Idaho 744, 86 P.3d 458 (2004)*.

In a property sale dispute, the grant of a new trial on damages, based on erroneous exclusion of evidence, was proper where the error affected a substantial right of the buyer, within the meaning of I.R.C.P. 61 and I.R.E. 103(a), because he was precluded from presenting evidence of his remodeling costs as an element of his damages. *White v. Mock, 140 Idaho 882, 104 P.3d 356 (2004)*.

During a discussion regarding the medical expert's expected testimony, defendant's counsel did not claim that the expert would testify that in his opinion the plaintiff's medical condition would shorten her life expectancy. There was nothing in the record indicating that the defendant's medical expert would testify, to a reasonable degree of medical probability, that in his opinion the plaintiff's life expectancy would be shortened by any of her medical conditions -- the district court did not err in excluding the speculative evidence. *Slack v. Kelleher, 140 Idaho 916, 104 P.3d 958 (2004)*.

**Expert Testimony.**

When reviewing an evidentiary ruling on expert testimony, court's inquiry is limited to whether the challenged ruling was an abuse of the trial court's discretion, and error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

**New Trial.**

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997)*.

**Objection.**

There is no authority in this state that requires a motion to strike or an objection before a trial court may exclude or not consider evidence offered by a party. Absent plain or fundamental error, some form of objection is ordinarily necessary, however, to preserve the right to challenge on appeal the admission or consideration of evidence. *Hecla Mining Co. v. Star-Morning Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992)*.

Denial of the inmate's petition for post-conviction relief was proper pursuant to *§ 19-4907* where he declined to present any evidence that his counsel ignored his request to file a direct appeal. The adoption of the inmate's position that his verified application and affidavits were

automatically introduced into evidence at the evidentiary hearing would have deprived the parties of the opportunity to object to the admissibility of any such proof. *Loveland v. State, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005)*.

Objections to evidence cannot be raised for the first time on appeal. There must be a timely objection to the evidence or a motion to strike, which is essentially a delayed objection. *Phillips v. Erhart, 151 Idaho 100, 254 P.3d 1 (2011)*.

Appellant's broad, general objection that the testimony of an accident reconstructionist invaded the province of the jury was not a proper objection to preserve appellant's challenges to the testimony; the objection was not sufficiently specific under this rule. *Hansen v. Roberts, 154 Idaho 469, 299 P.3d 781 (2013)*.

**Out-of-Court Statements.**

**--Offer of Proof Not Made.**

The issue of suppression of out-of-court statements, which were relied upon by the officer in stopping defendant and arresting defendant for driving under the influence and possession of a concealed weapon, was not preserved for appeal where the state made no offer of proof showing the substance of those statements or that such evidence would have shown the stop was reasonable. *State v. Schoonover, 125 Idaho 953, 877 P.2d 924 (Ct. App. 1994)*.

**Plain Error.**

The term "plain error," when applied to a criminal case, is intended to embody the concept of "fundamental error" -- that is, error which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process. *State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988)*.

In a prosecution for aggravated driving under the influence, allegations, not specified as grounds for objection at trial, that the state failed to prove the blood sample was withdrawn in the proper manner and properly processed for testing, or that the hospital's automatic chemical analyzer operated on the basis of accepted scientific principles, did not establish failure of authentication and identification, under Rule 901, constituting plain error in admitting evidence of the test result. *State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988)*.

No error in either the admission or the exclusion of evidence is grounds for granting a new trial or for setting aside a verdict unless refusal to take such action appears to the court to be inconsistent with substantial justice. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

In cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record,

including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings. If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings. Placing the burden of demonstrating harm on the defendant will encourage the making of timely objections that could result in the error being prevented or the harm being alleviated. *State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010)*.

**Preservation for Appeal.**

Defendant did not preserve the right to raise on appeal whether the trial court violated I.R.E. 404(a) by admitting the testimony of the state's child abuse expert concerning the profile of an offender in an incestuous family to show that defendant fit this profile. *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992)*.

The court refused to consider defendant's argument of the admissibility of the exhibit that was an enlargement of comparative fingerprints where defendant initially objected to the admission of the exhibit on the basis of best evidence, whereas, on appeal defendant argued that the district court erred in admitting the exhibit on the basis of lack of foundation. *State v. Norton, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000)*.

On appeal of defendant's conviction for possession of a controlled substance with intent to deliver, he challenged the reliability of drug detection dog that alerted to presence of drugs in defendant's truck. Because defendant did not bring a foundational challenge to the admission of the evidence of the canine alert, he was not required to make a foundational objection to preserve his claim for review. *State v. Yeoumans, 144 Idaho 871, 172 P.3d 1146 (2007)*.

Defendant's only stated objection was relevance, and he did not ask the court to exclude the exhibit for carrying a high risk of unfair prejudice; defendant failed to preserve any objection under that rule. *State v. Rocha, 157 Idaho 246, 335 P.3d 586 (2014)*.

Defects in documents admitted to support restitution under *§ 37-2732* are foundational errors, which require an objection at the time of the restitution hearing to preserve those arguments for appeal. *State v. Villa-Guzman, 166 Idaho 382, 458 P.3d 960 (2020)*.

Defendant failed to preserve defendant's foundational objections for documents used in determining an award of restitution, because defendant's objection to the prosecution and investigative costs was deficient in that it lacked the specificity required of evidentiary objections. *State v. Hess, 166 Idaho 707, 462 P.3d 1171 (2020)*.

Family preserved for appeal the issue of whether the district court abused its discretion in questioning an expert, where it was clear from the context of the family's motion to strike that they were disputing the propriety of the questioning and the testimony it elicited. The family's motion for a mistrial, coming at the next opportunity outside the presence of the jury and stating with particularity their objections to the questioning, complied with the mandate of Idaho R. Evid. 614(c). *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

**Prosecutor's Comments.**

By contradicting a witness's testimony in front of the jury, the prosecutor, in effect, presented his own unsworn testimony in violation of this rule and in violation of *I.R.E. 603. State v. Gerardo, 147 Idaho 22, 205 P.3d 671 (2009)*.

**Purpose.**

The purpose of this subsection (a)(2) is to preserve a record for appeal and to enable the court to rule on the evidence's admissibility. *Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 245 P.3d 992 (2010)*.

**Standard of Review.**

Appellate courts review trial court decisions admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. *Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997)*.

The basis of defendant's objection to the admission of preliminary hearing testimony, while not set forth specifically as required by subdivision (a)(1) of this rule, appeared to be under *§ 9-336*, and the trial court's ruling therefore would not be disturbed unless clearly erroneous. *State v. Cross, 132 Idaho 667, 978 P.2d 227 (1999)*.

The supreme court reviews challenges to a trial court's evidentiary rulings under an abuse of discretion standard. To determine whether a trial court has abused its discretion, the supreme court considers whether the trial court correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason. Error is disregarded as harmless unless the ruling affects a substantial right of the party. *Herman v. Herman, 136 Idaho 781, 41 P.3d 209 (2002)*.

**Substantial Rights.**

Plain error affecting substantial rights, although not properly brought to the attention of the trial court, may serve as the basis for review on appeal. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Error may not be based upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *L & L Furn. Mart, Inc. v. Boise Water Corp., 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991)*.

Court must disregard any error or defect in the proceeding "which does not affect the substantial rights of the parties." *Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995)*.

A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected the substantial rights of a party. *Wood v. State, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995)*.

In prosecution for robbery, admission of testimony of witnesses concerning hat and coat found in home of defendant's fiancee that purportedly resembled the clothing worn by the robber and which were identified by the witnesses as being similar to those worn by the robber did not affect a substantial right, where the coat and hat were not shown to the jury, and the district court sustained defendant's objection to introduction of the items into evidence, and following such ruling defendant's counsel did not renew motion to strike testimony of witnesses identifying the clothing, and in spite of such omission, the record showed that there was overwhelming evidence to support the jury's verdict of guilty. *State v. Hyde, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995)*.

Even though the trial court should not have allowed cross-examination regarding the two citations received by plaintiff in motor vehicle accident, the admission of the testimony in the personal injury action did not require a new trial because it did not affect plaintiff's substantial rights. *Martin v. Hackworth, 127 Idaho 68, 896 P.2d 976 (1995)*.

In malpractice action trial court did not abuse its discretion in excluding evidence regarding plaintiff's medical history of sexually-transmitted diseases (STDs) and the testimony of plaintiff's expert concerning the use of a fetal scalp monitor, to have refused to allow the defense to present evidence regarding plaintiff's history of STDs and also to have refused to strike expert's testimony regarding use of the monitor would have impaired the substantial rights of the defendant and thus the court prevented prejudice to both plaintiff by not allowing testimony regarding her history of STDs and to defendant by striking plaintiff's expert's testimony that defendant could not rebut without referring to this medical history. *Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997)*.

Trial court should have permitted cross examination of defense's accident reconstruction expert concerning defendant's statement to an insurance adjuster; the error affected plaintiff's substantial rights and was grounds for granting a new trial. *Dabestani ex rel. Dabestani v. Bellus, 131 Idaho 542, 961 P.2d 633 (1998)*.

**Cited in:**

*State, Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985)*; *State v. Stevens, 115 Idaho 457, 767 P.2d 832 (Ct. App. 1989)*; *State v. Fisher, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989)*; *Prouse v. Ransom, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989)*; *State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991)*; *State v. Browning, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992)*; *State v. Thompson, 121 Idaho 638, 826 P.2d 1350 (Ct. App. 1992)*; *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*; *State v. Floyd, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994)*; *State v. Vierra, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994)*; *State v. Stover, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994)*; *State v. Drennon, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994)*; *McKay Constr. Co. v. Ada County, 126 Idaho 923, 894 P.2d 156 (Ct. App. 1995)*; *State v. Martinez, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995)*; *State v. Welker, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997)*; *State v. Aspeytia, 130*

*Idaho 12, 936 P.2d 210 (Ct. App. 1997)*; *State v. Young, 136 Idaho 113, 29 P.3d 949 (2001)*; *Evans v. Bd. of Comm'rs, 137 Idaho 428, 50 P.3d 443 (2002)*; *Thorn Springs Ranch, Inc. v. Smith, 137 Idaho 480, 50 P.3d 975 (2002)*; *State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)*; *State v. Davis, 139 Idaho 731, 85 P.3d 1130 (Ct. App. 2003)*; *State v. Watkins, 148 Idaho 418, 224 P.3d 485 (2009)*; *State v. Estes, 223 P.3d 287 (2009)*; *State v. Fordyce, 151 Idaho 868, 264 P.3d 975 (2011)*; *Pacificorp v. Idaho State Tax Comm'n, 153 Idaho 759, 291 P.3d 442 (2012)*; *State v. Stone, 154 Idaho 949, 303 P.3d 636 (2013)*; *Van v. Portneuf Med. Ctr., 156 Idaho 696, 330 P.3d 1054 (2014)*; *Ballard v. Kerr, 160 Idaho 674, 378 P.3d 464 (2016)*; *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

**Decisions Under Prior Rule or Statute**

**Remarks of Counsel.**

Timely and proper objections should be made to the remarks of counsel properly to preserve and present to the Supreme Court alleged errors in remarks, so that the trial court may have an opportunity to prevent or, if possible, eradicate the errors by admonition or instruction, and so that there may be an adverse ruling or action by the trial court for review by the *Supreme Court. Stewart v. City of Idaho Falls, 61 Idaho 471, 103 P.2d 697 (1940)*.

The failure of a court to admonish the jury to disregard remarks of counsel was, in effect, an overruling of objection to the remarks, as well as the request for the admonition; such a ruling is deemed excepted to and therefore presents the question as to whether the jury was, by the remarks complained of, aroused and inflamed and by reason thereof, influenced in the verdict they returned. *Cogswell v. C.C. Anderson Stores Co., 68 Idaho 205, 192 P.2d 383 (1948)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Construction of *Rule 43(c) of the Federal Rules of Civil Procedure* and similar state provisions, providing for entry into record of evidence excluded by trial court. *9 A.L.R.3d 508*.

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# *I.R.E. Rule 104*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 104. Preliminary Questions.

**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

**(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

**(c) Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

**(1)** the hearing involves the admissibility of a confession;

**(2)** a defendant in a criminal case is a witness and so requests; or

**(3)** justice so requires.

**(d) Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Blood-Alcohol Content Test.
Foundation.
Instructions.

Medical Malpractice Cases.
Witness Qualifications.

**Blood-Alcohol Content Test.**

The state provided a sufficient foundation to establish that defendant's blood-alcohol content test was performed by a laboratory or method approved by the Idaho Department of Law Enforcement as required by I.C. *§ 18-8004(4)*. *State v. Uhlry, 121 Idaho 1020, 829 P.2d 1369 (Ct. App. 1992)*.

Where officer who administered a breath test did not "closely observe" defendant for the requisite fifteen-minute period, nor did the state present evidence showing that defendant had been observed by any officer for fifteen minutes preceding the tests, the results of the breath test produced by the Intoximeter 3000 machine were inadmissible. *State v. Utz, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993)*.

State laid a sufficient foundation for the admission of the alcohol concentration tests to be introduced into evidence through witness testimony; the expert's testimony stated that the Intoxilyzer 5000 was approved by the Idaho State Police almost two decades ago and was still in use. *State v. Anderson, 145 Idaho 99, 175 P.3d 788 (2008)*.

**Foundation.**

District court could have allowed a foundation to be established outside the presence of the jury as to witnesses' opinions that defendant did not have the character of a child molester. *State v. Rothwell, 154 Idaho 125, 294 P.3d 1137 (2013)*.

District court properly affirmed defendant's conviction for misdemeanor driving under the influence because she did not show error in the admission of a forensic scientist's testimony hearsay testimony regarding the foundation for admission of defendant's breath test results where the state police posted its standard operating procedures and analytical methods on its website and the testimony was presented to show that the accuracy of the breath testing equipment had been timely verified. *State v. Swenson, 156 Idaho 633, 329 P.3d 1081 (2014)*.

**Instructions.**

The court admitted the photographs of victim's bruises subject to a motion to strike if the state failed to later connect it up with victim's testimony. Later, victim testified that defendant had beaten and raped her and that the bruises depicted in the photographs were caused by him, and the state asked the court to instruct the jury to consider the bruises as being caused by defendant. Court's instruction on the admissibility of the photographs, that while the photographs had previously been admitted subject to limitations they were now admitted without limitations, was entirely neutral. *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*.

**Medical Malpractice Cases.**

Evidence rule places the responsibility of determining of the geographical scope of the community in the context of medical malpractice and the standard of care upon the judge; in making such decisions, the trial court should refrain from resolving conflicting factual disputes. *Both Bybee v. Gorman, 157 Idaho 169, 335 P.3d 14 (2014)*.

**Witness Qualifications.**

In a legal malpractice case against emergency care providers, the district court did not err in striking expert testimony as inadmissible and dismissing the case for failure to provide adequate expert medical testimony, because a lawyer, an out-of-state expert, and a nurse practitioner were not qualified to opine on the standard of care for doctors in a local emergency room. *Rich v. Hepworth Holzer, LLP, 172 Idaho 696, 535 P.3d 1069 (2023)*.

**Cited in:**

*State v. Bell, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988)*; *Earl v. Cryovac, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989)*; *Ryan v. Beisner, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992)*; *State v. Kay, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996)*; *Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002)*; *Carnell v. Barker Mgmt., Inc., 137 Idaho 322, 48 P.3d 651 (2002)*; *Swallow v. Emergency Med. of Idaho, P.A., 138 Idaho 589, 67 P.3d 68 (2003)*; *Medical Recovery Servs., LLC v. Eddins, 169 Idaho 236, 494 P.3d 784 (2021)*; *Mortensen v. Baker, 170 Idaho 744, 516 P.3d 1015 (2022)*.

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# *I.R.E. Rule 105*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

If the court admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Error Not Harmless.
Failure to Request Limiting Instruction.
Timing.

**Error Not Harmless.**

The erroneous admission of hearsay evidence was not harmless where the evidence was admitted for the truth of the content and its use was not limited to impeachment. *State v. Hansen, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999)*.

Trial court should have granted defendant a limiting instruction for the comments by a police officer during a videotaped confession, wherein the officer stated he was an expert in deception, as the officers' comments that defendant was lying were admissible for the purpose of giving context to defendant answers, but inadmissible for the purpose of proving the truth of the matter asserted--in this case, defendant's truthfulness. *State v. Cordova, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002)*.

**Failure to Request Limiting Instruction.**

Where the state put defendant on notice that it would seek to admit videotaped testimony of victim's prior inconsistent statements as evidence, and not just for the purpose of impeachment, and where defendant failed to object to the testimony or to request a limiting instruction at that time, defendant's later requested limiting instruction was neither timely nor specific. *State v. Vaughn, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993)*.

**Timing.**

When one party introduces evidence for a limited purpose by the terms of this rule, the opponent is entitled to an instruction restricting the use of such evidence to the purpose for which it was admitted. The instruction that was given at the conclusion of the trial apprised the jury of the sole purpose for which evidence of the incident could be considered and the court's decision regarding the timing of the instruction did not create grounds for either a mistrial or a new trial. *State v. Dopp, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996)*.

**Cited in:**

*State v. Matthews, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993)*; *State v. Grube, 126 Idaho 377, 883 P.2d 1069 (1994)*; *State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)*; *Kirk v. Ford Motor Co., 141 Idaho 697, 116 P.3d 27 (2005)*; *State v. Osterhoudt, 155 Idaho 867, 318 P.3d 636 (Ct. App. 2013)*; *State v. Weigle, 165 Idaho 482, 447 P.3d 930 (2019)*.

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# *I.R.E. Rule 106*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS.***

## Rule 106. Remainder of or Related Writings or Recorded Statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Failure to Limit Request.
Preservation for Review.
Videotape.

**Failure to Limit Request.**

Where at trial, officer testified as to statements defendant made during a taped police interview, the trial court committed no error in refusing to admit the full transcript of the taped interview or the tapes themselves, since defendant did not limit his request to those portions of the transcript which explained, qualified or were relevant to that part of the conversation regarding which officer testified. *State v. Fain, 116 Idaho 82, 774 P.2d 252 (1989)*, cert. denied, *493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989)*.

**Preservation for Review.**

The district court did not abuse its discretion by denying the admissibility of defendant's statements made during the police interrogation on hearsay grounds when trial counsel argued their admissibility as admissions of a party-opponent. Defendant's contention that admission of the statements was justified under other Rules of Evidence was not properly preserved for appeal and did not rise to the level of fundamental error. *State v. Parmer, 147 Idaho 210, 207 P.3d 186 (2009)*.

**Videotape.**

It was more appropriate to analyze the admissibility of the videotape under this rule because the essence of the prosecutor's reason for seeking admission of the tape was to demonstrate, by providing context, that the allegedly inconsistent statements introduced on cross-examination of victim were actually not inconsistent, rather than introduce prior consistent statements to mitigate inconsistent statements. *State v. Bingham, 124 Idaho 698, 864 P.2d 144 (1993)*.

The state's failure to tailor the submission of videotape evidence request resulted in the admission of patently prejudicial and irrelevant evidence which accompanied the jury even into deliberations, thus the videotape's admission could not be justified under this rule. *State v. Bingham, 124 Idaho 698, 864 P.2d 144 (1993)*.

Trial court did not abuse its discretion by preventing defendant from presenting a police officer on-body video of defendant's response to a police officer's statement about the officer finding bus tickets in a search of defendant's vehicle. Defendant's response was not required under the completeness doctrine as defendant's denial that officers found the bus tickets in a box in the vehicle did not provide context to the statements already in evidence. *State v. Ogden, 171 Idaho 843, 526 P.3d 1013 (2023)*.

**Cited in:**

*Chenery v. Agri-Lines Corp., 115 Idaho 281, 766 P.2d 751 (1988)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Construction and Application of Uniform Rule of Evidence 106, Applying Doctrine of Completeness to Writings and Recorded Statements. *27 A.L.R.6th 183*.

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# *I.R.E. Rule 201*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE II. JUDICIAL NOTICE.***

## Rule 201. Judicial notice of adjudicative facts.

**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

**(1)** is generally known within the trial court's territorial jurisdiction; or

**(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

**(c) Taking Notice.** The court:

**(1)** may take judicial notice on its own; or

**(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.

When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed. When a party requests judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the party must identify the specific items for which judicial notice is requested or offer to the court and serve on all parties copies of those items.

**(d) Timing.** The court may take judicial notice at any stage of the proceeding.

**(e) Opportunity To Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 21, 2007, effective July 1, 2007; amended March 26, 2018, effective July 1, 2018; amended and effective January 13, 2021.)

Annotations

## Case Notes

Error Not Preserved.
Harmless Error.
Judicial Notice Improper.
Judicial Notice Proper.
Jury Instructions.
Juvenile Proceeding.
Official Reports of the Government.
Ordinances.
Scientific Tests.
Specificity.

**Error Not Preserved.**

Petitioner failed to preserve a challenge to the judicial notice of his criminal records as he had not asked to be heard on the matter as subsection (e) requires. *Chaput v. State, 168 Idaho 774, 487 P.3d 366 (2021)*.

**Harmless Error.**

Summary judgment was properly awarded to a county in a developer's declaratory judgment action challenging the validity of various planning and zoning ordinances. Because standing was a jurisdictional issue, any error that the trial court committed in failing to take judicial notice of orders entered in a related case, in which the developer was determined to have standing, was harmless. *Martin & Martin Custom Homes, LLC v. Camas County, 150 Idaho 508, 248 P.3d 1243 (2011)*.

Although it was error to take judicial notice of the entire record in petitioner's criminal cases, instead of specifically identifying particular items for judicial notice under subsection (c), the error was harmless, where the documents upon which the court relied could be easily determined, and reliance on a few limited documents would not have affected his postconviction case's eventual outcome. *Chaput v. State, 168 Idaho 774, 487 P.3d 366 (2021)*.

**Judicial Notice Improper.**

The magistrate took improper judicial notice of the "fact" that it costs more to raise children who are ages 14 and 12 and that a child's needs are more expensive at those ages than for children who are only six and eight. *Brazier v. Brazier, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986)*.

Bar misconduct records do not meet the requirements of this rule. *Newman v. State, 149 Idaho 225, 233 P.3d 156 (2010)*.

In a will contest, there was no error in declining to take judicial notice of affidavits and reports relied on during the testator's guardianship and conservatorship proceeding three months before the will was executed, which documents were offered to demonstrate lack of testamentary capacity at the time of the will's execution. The documents constituted hearsay opinions of individuals regarding capacity and hearsay-within-hearsay declarations of the testator. *Wooden v. Martin (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012)*.

In a drug case, a trial court properly refused to take judicial notice that one ounce equaled 28.35 grams because this was not an adjudicatory fact. The conversion rate was not an issue for the jury to decide, rather, it was a matter established by law. *State v. Lemmons, 158 Idaho 971, 354 P.3d 1186 (2015)*.

District court did not err when it declined to take judicial notice of the entire file from the quiet title litigation because, even if timeliness was not an issue, defendants did not provide the necessary information required to take judicial notice of the quiet title litigation. *Bass v. Esslinger, 171 Idaho 699, 525 P.3d 737 (2023)*.

Supreme court declined to take judicial notice of the matters an employee identified because his request failed to comply with the requirements of the Idaho Rules of Evidence; the employee did not contend (nor did the supreme court determine) that the facts identified in the request for judicial notice constituted adjudicative facts. *Hennig v. Money Metals Exch., L.L.C., -- Idaho --, 551 P.3d 1237, 2024 Ida. LEXIS 72 (July 3, 2024)*.

**Judicial Notice Proper.**

Judicial notice of defendants' liquor and beer licenses was proper where the Idaho Department of Law Enforcement was the agency which issued the license numbers to the defendants, the defendants' record in this case contained a copy of the defendants' licenses and the defendants presented no evidence to dispute that they were the holders of the two licenses. *State, Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985)*.

It was permissible for magistrate to take judicial notice of court clerk's record regarding ex-husband's payment of child support in a suit to recover delinquent support payments. *Hunsaker v. Hunsaker, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990)*.

This section provides that where the department of law enforcement adopted rules and regulations pertaining to the administration of alcohol concentration tests, the court is empowered to take judicial notice of these rules and regulations. *State v. Howell, 122 Idaho 209, 832 P.2d 1144 (Ct. App. 1992)*.

District court erred in denying a petition for writ of habeas corpus where the inmate claimed the parole commission denied him parole in retaliation for his litigative activities while in prison. Evidence of the inmate's litigative activities was a matter of public record. *Drennon v. Craven, 141 Idaho 34, 105 P.3d 694 (Ct. App. 2004)*.

In prosecution for unlawful purchase of a firearm, the requirement that defendant have been convicted of a felony shall include a person who has entered a plea of guilty and does not

require sentencing for defendant to be considered a felon. When the district court, as the trier of fact, took judicial notice of defendant's previous conviction in the form of his guilty plea, the state had at that time provided sufficient evidence to satisfy that element of the crime. *State v. Cook, 143 Idaho 323, 144 P.3d 28 (Ct. App. 2006)*.

Magistrate court did not err during a hearing when it took judicial notice of the testimony in a prior hearing, because the magistrate court made clear it was taking judicial notice of the testimony, identified the testimony with sufficient specificity, and relied on its notes taken during the hearings, and the transcript of the hearing was provided as part of the appellate record. *Nicholson v. Bennett (In re Doe), 166 Idaho 720, 462 P.3d 1184 (2020)*.

District court properly denied defendant's motion to suppress evidence because the court never decided the issue of whether it could take judicial notice of a municipal ordinance or the procedure to be used since defendant did not object when the State and its witness referenced the ordinance at the suppression hearing, she did not object when the district court relied on the ordinance in its decision, and she did not raise the issue of judicial notice until her appeal. *State v. Neimeyer, 169 Idaho 9, 490 P.3d 9 (2021)*.

Pursuant to Idaho R. Evid. 201(b), the court took judicial notice of the fact that a developer brought a petition for judicial review pursuant to the Local Land Use Planning Act in a separate case, seeking review and reversal of the board of county commissioners' rejection of the developer's application for a plat amendment. However, the court did so only for the purpose of reviewing whether the developer's petition for judicial review precluded the district court from exercising its jurisdiction under the Idaho Declaratory Judgment Act. TCR, LLC v. Teton Cnty., -- Idaho --, -- P.3d --, *2024 Ida. LEXIS 5 (Jan. 11, 2024)*.

**Jury Instructions.**

The trial court was not only permitted, but required, to instruct the jury as to judically-noticed mortality figures where it had taken judicial notice of such figures admitted into evidence and contained in the testimony and reports of a life care planner and economist. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

**Juvenile Proceeding.**

Judicial notice of a local ordinance was properly taken in a juvenile proceeding relating to the alleged violation of a curfew. *Doe v. Doe, 146 Idaho 386, 195 P.3d 745 (2008)*.

**Official Reports of the Government.**

The Court of Appeals may take judicial notice of adjudicative facts, those not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; this notice may be taken at any stage in the proceeding, at the trial or appellate level, and extends to official reports of the federal

government, including those published by the *Bureau of Labor Statistics. Trautman v. Hill, 116 Idaho 337, 775 P.2d 651 (Ct. App. 1989)*.

**Ordinances.**

Existence of an ordinance relevant to adjudication of a dispute is a question well-suited to the application of this rule, and if an ordinance's existence is not reasonably in dispute because it is generally known within the territorial jurisdiction of the trial court, or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, then it may be accepted as evidence by judicial notice. *Doe v. Doe, 146 Idaho 386, 195 P.3d 745 (2008)*.

**Scientific Tests.**

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. *State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)*.

**Specificity.**

Specificity requirement of subsection (d) [now (c)] requires that a party provide more than a blanket reference to an entire case when requesting a court to take judicial notice of documents or items within it. *Fortin v. State, 160 Idaho 437, 374 P.3d 600 (2016)*.

Where an attorney is requesting that a court take judicial notice of a document or items, that attorney must state with particularity what he is asking the court to take notice of. Where an attorney does not meet this requirement, it is improper for a court to take judicial notice. *Rome v. State, 164 Idaho 407, 431 P.3d 242 (2018)*.

**Cited in:**

*State v. Griffiths, 113 Idaho 364, 744 P.2d 92 (1987)*; *Hays v. State, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987)*; *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*; *Knopp v. Nelson, 116 Idaho 343, 775 P.2d 657 (Ct. App. 1989)*; *State v. Phillips, 118 Idaho 27, 794 P.2d 297 (Ct. App. 1990)*; *State v. Nunez, 138 Idaho 636, 67 P.3d 831 (2003)*; *Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014)*; *Idaho Dep't of Health & Welfare v. Doe (In re Doe), 160 Idaho 154, 369 P.3d 932 (2016)*; *McKinney v. State, 162 Idaho 286, 396 P.3d 1168 (2017)*; *Ellis v. Ellis, 167 Idaho 1, 467 P.3d 365 (2020)*.


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# *I.R.E. Rule 301*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE III. PRESUMPTIONS.***

## Rule 301. Presumptions in Civil Cases Generally.

**(a) Effect.** In a civil case, unless a statute, Idaho appellate decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally. The burden of producing evidence is satisfied by evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom the presumption operates does not meet the burden of producing evidence, the presumed fact must be deemed proved. If that party meets the burden of producing evidence, the jury must not be instructed on the presumption and the trier of fact may determine the existence or nonexistence of the presumed fact without regard to the presumption.

**(b) Jury Instructions.** When a presumption operates in a civil case, the court must instruct the jury that the fact has been proved without using the term "presumption."

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Effect of Presumption.
In General.
Negligence Instruction.
Survivorship in Joint Accounts.

**Effect of Presumption.**

A presumption under this rule relieves the party in whose favor the presumption operates from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. *Bongiovi v. Jamison, 110 Idaho 734, 718 P.2d 1172 (1986)*.

A Rule 301 presumption relieves the party in whose favor it operates from presenting further evidence of the presumed fact until the opposing party introduces substantial evidence of the nonexistence of the fact. *Krebs v. Krebs, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988)*.

Where husband alleged that property was his separate property and not community property because wife quitclaimed her interest to him, but she alleged that she was induced to do so by husband's artifice, where wife introduced evidence demonstrating that a confidential relationship existed and that husband was instrumental in procuring the deed, the burden shifted to husband to come forward with evidence tending to disprove at least one of the four prima facie elements of undue influence. *Krebs v. Krebs, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988)*.

The burden was on long-term healthcare facility to demonstrate its right to reimbursement; however, once the facility had submitted substantial evidence that it was efficiently operated and had incurred costs beyond its control, the presumption contained in former § 56-110(a)(6) disappeared, and the facility had made a prima facie case that the costs were reasonable. *Idaho County Nursing Home v. Idaho Dep't of Health & Welfare, 120 Idaho 933, 821 P.2d 988 (1991)*.

Where husband, during marriage, executed a quitclaim deed to ranch property to his wife as her separate property in accordance with the requirements of *§ 55-601*, husband's testimony as to lack of consideration was inadmissible and his evidence insufficient to rebut the presumption of *§ 32-906*; therefore, finding that property was wife's separate property was upheld. *Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995)*.

It was within the legislature's power to enact *§ 42-1411(4)*, which directs that the contents of the Director of the Idaho Department of Water Resources report shall constitute prima facie evidence of some water rights claims; this direction is recognized in this rule to create an evidentiary presumption, and unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the director's report are established. *State ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995)*.

**In General.**

This rule provides two major benefits. First, it standardizes the definition of the word "presumption"; the rule simply means that when courts use the word presumption, and it is not otherwise defined by statute or the Rules of Evidence, then it shifts the burden of production. Second, the rule effectively eliminates the word presumption from jury instructions. *Bongiovi v. Jamison, 110 Idaho 734, 718 P.2d 1172 (1986)*.

While affidavits may dispel the presumed correctness of the facts contained in a report, the facts contained therein still exist as facts. Facts contained in the affidavits create triable issues to the extent they conflict with facts alleged in the report. Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant. *State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (1997)*.

**Negligence Instruction.**

Giving "dead man's" instruction that motorcyclist, killed when hit by another vehicle, was presumed to be exercising ordinary care, unless defendants introduce substantial evidence to the contrary, was reversible error; a properly instructed jury may well have allocated some negligence to motorcyclist. *Smith v. Angell, 122 Idaho 25, 830 P.2d 1163 (1992)*.

**Survivorship in Joint Accounts.**

This rule has not changed the rule that a survivor of a joint account is required to show by clear and convincing evidence the deceased party to the account intended that the corpus of the account pass to the survivor by right of survivorship. *Ashe v. Hurt, 114 Idaho 70, 753 P.2d 281 (Ct. App. 1988)*, aff'd, *117 Idaho 266, 787 P.2d 252 (1990)*.

**Cited in:**

*Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989)*; *Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990)*; *Evans v. Hara's, Inc., 123 Idaho 473, 849 P.2d 934 (1993)*; *State v. Habeb, 165 Idaho 953, 454 P.3d 595 (2019)*.

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# *I.R.E. Rule 302*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE III. PRESUMPTIONS.***

## Rule 302. Applicability of Federal Law in Civil Cases.

In a civil case, federal law governs the effect of a presumption regarding a claim or defense for which federal law supplies the rule of decision.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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## Rule 303. Presumptions in Criminal Cases.

**(a) Scope.** Unless otherwise provided by statute, in criminal cases presumptions that operate against the defendant, recognized at common law or created by statute, are governed by this rule. For purposes of this rule, statutory provisions that certain facts are prima facie evidence of other facts or of guilt are treated as presumptions.

**(b) Submission to Jury.** The court may submit the question of guilt or of the existence of a presumed fact to the jury only if, on the evidence as a whole, a reasonable juror could find guilt or the presumed fact beyond a reasonable doubt.

**(c) Instructing the Jury.** When the existence of a presumed fact operates against the defendant:

**(1)** the court must not instruct the jury to find a presumed fact against the defendant and must not instruct the jury in terms of a presumption;

**(2)** the court must instruct the jurors that they may draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the defendant in reliance upon an inference of fact if they find that such inference is valid and if they find that the evidence as a whole, including the inference, convinces them beyond a reasonable doubt that the defendant is guilty.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 401*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 401. Test for Relevant Evidence.

Evidence is relevant if:

**(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and

**(b)** the fact is of consequence in determining the action.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Abuse of Discretion Standard.
Driving Under the Influence.
Error Harmless.
Error Not Harmless.
Escape or Flight.
Evidence.
Evidence Held Admissible.
Evidence Held Inadmissible.
Evidence of Character.
Evidence of Flight.
Evidence of Intent.
Expert Testimony.
Illustrative Evidence.
Impeachment Evidence.
In General.
Jury Verdict.
Lay Witness.
Objections.
Other Bad Acts and Uncharged Crimes.
Photographs.

Plane Crash.
Pornographic Images.
Probative Value.
Review.
Scientific Tests.
Value of Marijuana Plants.
Video.

**Abuse of Discretion Standard.**

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice, the appellate court uses an abuse of discretion standard. *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

In prosecution for delivery of and trafficking in methamphetamine, evidence that defendant sent two money orders, both for substantial amounts, to the same person in a city within the same week that two packages were sent from fictitious people and addresses and delivered to defendant through an airline from the same city, made it more probable that defendant was engaged in trafficking methamphetamine and thus such evidence was relevant; the trial court's conclusion that the probative value of the evidence was not outweighed by its unfair prejudice was not an abuse of discretion and such evidence was properly admitted. *State v. Kopsa, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994)*.

**Driving Under the Influence.**

The trial court erred in excluding nonforensic evidence of defendant's blood alcohol concentration and its correlation to the level of alcohol present in his breath; this evidence was relevant and admissible for the purpose of impeaching the accuracy of the state's breath test results. *State v. Pressnall, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)*.

In a driving under the influence case where relevance was an issue, defendant's expert was not allowed to argue that the Intoxilyzer 5000 was inaccurate because alcohol measured by the Intoxilyzer 5000 was not measuring air from the deep lung area, but instead measured alcohol coming from the airway. The expert's explanation of how the air increased in alcohol concentration as it passed through the airways was in accord with what the Idaho Legislature defined as a per se violation; the testimony did not relate to the accuracy of the measurement of the breath, but instead challenged the Legislature's reliance on breath testing to establish a per se limit of breath alcohol without regard to the alcohol concentration in the body. *State v. Roach, 157 Idaho 551, 337 P.3d 1280 (2014)*.

Evidence admitted to generally attack the validity of breath testing is irrelevant; therefore, in a driving under the influence (DUI) case, a magistrate court properly determined that expert testimony was irrelevant where a doctor sought to testify that a breath test was an unreliable determination of breath alcohol concentration. Testimony explaining how a breath sample's

alcohol content might vary based on the physiological variables did not relate to whether an individual violated the per se DUI offense, which simply required that a breath test yield a result above the per se limit. *State v. Roach, 157 Idaho 551, 337 P.3d 1280 (2014)*.

Evidence showing that there was carboxy-THC in defendant's bloodstream was relevant and properly admitted because the State linked the evidence of carboxy-THC in defendant's blood to her impairment, as it presented evidence that she was impaired and linked the intoxication to marijuana use through both the carboxy-THC evidence and other evidence that defendant's appearance and behavior were indicative of marijuana intoxication. *State v. Morin, 158 Idaho 622, 349 P.3d 1213 (2015)*.

In a prosecution of defendant for felony driving under the influence, the accuracy of defendant's breathalyzer test result was a fact material to his conviction, as the accuracy of the result was a fact that the state had to establish beyond a reasonable doubt. Therefore, evidence of the machine's prior and subsequent malfunctioning was relevant. *State v. Cruz-Romero, 160 Idaho 565, 376 P.3d 769 (2016)*.

**Error Harmless.**

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unpresented alibi testimony, such evidence would not have likely produced an acquittal and denial of defendant's motion for a new trial was proper. *State v. Roberts, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995)*. See also *State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996)*.

Where there was nothing in a challenged videotape to address the defendant's assertion that methamphetamine belonged to another person, even though the district court may not have performed the required balancing test in ruling on the defendant's request for a short continuance to acquire the tape from the prosecution and offer it into evidence, there was no reversible error because his substantial rights were not affected and thus there was no prejudice. *State v. Saxton, 133 Idaho 546, 989 P.2d 288 (Ct. App. 1999)*.

The hearsay nature of testimony regarding statements made by the victim, defendant's ex-wife, expressing her fear that defendant was going to harm her, was not subject to an exception based on a claim that the victim committed suicide. While there was some examination of that possibility during the investigation, it was not a part of the defense case. However, the weight of other evidence against the defendant rendered admission of the victim's statements harmless. *State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010)*.

Although an expert witness's testimony about defendant's high suggestibility and social anxiousness should have been admitted, as it was relevant to a determination of whether his statements were the subject of police coercion, because defendant's recollection of the events was never substantially altered to submit to the detective's suggested version of the events and defendant's statements were voluntary, the district court's selective exclusion of the expert's

suggestibility testimony amounted to harmless error. *State v. Stone, 154 Idaho 949, 303 P.3d 636 (2013)*.

Even though the trial court erred by admitting a knife that defendant was carrying at the time of his arrest into evidence, as it was not relevant to his trafficking in heroin, the error was harmless, because of the strength of the state's other evidence, including a video of an officer pulling a plastic bag of what turned out to be heroin out of defendant's underwear and defendant's admission that he used heroin. *State v. Jones, 167 Idaho 353, 470 P.3d 1162 (2020)*.

While a trial court abused the court's discretion by admitting on-body video of the officer's statement about being nervous for finding a tactical vest in a search of defendant's vehicle, because the officer's statement had no bearing on any fact of consequence, the error was harmless. The prejudicial effect from the officer's comment was minimal in the context of the totality of the evidence adduced at trial and did not contribute to the jury's verdict. *State v. Ogden, 171 Idaho 843, 526 P.3d 1013 (2023)*.

**Error Not Harmless.**

Trial judge erred in excluding the evidence on lack of farmerlike performance under a sharecropping agreement, as the excluded evidence reasonably could have affected the amount of damages awarded to the owners by the jury; consequently, the error was not harmless. *Prouse v. Ransom, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989)*.

In an action for possession of a controlled substance with intent to deliver, the admission of two bags of unidentified white powder that were not controlled substances, but were found in the possession of defendant along with a controlled substance (methamphetamine), was in error because they were not relevant to the question of defendant's possession of methamphetamine with intent to deliver. *State v. Seitter, 127 Idaho 356, 900 P.2d 1367 (1995)*.

In a common law marriage case, the magistrate court erred by excluding evidence of the parties' conduct after December 31, 1995, as irrelevant to whether the parties had a common law marriage before the statutory cut-off date, and dismissing petitioner's common law marriage claim because the January 10, 1996 life insurance application and the July 1996 claim for medical benefits were relevant to proving the parties entered a common law marriage in 1995, and the error affected petitioner's substantial rights. If the evidence had been admitted, petitioner might have met her burden to demonstrate by a preponderance of evidence that the parties consented to enter into a common law marriage and the presumption of marriage would have been applied, shifting the burden to respondent to prove no marriage occurred. *Martinez v. Carretero, -- Idaho --, 539 P.3d 565 (2023)*.

**Escape or Flight.**

Escape or flight is one of the exceptions to the general rule prohibiting evidence of prior bad acts or crimes. Evidence of escape or flight may be admissible because it may indicate a consciousness of guilt. However, the inference of guilt may be weakened when a defendant

harbors motives for escape other than guilt of the charged offense. The existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. *State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009)*.

**Evidence.**

Because the suspension advisory form stated the adverse consequences faced by defendant for failing to perform evidentiary testing, it strengthened the inference that he was unwilling to submit to a test because he believed the test results would show an alcohol concentration above the legal limit; the exhibit, therefore, was relevant. *State v. Rocha, 157 Idaho 246, 335 P.3d 586 (2014)*.

District court did not err in limiting defendant's cross-examination of a detective about whether he followed up on investigative leads of two individuals, as without any evidence linking those individuals to the murder the line of questioning would not provide evidence making it more or less likely that defendant killed the victim and, therefore, was not relevant. State v. Buck, -- Idaho --, -- P.3d --, *2023 Ida. App. LEXIS 20 (Sept. 20, 2023)*.

**Evidence Held Admissible.**

The district court did not abuse its discretion in admitting bank deposit slips and money order receipts showing that the defendant had handled several thousand dollars during a period of approximately six weeks, where evidence of the financial transactions was relevant to prove the defendant's knowledge of the controlled substances in his possession, and there was nothing inherently inflammatory about the evidence of financial transactions. *State v. Palmer, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985)*.

In a personal injury action, the trial court did not abuse its discretion in deeming the evidence of the defendant's driving, three or four hours before the accident, too remote to corroborate the plaintiff's testimony that he detected the odor of alcohol coming from the defendant's car immediately following the accident. *Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988)*.

Where, in a prosecution for robbery of a store, the central issue at trial was the identity of persons who robbed the store, testimony regarding the capture of the defendant, yielding articles connected with the robbery, was admissible as highly probative of the defendant's identity as one of those persons and relevant. *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*.

Fact that alleged threats against crime victim by defendant were made months after the crime was committed did not decrease the relevance of the evidence because if one is going to threaten to harm another for prosecuting a case, the threat will be made sometime between the date of the incident giving rise to the prosecution, and the time of trial. *State v. Hernandez, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991)*.

Victim's testimony, concerning letters defendant allegedly wrote to victim after an aggravated battery, was relevant because someone who was innocent of the charge would be unlikely to threaten the victim or apologize for the act. *State v. Hernandez, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991)*.

Even though no weapon was seen during the course of the robbery, where defendant made a threat implying that a concealed weapon was present, sawed-off shotgun found in defendant's automobile was slightly relevant and was admissible as its probative value was not outweighed by its prejudicial impact. *State v. Waddle, 125 Idaho 526, 873 P.2d 171 (Ct. App. 1994)*.

In a suit by distributor against manufacturer, testimony of four ex-distributors from the same time frame and geographical area was relevant to show repeated or flagrant violations of the *Idaho Consumer Protection Act. Mac Tools, Inc. v. Griffin, 126 Idaho 193, 879 P.2d 1126 (1994)*.

Testimony by witness that robbery defendant told him he had gotten money to buy drugs from a robbery was relevant to whether defendant robbed store; it made the existence of a fact of consequence to the determination of the action more probable than it would have been without the testimony. *State v. Guzman, 126 Idaho 368, 883 P.2d 726 (Ct. App. 1994)*.

In personal injury action on theory that city was negligent in design of intersection where accident occurred in failing to construct a raised median, admission of evidence of other accidents that took place in the same area both before and after plaintiff's accident was properly admitted since all were of a type which could have been prevented or affected by the proposed median and thus evidence of such accidents had some tendency to make the fact that the street design did not comply with existing standards appear more likely to exist. *Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994)*.

Where defendant argued that it was error for the trial court to admit the testimony of a witness describing his observations of the reckless driving patterns of defendant's truck ten minutes before an accident occurred, the Supreme Court held that the driving observed was relevant as to the probable fashion in which the vehicle was being driven at the time of the accident and admissible. *State v. Johnson, 126 Idaho 892, 894 P.2d 125 (1995)*.

The magistrate was correct in admitting the evidence of prior wills where the wills were not offered as testamentary documents; they were offered as relevant evidence to shed light on settlor's donative intent, and the fact that they were revoked by later wills did not affect their relevance as to the decedent's frame of mind. *Salfeety v. Seideman, 127 Idaho 817, 907 P.2d 794 (1995)*.

Because the matter to be proved at trial centered on the number of cases of beer sold, the information contained in exhibit -- a summary of plaintiff's records of the total number of cases of beer sold -- was clearly relevant, and the lower court did not err in admitting exhibit for illustrative purposes over objection. *Ernst v. Hemenway & Moser Co., 126 Idaho 980, 895 P.2d 581 (1995)*.

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State would have resulted from the jury being uninformed, and such evidence would have impermissibly invited the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996)*.

The district court correctly ruled that welfare worker's testimony, that defendant listed that county as his residence on a welfare application, was relevant on the issue of where defendant resided for purposes of proving violation of the *Sex Offender Registration Act. State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996)*.

Where testimony indicated that the defendant stated that a certain person he thought had testified at a previous trial had ruined ten years of his life, and where exclusion of evidence of the fact of the defendant's conviction would have left the jury guessing as to what criminal act was involved and why the defendant's statements were taken as a threat, admission of that evidence was relevant, had a tendency to make the existence of threats against the supposed witness more probable, and was properly admitted. *State v. Baer, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999)*.

Evidence of an alternate route the defendant could have taken was relevant for the jury to consider when assessing the degree of causation attributable to each party. *Slack v. Kelleher, 140 Idaho 916, 104 P.3d 958 (2004)*.

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to *§ 18-1506(1)(b)*, regarding previous activities with the victim may be admissible when they are relevant to the intent of the defendant's actions; evidence that his touchings were for sexual gratification, rather than being accidental or innocent. *State v. Marsh, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004)*.

Contrary to the district court's determination, the store manager's testimony with regard to the camera coverage in the store was material and relevant; it would have challenged the store loss prevention investigator's credibility and could have had exculpatory value. *State v. Karpach, 146 Idaho 736, 202 P.3d 1282 (2009)*.

In defendant's trial on charges of lewd and lascivious conduct for molesting his daughter, the trial court did not err in admitting defendant's statements to his ex-wife (the victim's mother) that their daughter walked in on him and saw him watching pornography and masturbating because the statements were relevant to help the jury understand why the victim's mother did not immediately act on the victim's initial report of defendant's sexual misconduct. *State v. Johnson, 148 Idaho 664, 227 P.3d 918 (2010)*.

Although *§ 45-501* does not specifically require substantial performance of a contract before a lien attaches, a contractor is required to demonstrate substantial performance. Thus, evidence of construction defects was relevant and should have been admitted in a dispute regarding the

construction of a log home. *Perception Constr. Mgmt. v. Bell, 151 Idaho 250, 254 P.3d 1246 (2011)*.

In a case involving lewd conduct with a minor under sixteen, evidence that defendant had sexually explicit conversations with the victim regarding his wife was relevant because these explicit conversations, along with defendant purchasing underwear for the victim and expressing his love for her, constituted evidence of defendant grooming the victim for sexual abuse. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

District court properly determined that the victim's attorney's testimony was relevant where whether or not the victim committed suicide was a central issue throughout the trial, and the attorney's testimony related to the victim's state of mind. *State v. Abdullah, 158 Idaho 386, 348 P.3d 1 (2015)*.

Trial court did not err by determining that evidence from the assault count was relevant to the battery count to show intent and absence of mistake or accident for the battery count, as they occurred in the same area and in a similar manner just a few days later. Defendant failed to argue any basis for determining that the significant probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Diaz, 158 Idaho 629, 349 P.3d 1220 (2015)*.

Trial court did not err by determining that evidence from the battery count was relevant to the assault count where defendant's conduct during the battery was potent evidence of his specific intent to commit rape not only during that incident but also during the assault, and the two crimes were very similar. The probative value of the evidence was not substantially outweighed by any prejudicial effect given the similarity of the two counts. *State v. Diaz, 158 Idaho 629, 349 P.3d 1220 (2015)*.

In a fraud case, healing videos were properly admitted as relevant to demonstrate the nature of the claims that a claimed healer was advancing. Moreover, there was a sufficient foundation for the admission of the videos where the healer's voice was identified as the person speaking. *Alexander v. Stibal, 161 Idaho 253, 385 P.3d 431 (2016)*.

Although the evidence from an investigator and reconstructionist was prejudicial to the employer because it established the appearance of, if not the basis for, retaliatory conduct against third parties not involved in the case, creating the potential for confusion, the evidence was probative and not unfairly prejudicial. *Eller v. Idaho State Police, 165 Idaho 147, 443 P.3d 161 (2019)*.

In a threats against a public servant case, because it was a material and disputed issue at trial whether a letter contained threats to harm the prosecutor or mere attempts at negotiation, the prosecutor's reaction to receiving the defendant's letter was admissible, as it was relevant to show that the interaction between defendant and the prosecutor was not one of negotiation. *State v. Sanchez, 165 Idaho 563, 448 P.3d 991 (2019)*.

District court did not abuse its discretion in allowing the State to ask why the wife's niece asked officers to lie about who called 911 as the evidence was relevant to rehabilitating her after her

credibility was attacked, without objection, by the State. State v. Reyes, 169 Idaho 781, 503 P.3d 997 (2022).

District court did not err in admitting a witness's testimony regarding a prior "harassing" incident between the witness and defendant, because the challenged testimony was relevant to proving defendant's motive as it tended to show that it was the defendant who attacked his girlfriend and that he did so out of jealously. State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022).

**Evidence Held Inadmissible.**

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

It is well established that a trial court has considerable discretion to exclude evidence for reasons of foundation, relevance, or that the question was confusing and could have been interpreted in many different ways; inasmuch as counsel for defendant was able to elicit testimony that defendant suffered from problems which impaired her ability, there was no prejudice in the trial court not allowing defendant's mother to answer a question asking if defendant suffered from any physical or mental ailments. State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992).

To the extent that pastor described personal observations of the defendant, his testimony was properly admitted at trial; however, it was his testimony suggesting "demonic possession" which was excluded by the trial court. The witness was allowed to testify and describe personal observations; however, any conclusions as to the cause of defendant's condition were excluded. State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992).

Defendant, having lost a motion in limine made by the state to exclude certain evidence as irrelevant, could not on appeal advance other factual theories as to why the challenged evidence was relevant. State v. Vierra, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994).

In quid pro quo sexual harassment action, trial court was correct in excluding evidence as irrelevant under this rule that supervisor and alleged harasser were friends because it would take too great a leap of faith to conclude that because they were friends, the supervisor fired plaintiff to protect his friend. De Los Santos v. J.R. Simplot Co., 126 Idaho 963, 895 P.2d 564 (1995).

Attorney-generated letters orchestrating the exchange of children for court-ordered visitation periods were not relevant in a trial for aggravated battery and firearms charges, especially when

the matter of visitation protocol had previously been reduced to a formal order. *State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999)*.

Although the injured customer's expert testified about and relied upon a summary of the store's accident history that contained information that would be considered irrelevant under I.R.E. 401 and 403 because it contained information about accidents that were not the result of improperly stacked merchandise, the expert could use the accident summary as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 95 P.3d 34 (2004)*.

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010)*.

District court did not err in striking an animal welfare advocate's declaration and exhibits and failing to consider them in determining a neighbor's motion for summary judgment, because few, if any, of the facts alleged in the declaration applied to the specific defamation claim at issue. *Elliott v. Murdock, 161 Idaho 281, 385 P.3d 459 (2016)*.

Where defendant was convicted for sexual battery and sexual exploitation of a child, the district court did not err in excluding proposed testimony regarding drug gangs because it had no tendency to make a fact of consequence in the case more or less probable and did not relate to the elements of the charged sex offenses. *State v. Ogden, 171 Idaho 258, 519 P.3d 1198 (2022)*.

District court did not abuse its discretion by precluding defendant's expert testimony and other evidence of causation in a conviction for aggravated DUI because any evidence about the bicyclist's conduct or bicycle did not make more or less probable the fact that defendant failed to yield to the bicyclist thereby causing, at least in some manner, the bicyclist's serious injuries. State v. Buehler, -- Idaho --, -- P.3d --, *2022 Ida. App. LEXIS 22 (Dec. 19, 2022)*.

**Evidence of Character.**

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers, however, I.R.E., Rule 404 prohibits the admission of evidence of a person's

character, even if in the form of an expert opinion, if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite introduction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989)*.

**Evidence of Flight.**

In a prosecution for lewd conduct with a minor under sixteen, evidence of the defendant's flight from the state was relevant where, upon learning that police wanted to talk to him about the alleged sexual abuse, the defendant immediately left Idaho and returned to Oregon and gave his employer a false reason to explain his sudden departure; these actions reasonably implied a consciousness of guilt and a desire to flee the jurisdiction in order to avoid prosecution. *State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)*.

**Evidence of Intent.**

Evidence which included a substantial quantity of pornographic magazines, catalogues and books, combined with the totality of the vast quantity of challenged evidence, was probative of the defendant's preoccupation and attraction toward female children, which was relevant in the jury's determination on the contested issue of whether the defendant had the necessary intent when he committed the charged acts. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

**Expert Testimony.**

Where a scientist's research casts doubt upon the ability of eyewitnesses to perceive accurately, or to memorize and recall fully certain observed events, such research meets the criterion of this rule, and any concern for invasion of the jury's factfinding mission is obviated by I.R.E., Rule 704, which permits experts to render opinions on ultimate issues; accordingly, expert testimony concerning eyewitness identification is admissible under appropriate circumstances. *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*.

In criminal case where defendant was charged with driving under the influence in violation of *§§ 18-8004* and *18-8005(3)* expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea, 119 Idaho 352, 806 P.2d 445 (1991)*.

Motion for an expert witness was denied in a case where a potential parolee was challenging the licensing requirements of I.C.A. *§ 20-223* because an expert's opinion regarding the merit of

allowing psychological evaluations to be conducted by only licensed evaluators was not relevant to the legal determination of whether licensing was required. *Dopp v. Idaho Comm'n of Pardons Parole, 144 Idaho 402, 162 P.3d 781 (Ct. App. 2007)*.

**Illustrative Evidence.**

In murder prosecution, court properly admitted video of computer generated objects falling down stairs, as it was relevant to illustrate state expert's testimony that it was impossible for deceased infant to have sustained his injuries as a result of falling down stairs, as defendant claimed. *State v. Stevens, 146 Idaho 139, 191 P.3d 217 (2008)*.

While the district court erred in admitting a clay model of a child's head, the minor inaccuracies in the model did not make it irrelevant for the purpose of showing the jury where the child sustained a head wound, as the model was not portrayed to the jury as an exact replica. *State v. Ehrlick, 158 Idaho 900, 354 P.3d 462 (2015)*.

**Impeachment Evidence.**

A defendant charged with driving under the influence by proof of excessive alcohol content is entitled to offer any competent evidence tending to impeach the results of the evidentiary tests admitted against him; thus, a defendant may introduce evidence of his blood alcohol content, or other direct or circumstantial evidence, to show a disparity between such evidence and the results produced by the chemical testing, so as to give rise to an inference that the prosecution's test results were defective. *State v. Pressnall, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)*.

Excluded evidence of DUI defendant's blood alcohol level and its relationship to his breath alcohol content specifically contradicted the results of the tests admitted against him, and assuming the jury believed defendant's testimony regarding his alcohol consumption, the excluded testimony would have demonstrated that his alcohol concentration was lower than that shown by the intoximeter, which would have permitted the jury to doubt the accuracy of the state's evidence. Consequently, the exclusion of this testimony may have contributed to a jury finding that defendant was driving while having an alcohol content of .10 percent or more, and the error in excluding impeaching evidence, as it related to the reliability of the breath test results, reasonably could have affected the ultimate outcome of this case. *State v. Pressnall, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)*.

In a criminal trial, evidence of the relationship between an eyewitness and the State was irrelevant to defendant's case where the eyewitness' description was given before defendant entered into an agreement with the State, and the eyewitness was receiving no consideration for his testimony. *State v. Tarrant-Folsom, 140 Idaho 556, 96 P.3d 657 (Ct. App. 2004)*.

In defendant's trial on charges of drug trafficking, the state's questions regarding whether marks or imperfections on defendant's inner arms were needle/injection marks were relevant to address defendant's contention that the drugs discovered by law enforcement officers belonged to his companion and not to him. Whether or not defendant had injection marks on his arms

tended to support the veracity of the companion's testimony, making it more probable that the case in which drugs were found did, in fact, belong to defendant. *State v. Grantham, 146 Idaho 490, 198 P.3d 128 (2008)*.

Evidence that a witness and defendant associated with each other, although members of different gangs, bore directly on a witness's credibility and was, therefore, relevant as impeachment evidence for the purpose of showing bias. Evidence that they were closely associated, and that their respective gang memberships were a component of that affiliation, was relevant. *State v. Thumm, 153 Idaho 533, 285 P.3d 348 (2012)*.

**In General.**

Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of that fact more probable than it would be without the evidence, is relevant. *State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989)*.

**Jury Verdict.**

Where two weeks prior to submission of hearing officer's decision to Board, a jury in an independent action concluded that doctor was not liable for malpractice in care of certain patient and doctor moved the Board to have the jury verdict received in evidence to show that jury concluded that he had met the local community standard of care as to such patient and that such verdict was a judicially cognizable fact which the Board should have considered, since the question the jury answered was "was doctor's negligence the proximate cause of patient's injuries" and the negative answer could have indicated any number of things, such verdict was not relevant under this rule as it did not have a tendency to make the existence of any fact that was of consequence to the proceeding more probable or less probable. *Krueger v. Board of Professional Discipline, 122 Idaho 577, 836 P.2d 523 (1992)*, cert. denied, *507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 672 (1993)*.

**Lay Witness.**

Defendant's convictions for burglary and petit theft were appropriate and there was no error in admitting into evidence the opinions of lay witnesses who identified the defendant as the man appearing in security videotape or in photographs derived from the videotape. The opinion of each lay witness, identifying defendant, was rationally based on the perception of the witness and the testimony was helpful to the jury in the determination of a fact in issue. *State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009)*.

**Objections.**

Defendant's only stated objection was relevance, and he did not ask the court to exclude the exhibit for carrying a high risk of unfair prejudice; defendant failed to preserve any objection under that rule. *State v. Rocha, 157 Idaho 246, 335 P.3d 586 (2014)*.

**Other Bad Acts and Uncharged Crimes.**

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991)*.

Where, in a murder prosecution uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. *State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991)*, overruled on other grounds, *State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)*.

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained" incident. *State v. Cook, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007)*.

**Photographs.**

Photographic evidence of a homicide victim, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, is admissible at the discretion of the trial court, as an aid to the jury in arriving at a fair understanding of the evidence; proof of the corpus delicti; extent of injury, condition and identification of the body; or for its bearing on the question of the degree of the crime, even though it may have the additional effect of tending to excite the emotions of the jury *State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009)*.

**Plane Crash.**

In action for personal injuries sustained in an airplane crash, evidence about the airline's maintenance practices and records of the plane in question during the time prior to the accident was relevant in explaining why a form that would have covered the reinstallation of the flight controls on the plane in question was missing and in explaining how an inadequately sized bolt could have been used, without ever being secured with a nut or cotter pin and how the airline

did not discover the improperly sized and unsecured bolt. *Soria v. Sierra Pac. Airlines, 111 Idaho 594, 726 P.2d 706 (1986)*.

**Pornographic Images.**

Pornographic images and incest stories found on the defendant/father's computer were admissible in a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, involving his daughter, as they were relevant to, and corroborated, the victim's testimony that she was shown pornography prior to and during the sexual abuse and helped prove the intent element of the crime. *State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009)*.

**Probative Value.**

The determination of whether the proffered evidence lacks probative value because of remoteness in time rests in the sound discretion of the trial court. *Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988)*.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or if the evidence has a tendency to mislead the jury, create confusion or undue delay, waste time, or is cumulative. *L & L Furn. Mart, Inc. v. Boise Water Corp., 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991)*.

**Review.**

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under I.R.E. 404(b). *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

Whether evidence is relevant under this rule is an issue of law which an appellate court should review de novo. *State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009)*.

In a case in which plaintiff claimed that he was discharged in retaliation for engaging in protected activity, the district court did not err when it admitted into evidence emails sent by plaintiff to defendant's employees after his termination. One particular email was relevant to show that plaintiff carried a grudge and that he could simply not let go of a previous complaint, even when it had been addressed. *Van v. Portneuf Med. Ctr., 156 Idaho 696, 330 P.3d 1054 (2014)*.

**Scientific Tests.**

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific

acceptance is a proper condition for taking judicial notice. State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

**Value of Marijuana Plants.**

Evidence of the value of marijuana plants seized by police during a search of defendants' residence for marijuana and drug manufacturing materials was relevant to the issue of intent to deliver even though the issue was defendants' intent to deliver the processed marijuana, not to deliver the plants themselves; the value of mature plants necessarily would reflect the potential revenue to be gained by selling the marijuana harvested and processed from such plants. State v. Randles, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989).

**Video.**

A redacted video of a traffic stop was relevant in a drug possession case where it showed that the defendant was in the particular area in the vehicle where the drugs were found and, through the defendant's elaborate and convoluted explanation for his previous whereabouts, it demonstrated his consciousness of guilt. State v. Betancourt, 151 Idaho 635, 262 P.3d 278 (2011).

**Cited in:**

*State v. Martinez, 109 Idaho 61, 704 P.2d 965 (Ct. App. 1985)*; Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986); Roeh v. Roeh, 113 Idaho 557, 746 P.2d 1016 (Ct. App. 1987); Nettleton v. Thompson, 117 Idaho 308, 787 P.2d 294 (Ct. App. 1990); State v. Brazzell, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990); Needs v. Hebener, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); Ernst v. Hemenway & Moser Co., 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991); Sullivan v. Bullock, 124 Idaho 738, 864 P.2d 184 (Ct. App. 1993); State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993); State v. Velasquez-Delacruz, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); State v. Holden, 126 Idaho 755, 890 P.2d 341 (Ct. App. 1995); State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998); Staff of State Real Estate Comm'n v. Nordling, 135 Idaho 630, 22 P.3d 105 (2001); State v. Hauser, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006); State v. Pearce, 146 Idaho 241, 192 P.3d 1065 (2008); State v. Critchfield, 153 Idaho 680, 290 P.3d 1272 (2012); State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013); State v. Bergerud, 155 Idaho 705, 316 P.3d 117 (Ct. App. 2013); State v. Russo, 157 Idaho 299, 336 P.3d 232 (2014); State v. Miller, 157 Idaho 838, 340 P.3d 1154 (Ct. App. 2014); State v. Folk, 157 Idaho 869, 341 P.3d 586 (Ct. App. 2014); State v. McKean, 159 Idaho 75, 356 P.3d 368 (2015); State v. Blake, 161 Idaho 33, 383 P.3d 712 (2016); State v. Stewart, 161 Idaho 235, 384 P.3d 999 (2016); State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018); Ybarra v. Legis. of Idaho, 166 Idaho 902, 466 P.3d 421 (2020); Gomersall v. St. Luke's Reg'l Med. Ctr., 168 Idaho 308, 483 P.3d 365 (2021); Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021); State v. Towell, -- Idaho --, 535 P.3d 624 (2023).

## Research References & Practice Aids

## RESEARCH REFERENCES

### A.L.R.

Admissibility and use of evidence of nonuse of bicycle helmets. *2 A.L.R.6th 429*.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. *24 A.L.R.6th 747*.

Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. *79 A.L.R.6th 351*.

Idaho Court Rules Annotated
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# *I.R.E. Rule 402*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 402. General Admissibility of Relevant Evidence.

Relevant evidence is admissible unless these rules, or other rules applicable in the courts of this state, provide otherwise. Irrelevant evidence is not admissible.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

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**Abuse of Discretion Standard.**

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice the appellant court uses an abuse of discretion standard. *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

**Background Evidence.**

Admission of testimony by officer that he had been involved in surveillance of a drug lab, which surveillance was unrelated to charge of sale of marijuana by defendant, prior to his meeting with defendant, was not reversible error, where first objection to the testimony was made after the jury had already heard about the surveillance and there was no motion to strike the evidence brought by counsel, because, although irrelevant evidence is inadmissible, some leeway is allowed even on direct examination for preliminary facts that do not bear directly on the legal issues, but merely provide background for the narrative. *State v. Walker, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991)*.

**Character Evidence.**

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite introduction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989)*.

**Diagram.**

A diagram is relevant to illustrate witness' testimony where he used the diagram to aid his testimony concerning his investigation of the crime scene. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

**Evidence Irrelevant.**

Where evidence of a murder victim's past predatory sexual activities was found not admissible pursuant to the defendant's proffered defense under *§ 19-202A*, the evidence was also inadmissible under this rule as being irrelevant to the murder. *State v. Arrasmith, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998)*.

Police officer's comments during videotaped confession that implied he believed defendant was lying should have been redacted as they did not provide context to a relevant answer by defendant. *State v. Cordova, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002)*.

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered evidence was inadmissible

under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test. *Loza v. Arroyo Dairy, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002)*.

District court did not err in striking an animal welfare advocate's declaration and exhibits and failing to consider them in determining a neighbor's motion for summary judgment, because few, if any, of the facts alleged in the declaration applied to the specific defamation claim at issue. *Elliott v. Murdock, 161 Idaho 281, 385 P.3d 459 (2016)*.

**Evidence Relevant.**

Letter was relevant evidence, where, due to its "malicious" tone, it lent support to plaintiff's claim that housing authority was engaged in a smear campaign as a "cover-up" for plaintiff's being improperly fired. *Lubcke v. Boise City/ADA City Hous. Auth., 124 Idaho 450, 860 P.2d 653 (1993)*.

In personal injury action on theory that city was negligent in design of intersection where accident occurred in failing to construct a raised median, admission of evidence of other accidents that took place in the same area both before and after plaintiff's accident was properly admitted since all were of a type which could have been prevented or affected by the proposed median and thus evidence of such accidents had some tendency to make the fact that the street design did not comply with existing standards appear more likely to exist. *Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994)*.

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to *§ 18-1506(1)(b)*, regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant's actions. *State v. Marsh, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004)*.

Although *§ 45-501* does not specifically require substantial performance of a contract before a lien attaches, a contractor is required to demonstrate substantial performance. Thus, evidence of construction defects was relevant and should have been admitted in a dispute regarding the construction of a log home. *Perception Constr. Mgmt. v. Bell, 151 Idaho 250, 254 P.3d 1246 (2011)*.

The district court did not abuse its discretion in admitting evidence about the criminality of gangs under Idaho R. Evid. 403 and 404. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013)*.

In a case involving lewd conduct with a minor under sixteen, evidence that defendant had sexually explicit conversations with the victim regarding his wife was relevant because these explicit conversations, along with defendant purchasing underwear for the victim and expressing

his love for her, constituted evidence of defendant grooming the victim for sexual abuse. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

Expert opinion regarding the lividity patterns was relevant, where it was admitted to support the state's theory regarding the method in which defendant had used the piece of clothing to commit a homicide. *State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018)*.

In a threats against a public servant case, because it was a material and disputed issue at trial whether a letter contained threats to harm the prosecutor or mere attempts at negotiation, the prosecutor's reaction to receiving the defendant's letter was admissible, as it was relevant to show that the interaction between defendant and the prosecutor was not one of negotiation. *State v. Sanchez, 165 Idaho 563, 448 P.3d 991 (2019)*.

District court did not err in admitting a witness's testimony regarding a prior "harassing" incident between the witness and defendant, because the challenged testimony was relevant to proving defendant's motive as it tended to show that it was the defendant who attacked his girlfriend and that he did so out of jealously. *State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022)*.

In a common law marriage case, the magistrate court erred by excluding evidence of the parties conduct after December 31, 1995, as irrelevant to whether the parties had a common law marriage before the statutory cut-off date, and dismissing petitioner's common law marriage claim because the January 10, 1996, life insurance application and the July 1996 claim for medical benefits were relevant to proving the parties entered a common law marriage in 1995, and the error affected petitioner's substantial rights. If the evidence had been admitted, petitioner might have met her burden to demonstrate by a preponderance of evidence that the parties consented to enter into a common law marriage and the presumption of marriage would have been applied, shifting the burden to respondent to prove no marriage occurred. *Martinez v. Carretero, -- Idaho --, 539 P.3d 565 (2023)*.

**Exclusion of Relevant Evidence.**

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or if the evidence has a tendency to mislead the jury, create confusion or undue delay, waste time, or is cumulative. *L & L Furn. Mart, Inc. v. Boise Water Corp., 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991)*.

Trial court did not abuse its discretion when it prohibited defendant from taking a police officer's video deposition in another state where defendant scheduled the deposition late in the proceedings and could have taken the officer's deposition at any time over the previous two years; it would have been unduly burdensome to expect plaintiff to travel to California on short notice the week before trial to participate in the deposition. *Bailey v. Sanford, 139 Idaho 744, 86 P.3d 458 (2004)*.

**Expert Testimony.**

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers, however, I.R.E., Rule 404 prohibits the admission of evidence of a person's character, even if in the form of an expert opinion, if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

In prosecution for rape and lewd and lascivious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988)*.

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. *State v. Gong, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988)*.

In criminal case where defendant was charged with driving under the influence in violation of *§§ 18-8004* and *18-8005(3)*, expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea, 119 Idaho 352, 806 P.2d 445 (1991)*.

**Foundation.**

Because videotape did not show everything that would be visible to a driver on that road and the lack of information regarding temporal and climatic conditions under which the tape was made, the videotape of the portion of the highway where officer initially observed defendant driving erratically and going through a stop sign lacked adequate foundation; further, even if the tape were admissible, its probative value was outweighed by the danger of unfair prejudice. *State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991)*.

**Harmless Error.**

Although an expert witness's testimony about defendant's high suggestibility and social anxiousness should have been admitted, as it was relevant to a determination of whether his statements were the subject of police coercion, because defendant's recollection of the events was never substantially altered to submit to the detective's suggested version of the events and defendant's statements were voluntary, the district court's selective exclusion of the expert's suggestibility testimony amounted to harmless error. *State v. Stone, 154 Idaho 949, 303 P.3d 636 (2013)*.

**Impeachment Evidence.**

In a prosecution for driving while under the influence, where the state has alleged that the defendant was driving while having an alcohol content of .10 percent or more as shown by analysis of his blood, breath or urine, evidence of a contradictory alcohol content, otherwise proper, is admissible for the purpose of impeaching the results of the evidentiary tests submitted by the state. The probative weight to be accorded to such testimony is left to the jury as trier of the facts, as is the weight to be accorded other evidence in the case. *State v. Pressnall, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)*.

**Other Bad Acts and Uncharged Crimes.**

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991)*.

Where defendant was convicted for sexual battery and sexual exploitation of a child, the district court did not err in excluding proposed testimony regarding drug gangs, because it had no tendency to make a fact of consequence in the case more or less probable and did not relate to the elements of the charged sex offenses. *State v. Ogden, 171 Idaho 258, 519 P.3d 1198 (2022)*.

**Possession of Controlled Substance.**

Where defendant claimed that he did not know the nature of the residue in the vial that he possessed, not that he did not know the illegal nature of the substance he possessed; testimony of third party was relevant to the issue of knowledge of what the substance was. *State v. Lamphere, 130 Idaho 630, 945 P.2d 1 (1997)*.

**Probative Prejudicial Evidence.**

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because, although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator, and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

When defendant's accomplice testified against him at trial, the district court erred by excluding evidence that the witness avoided a mandatory three-year prison sentence by testifying against

defendant. Because the evidence was relevant to the witness's credibility for purposes of this rule, the district court should have weighed the factors set forth in Idaho R. Evid. 403 before ruling on the admissibility of the evidence. *State v. Ruiz, 150 Idaho 469, 248 P.3d 720 (2010)*.

**Rape Prosecution.**

**--Physical Injury.**

Evidence of physical injury is not necessary to establish the use of force in a rape prosecution. It was relevant, however, where it tended to corroborate the complaining witness's version of the events surrounding the alleged rape and to contradict the defendant's claim of consent. The photographs showing the existence of physical bruises was clearly relevant to the critical factual issue to be decided by the jury. *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*.

**Review of Admission.**

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under I.R.E. 404(b). *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

**Scientific Tests.**

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. *State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)*.

**Cited in:**

*Chenery v. Agri-Lines Corp., 115 Idaho 281, 766 P.2d 751 (1988)*; *State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989)*; *Ernst v. Hemenway & Moser Co., 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991)*; *State v. Velasquez-Delacruz, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994)*; *Orthman v. Idaho Power Co., 134 Idaho 598, 7 P.3d 207 (2000)*; *State v. Mantz, 148 Idaho 303, 222 P.3d 471 (2009)*; *State v. McKean, 159 Idaho 75, 356 P.3d 368 (2015)*; *State v. Cruz-Romero, 160 Idaho 565, 376 P.3d 769 (2016)*; *Gomersall v. St. Luke's Reg'l Med. Ctr., 168 Idaho 308, 483 P.3d 365 (2021)*; *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Admissibility and use of evidence of nonuse of bicycle helmets. *2 A.L.R.6th 429*.

Admissibility of evidence of prior accidents or injuries at same place. *15 A.L.R.6th 1*.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. *24 A.L.R.6th 747*.

Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. *79 A.L.R.6th 351*.

Idaho Court Rules Annotated
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# *I.R.E. Rule 403*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

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**Abuse of Discretion Standard.**

The lower court's conclusions that the probative value of the evidence is not outweighed by its unfair prejudice is reviewed under an abuse of discretion standard. *State v. Matthews, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993)*.

A lower court's determination under this section will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State v. Birkla, 126 Idaho 498, 887 P.2d 43 (Ct. App. 1994)*.

Where the district court allowed admission of relevant evidence regarding defendant's prior offense and sentence for sexual abuse of a minor, and where the defendant failed to demonstrate that the probative value of his conviction and probation was substantially outweighed by the danger of unfair prejudice, he failed to show abuse of discretion in the denial of his motion in limine insofar as allowing the fact of, and the procedure in, his prior conviction. *State v. Baer, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999)*.

When reviewing a trial court's determination that the probative value of evidence was not substantially outweighed by the danger of unfair prejudice, the appellate court uses an abuse of discretion standard. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

**Alternate Perpetrator Evidence.**

This rule is the controlling authority for the admissibility of alternate perpetrator evidence, subject to the relevancy and hearsay standards of the rules of evidence. *State v. Meister, 148 Idaho 236, 220 P.3d 1055 (2009)*.

District court did not err in limiting defendant's cross-examination of a detective about whether he followed up on investigative leads of two individuals, as without any evidence linking those individuals to the murder the line of questioning would not provide evidence making it more or less likely that defendant killed the victim and, therefore, questioning whether law enforcement investigated specific individuals with no connection to the murder would provide no probative evidence. State v. Buck, -- Idaho --, -- P.3d --, *2023 Ida. App. LEXIS 20 (Sept. 20, 2023)*.

**Appellate Review.**

Where the admission of the testimony did not constitute fundamental error, and where defendant failed to object under this rule during trial, the issue was not preserved for appeal. *State v. Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000)*.

Defendant's only stated objection was relevance, and he did not ask the court to exclude the exhibit for carrying a high risk of unfair prejudice; defendant failed to preserve any objection under that rule. *State v. Rocha, 157 Idaho 246, 335 P.3d 586 (2014)*.

**Applicability.**

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the testimony of the preliminary hearing witness regarding the defendant's alleged statement in her presence was not hearsay but a party's statement under I.R.E., Rule 801(d)(2); however, on remand the trial court should make a ruling on the application of this rule to this testimony. *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*.

There are very few categories of people whose testimony must be excluded as a matter of law. In general, every person is competent to be a witness, except persons whom the court finds to be incapable of receiving just impression of the facts respecting which they are examined, or of relating them truly. As long as the evidence offered by the testimony is relevant under I.R.E., Rule 402, any person meeting the above qualifications may testify, subject, of course, to exclusion in the discretion of the trial court under this rule. *State v. Rhoades, 119 Idaho 594, 809 P.2d 455 (1991)*.

For purposes of Idaho R. Evid. 404(b), some of defendant's prior acts that were placed in evidence were unnerving and carried with them a potential for unfair prejudice; therefore, it was necessary for the trial court to evaluate whether the danger of unfair prejudice from this evidence substantially outweighed its probative value, for purposes of this rule. *State v. Hoak, 147 Idaho 919, 216 P.3d 1291 (2009)*.

When defendant's accomplice testified against him at trial, the district court erred by excluding evidence that the witness avoided a mandatory three-year prison sentence by testifying against defendant. Because the evidence was relevant to the witness's credibility, the district court should have weighed the factors set forth in this rule before ruling on the admissibility of the evidence. *State v. Ruiz, 150 Idaho 469, 248 P.3d 720 (2010)*.

**Collateral Source Rule.**

In plaintiff's action to recover damages for personal injuries following a car accident, the district court correctly determined that evidence of Medicare write-offs was inadmissible. By treating a Medicare write-off as a collateral source, the danger of prejudice contemplated in this rule is

avoided, and the jury will not be influenced by the existence of *Medicare. Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003)*.

**Common Scheme or Plan.**

The trial court did not err in permitting evidence of prior uncharged sex acts between the defendant and each of the three victims because such testimony was indeed admissible to show a common scheme or plan; although such evidence was still subject to the limitations imposed by this section which proscribes both the "needless presentation of cumulative evidence," and evidence whose "probative value is substantially outweighed by the danger of unfair prejudice," the trial court found that neither of these limitations was violated in the instant case. *State v. Tolman, 121 Idaho 899, 828 P.2d 1304 (1992)*.

**Defense Counsel as Witness.**

Where district court expressly noted that allowing defendant's counsel to testify would confuse and mislead the jury and would be a needless presentation of cumulative evidence under this rule, the Court of Appeals found no abuse of discretion in the district court's refusal to allow counsel to testify. *Cannon Bldrs., Inc. v. Rice, 126 Idaho 616, 888 P.2d 790 (Ct. App. 1995)*.

**Discretion of Court.**

Where plaintiff's counsel used a per diem argument in his opening statement, made repeated efforts to offer a treatise into evidence and made repeated reference to defendant/manufacturer's stipulation that reducing the combine auger cover opening to 1.3 inches was feasible, it was within the discretion of the trial court to control the contents of opening statements and limit the number of requests for evidence and the number of references to the stipulation. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

It is well established that a trial court has considerable discretion to exclude evidence due to lack of foundation, or because the evidence is confusing and could be interpreted in many different ways. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

The trial court exercised its discretion in excluding the use of the tort claim notices as prior inconsistent statements, reasoning that, because the purpose of a tort claim notice is merely to give notice and not to assert liability, it carries even less evidentiary weight than the pleadings of a complaint, and the probative value of the tort claim notices was substantially outweighed by their potential to confuse or mislead the jury. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

There was no abuse of discretion where the trial court set out the relevance for each item of evidence and weighed its probative value against the harm of prejudice, since this illustrated that the court perceived the issue as one of discretion and also that the decision was made within the correct legal standards. *Highland Enters., Inc. v. Barker, 133 Idaho 330, 986 P.2d 996 (1999)*.

**--Abuse.**

Purchaser of business failed to show that the decision of district court to not allow evidence of later assignment by seller's estate was not an abuse of discretion, where any relevance would have been outweighed by confusing the issues and misleading the jury. *Lloyd v. DeMott, 124 Idaho 62, 856 P.2d 99 (Ct. App. 1993)*.

In the trial court's conclusory statement in the written order, no reasoning was mentioned for the ruling concerning this rule; therefore, the trial court abused its discretion in making the ruling. *Dabestani ex rel. Dabestani v. Bellus, 131 Idaho 542, 961 P.2d 633 (1998)*.

**Evidence Held Admissible.**

The district court did not abuse its discretion in admitting bank deposit slips and money order receipts showing that the defendant had handled several thousand dollars during a period of approximately six weeks, where evidence of the financial transactions was relevant to prove the defendant's knowledge of the controlled substances in his possession, and there was nothing inherently inflammatory about the evidence of financial transactions. *State v. Palmer, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985)*.

Although there was no dispute as to the identity of the victim, the testimony of the mother of the victim as to the identity of the victim was clearly relevant in that it proved one of the elements of the state's case, and the prejudicial impact, if any, of having the mother identify the victim was not so great as to show an abuse of discretion. *State v. Buzzard, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986)*.

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator, and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

The district court correctly applied the Rules of Evidence when it allowed three women, who were not victims in the case, to testify regarding their accusations of defendant's sexual misbehavior with them when they were minors, where the trial court weighed the proffered testimony and determined that it would be more helpful to the jury in determining the credibility of the victim's testimony than it would be prejudicial to defendant. *State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993)*.

Even though no weapon was seen during the course of the robbery, where defendant made a threat implying that a concealed weapon was present, sawed-off shotgun found in defendant's

automobile was slightly relevant and was admissible as its probative value was not outweighed by its prejudicial impact. *State v. Waddle, 125 Idaho 526, 873 P.2d 171 (Ct. App. 1994)*.

Where rape defendant's choice of words in his statement were crude, vulgar and potentially offensive to a jury, this was not, in and of itself, sufficient reason to exclude defendant's uncoerced statement to law enforcement investigators. *State v. Floyd, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994)*.

In prosecution for delivery of and trafficking in methamphetamine, evidence that defendant sent two money orders, both for substantial amounts, to the same person in a city within the same week that two packages were sent from fictitious people and addresses and delivered to defendant through an airline from the same city, made it more probable that defendant was engaged in trafficking methamphetamine and thus such evidence was relevant; however, the trial court's conclusion that the probative value of the evidence was not outweighed by its unfair prejudice was not an abuse of discretion and such evidence was properly admitted. *State v. Kopsa, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994)*.

In trial of defendant convicted of delivery of a controlled substance, district court did not err in admitting evidence of prior drug transaction with undercover officer because it was relevant to the state's rebuttal of defendant's affirmative defense of entrapment and was relevant to prove defendant's motive or intent. *State v. Canelo, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996)*.

Where, prior to charged offense of forgery and burglary, evidence showed another business's check had been paid which was signed by the defendant, who had no authorized power of endorsement, and it was paid by the same bank where defendant had attempted to pass the unauthorized check at issue, such proffered evidence was probative and admissible under I.R.E. 404(b) to prove the absence of mistake or accident. *State v. McAbee, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997)*.

Where, in its analysis, the district court considered several factors, including the similarity of prior occurrences to the offenses charged as to the method of enticement and the age of the children, where the court noted the probative value of the evidence, and where a limiting instruction was given to the jury prior to contested testimony and a general instruction was given in final instructions, the court utilized reason and proper legal standards in deciding to admit the testimony, and did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

Where the defendant opened the door for the admission of prior act evidence by testifying that he had never fired the gun used in this crime before, that he had never seen anyone shot before, and that he had never pointed a gun at anyone, evidence contradicting that testimony was relevant and admissible to impeach his credibility. *State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999)*, cert. denied, *529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000)*.

Where the district court recognized the discretionary nature of its inquiry into the probative value of prior act evidence, and made a reasoned decision within the boundaries of its discretion after considering the evidence three separate times before the trial and again during the trial,

there was no abuse in the admission of the evidence. State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, *529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000)*.

Testimony of defendant's daughter that 23 years ago defendant had been a willing and vigorous participant in sexual assaults on the daughter, in concert with defendant's husband, had substantial probative value addressing the issue of whether defendant knowingly and intentionally committed the charged offense against her grandson. State v. Law, 136 Idaho 721, 39 P.3d 661 (Ct. App. 2002).

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to § 18-1506(1)(b), regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant's actions; evidence indicated that his touching was for sexual gratification, rather than being accidental or innocent. State v. Marsh, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004).

In a criminal prosecution for forgery, the trial court did not err by admitting a loan agreement signed by defendant, which stated that the purpose was to pay for a forged check, and under I.R.E. 403, there was no danger of unfair prejudice. State v. Hill, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

In defendant's accessory case, a witness's testimony regarding a drug buy was relevant to explain why she initially gave an untruthful account to the police, and the testimony was thus probative for a purpose other than to show defendant's poor character. In addition, because the witness's credibility was essential to the jury's determination, a rational explanation as to why the witness would alter her story to the police was highly probative; any prejudice to defendant was slight since the witness did not implicate her in the drug purchase. State v. Hauser, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006).

Defendant's statements to his ex-wife (the victim's mother) that their daughter walked in on him and saw him watching pornography and masturbating because the statements were relevant to help the jury understand why the victim's mother did not immediately act on the victim's initial report of defendant's sexual misconduct. Further, the statements were relevant as admissions, as defendant could simply have denied that the victim saw anything at all; the jury was entitled to consider these statements as evidence that some sort of sexual encounter occurred between defendant and his daughter, evidence that could be directly probative of defendant's guilt. State v. Johnson, 148 Idaho 664, 227 P.3d 918 (2010).

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under Idaho R. Evid. 412 and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010).

During defendant's trial for felony domestic violence, the court did not err in admitting evidence that the victim, his girlfriend, was pregnant at the time of the attack because, while there was no

direct evidence of miscarriage, if a miscarriage occurred, it was not an unrelated act or circumstance; instead, it was part and parcel of the crime for which defendant was charged. *State v. Fordyce, 151 Idaho 868, 264 P.3d 975 (2011)*.

The district court did not abuse its discretion in admitting evidence about the criminality of gangs under this rule and Idaho R. Evid. 404. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013)*.

Character witnesses' testimony regarding the defendant's trustworthiness with children was pertinent to the charge of lewd conduct with a six-year-old and should have been admitted. So long as the witnesses testified only to general observations rather than specific incidents, the likelihood of confusion or prejudice would be minimal. *State v. Rothwell, 154 Idaho 125, 294 P.3d 1137 (2013)*.

Trial court erred by holding that defendant's trial counsel was ineffective for failing to object to testimony from defendant's former cellmate regarding threats defendant allegedly made against the cellmate's family under this rule because the testimony was relevant to show consciousness of guilt and the cellmate's credibility. The probative value of the testimony was not substantially outweighed by the danger of unfair prejudice because it was not unfair to allow the jury to known that defendant had attempted to influence evidence by making threats against the victim and a potential witness's testimony. *Cook v. State, 157 Idaho 775, 339 P.3d 1179 (Ct. App. 2014)*.

District court properly admitted defendant's statements about the killing of spouses in other cultures where although the statements supported an inference that defendant believed he could kill his wife without offending those in his community with similar views, the statements were highly probative for the very same reason, and the statements assisted the State in proving its case because it went directly towards defendant's state of mind and motive for the murder. *State v. Abdullah, 158 Idaho 386, 348 P.3d 1 (2015)*.

District court did not err by excluding evidence of the victim's life insurance policies where the life insurance policy evidence did not alter the fact that defendant took out the vending machine insurance policies shortly before his wife's death, and the life insurance policies were an extraneous piece of information that had little to do with the case. *State v. Abdullah, 158 Idaho 386, 348 P.3d 1 (2015)*.

Trial court did not err by determining that evidence from the assault count was relevant to the battery count to show intent and absence of mistake or accident for the battery count, as they occurred in the same area and in a similar manner just a few days later. Defendant failed to argue any basis for determining that the significant probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Diaz, 158 Idaho 629, 349 P.3d 1220 (2015)*.

Trial court did not err by determining that evidence from the battery count was relevant to the assault count where defendant's conduct during the battery was potent evidence of his specific intent to commit rape not only during that incident but also during the assault, and the two crimes were very similar. The probative value of the evidence was not substantially outweighed by any prejudicial effect given the similarity of the two counts. *State v. Diaz, 158 Idaho 629, 349 P.3d 1220 (2015)*.

Reenactment photos were not unfairly prejudicial, where they were necessary to fully explain the expert's testimony regarding his theory about the lividity patterns on the victim's body. *State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018)*.

District court abused its discretion in admitting the two still images from pornographic videos allegedly viewed by defendant because there was no evidence that the videos depicted actual child pornography, defendant was never charged with possession of child pornography, nor was evidence introduced that the videos actually depicted children being sexually abused. *State v. McGrath, 169 Idaho 656, 501 P.3d 346 (2021)*.

District court did not abuse its discretion by allowing the state to inquire into defendant's brother's prior inconsistent statements for impeachment purposes, because it did not admit the late-disclosed jailhouse telephone conversations between defendant and his brother, the colloquy did not reference the brother's incarceration, and defendant's position was that the evidence was merely cumulative. *State v. Lankford, -- Idaho --, 535 P.3d 172 (2023)*.

Where cross-examination of defendant about prior misdemeanor petit theft conviction was admissible under Idaho R. Evid. 608 as probative of his character for truthfulness, it was not unduly prejudicial under this rule because it did not invite jury to infer that defendant was violent. *State v. Johnson, -- Idaho --, 544 P.3d 766 (2024)*.

**Evidence Held Inadmissible.**

Where, in prosecution for rape, the defendant admitted engaging in intercourse with the alleged victim, and the only material issue was whether the intercourse had been consensual or forced, the testimony concerning "passes" made by the defendant toward other women on the day of the alleged rape had marginal relevancy and carried a high risk of unfair prejudice. *State v. Clay, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987)*.

Where the evidence against defendant, who was convicted of felony injury to child, was wholly circumstantial, the improper testimony about defendant's temper and his alleged choking of victim's mother was not harmless error; this evidence may have led the jury to a guilty verdict based upon an impermissible inference that defendant had a propensity to violence, rather than upon the evidence as to his guilt or innocence of the crime charged. *State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)*.

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unpresented alibi testimony, such

evidence would not have likely produced an acquittal and denial of defendant's motion for a new trial was proper. *State v. Roberts, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995)*. See also *State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996)*.

In prosecution for felony driving under the influence of alcohol, exclusion of surrebuttal testimony to counter other testimony as to how much defendant had to drink on grounds that such testimony was repetitive of evidence already in the record was not error. *State v. Knight, 128 Idaho 862, 920 P.2d 78 (Ct. App. 1996)*.

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State would have resulted from the jury being uninformed, and such evidence would have impermissibly invited the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996)*.

Officer's testimony about defendant's conduct while allegedly intoxicated on prior occasions provided little probative value on defendant's ability to form the necessary intent on the night in question and, considering the nature of the testimony, there was a significant danger of unfair prejudice. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

In a prosecution for rape, admission of testimony regarding victim's prior allegations that she was abused by her father was properly denied because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998)*.

Evidence offered by defendant to attack the victim's credibility, regarding her mental health, medication she was taking for a mood disorder, and alleged instances of her irrational behavior which included threats against other members of her family, had little, if any, relevance to the victim's truthfulness or untruthfulness and any marginal relevance it might have was outweighed by the potential of unfair prejudice and jury confusion. *State v. Crowe, 135 Idaho 43, 13 P.3d 1256 (Ct. App. 2000)*.

Where the accountant's testimony was repetitious of that already given by husband and the probative value of his testimony was minimal since his knowledge was primarily based upon representations made by the husband, the court did not abuse its discretion in finding that the probative value of the testimony was substantially outweighed by concerns over the needless presentation of cumulative evidence. *Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002)*.

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered evidence was inadmissible under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test as any marginal probative value of the statements was outweighed by the risk of unfair prejudice. *Loza v. Arroyo Dairy, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002)*.

In defendant's trial for bank robbery, the court properly excluded evidence of alternative perpetrators. The proffered evidence did not directly link third parties to the crime, and was of little probative value. *State v. Kerchusky, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003)*.

In defendant's trial for lewd and lascivious conduct with defendant's minor child, where defendant was allowed to present testimony that the child was not a truthful person, and instances of the child's alleged recantations of prior accusations of sexual abuse occurred several years earlier, evidence of the alleged recantations was properly excluded to avoid a mini-trial of the child's prior allegations. *State v. Harshbarger, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003)*.

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under Idaho R. Evid. 412 and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. *State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010)*.

Exclusion of defendant's proffered evidence was proper as defendant's offer of proof did not demonstrate that the child was previously exposed to the sort of acts and bodily conditions that were described in her report of the charged acts; because the offer of proof did not tend to show that the child had prior knowledge that would have enabled her to fabricate the specific acts alleged against defendant, the proffered evidence was not shown to be relevant. *State v. Molen, 148 Idaho 950, 231 P.3d 1047 (Ct. App. 2010)*.

District court did not err in striking an animal welfare advocate's declaration and exhibits and failing to consider them in determining a neighbor's motion for summary judgment, because few, if any, of the facts alleged in the declaration applied to the specific defamation claim at issue. *Elliott v. Murdock, 161 Idaho 281, 385 P.3d 459 (2016)*.

Refusing to admit the victim's Facebook posts was not error, where it was highly speculative that the posts pertained to defendant. *State v. Hall, 161 Idaho 413, 387 P.3d 81 (2016)*.

**Expert Testimony.**

Cumulative testimony by dam operator's expert, regarding his opinion of the reasonableness of designing and constructing a downstream crossing without taking an upstream dam's spillway capacity into consideration, could properly be excluded. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

The court did not err in permitting the fire investigation expert to testify about possible causes of the fire. All reasonably likely causes of the fire were relevant because the fire's cause was a central element of both of the plaintiff's causes of action, and the expert's testimony made it clear that, although he found no physical evidence at the scene of the fire during his on-site investigation three years later, he could not rule out any of the potential causes that he

described, and given the process of elimination used by fire investigators to determine the cause of the fire, it was appropriate for the expert to discuss potential causes that he could not rule out. *Lanham v. Idaho Power Co., 130 Idaho 486, 943 P.2d 912 (1997)*.

Although the injured customer's expert testified about and relied upon a summary of the store's accident history that contained information that would be considered irrelevant under I.R.E. 401 and 403 because it contained information about accidents that were not the result of improperly stacked merchandise, the expert could use the accident summary as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 95 P.3d 34 (2004)*.

**Foundation.**

In prosecution for manufacturing a controlled substance, the question whether extrinsic evidence of drug-related activities should have been admitted to contradict the informant's cross-examination testimony was committed to the trial court's discretion on remand, the critical question being the foundation laid by the defendant for introducing the evidence. *State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*.

Because videotape did not show everything that would be visible to a driver on that road and the lack of information regarding temporal and climatic conditions under which the tape was made, the videotape of the portion of the highway where officer initially observed defendant driving erratically and going through a stop sign lacked adequate foundation; further, even if the tape were admissible, its probative value was outweighed by the danger of unfair prejudice. *State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991)*.

**Harmless Error.**

Although evidence of uncharged murder was admitted in error, where, beyond a reasonable doubt, the evidence did not influence the jury's verdict, the error was harmless. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

Where the relevant portion of a witness' preliminary hearing testimony related only to events giving rise to a sexual battery charge, a nearly identical account of which was provided at trial by another witness, and where the defendant himself argued on appeal that the trial court should have excluded the preliminary hearing testimony as needlessly cumulative, the trial court's error in admitting that testimony was harmless. *State v. Cross, 132 Idaho 667, 978 P.2d 227 (1999)*.

Trial court abused its discretion by admitting a detectives' victim statements without conducting the analysis required by this rule, however, the error was harmless given that defendant's incriminating statements in the videotaped interview still would have been shown to the jury as

an admission of a party opponent and defendant was afforded the opportunity to present evidence showing why those statements should not have been believed. *State v. Parker, 157 Idaho 132, 334 P.3d 806 (2014)*.

Even though the trial court erred by admitting the victim's widow's irrelevant testimony that she and the victim were trying to have children and that the victim was an amazing man, the error was harmless, because the jury was presented with significant and substantial evidence about the manner in which the victim lost his life and defendant's actions that night. *State v. Garcia, 166 Idaho 661, 462 P.3d 1125 (2020)*.

In a common law marriage case, the magistrate court erred by excluding evidence of the parties conduct after December 31, 1995, as irrelevant to whether the parties had a common law marriage before the statutory cut-off date, and dismissing petitioner's common law marriage claim because the January 10, 1996, life insurance application and the July 1996 claim for medical benefits were relevant to proving the parties entered a common law marriage in 1995, and the error affected petitioner's substantial rights because if the evidence had been admitted, petitioner might have met her burden to demonstrate by a preponderance of evidence that the parties consented to enter into a common law marriage and the presumption of marriage would have been applied, shifting the burden to respondent to prove no marriage occurred. *Martinez v. Carretero, -- Idaho --, 539 P.3d 565 (2023)*.

**Illustrative Evidence.**

In murder prosecution, court properly admitted video of computer generated objects falling down stairs, as it was relevant to illustrate state expert's testimony that it was impossible for deceased infant to have sustained his injuries as a result of falling down stairs, as defendant claimed. The probative value of the video was not outweighed by its prejudicial effect, particularly in light of limiting instructions issued by the court. *State v. Stevens, 146 Idaho 139, 191 P.3d 217 (2008)*.

In a case where defendant was convicted of the first degree murder of his 11-week-old daughter, a video animation of a shaken baby was properly admitted for illustrative purposes, as it was relevant and the prejudicial effect or jury confusion from the video did not outweigh the probative value, where a pediatrician utilized the video evidence to explain the theory of the murder based on the violent shaking of the victim; the pediatrician used the video to demonstrate the form of injury possible to the victim; the district court heard foundation as to the video's purpose and role in the expert's testimony; and the district court instructed the jury on the limitations of an illustrative exhibit. *State v. Baker, 161 Idaho 289, 385 P.3d 467 (Idaho Ct. App. 2016)*.

**Impeachment of Evidence.**

Court did not err by excluding testimony from a lay witness concerning shareholder's involvement in a recent auto accident, offered to show lack of memory and lack of credibility in

order to impeach shareholder's testimony. *Ramco v. H-K Contractors, 118 Idaho 108, 794 P.2d 1381 (1990)*.

In considering the testimony, the trial court properly found that project engineer's prior deposition testimony on the size of the opening in manufacturer's combine which mangled plaintiff's foot had been impeached; the trial court gave the limiting instruction that the portions of project engineer's deposition testimony read to the jury were only for the purpose of impeachment and not for the purpose of proving that the combine's design was defective or to prove negligence or culpable conduct in connection with plaintiff's accident. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

The court properly excluded testimony by dam operator's expert, which was based on data gathered four years after the 1984 flood, as being too remote in time from the events in issue. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

In a criminal trial, evidence of the relationship between an eyewitness and the State was irrelevant to defendant's case where the eyewitness' description was given before defendant entered into an agreement with the State, and the eyewitness was receiving no consideration for his testimony; therefore, the probative value of this evidence was outweighed by the possibility of confusing and misleading the jury. *State v. Tarrant-Folsom, 140 Idaho 556, 96 P.3d 657 (Ct. App. 2004)*.

In child sexual abuse prosecution, trial court was within its discretion to deny defendant's request to present evidence that one of his minor victims had lied when she initially reported to her foster mother that defendant refused to stop. The evidence was not relevant either to rebut the foster mother's statement that the victims had never lied to her about a matter of significance, or to impeach the victims, and any marginal probative value of that evidence was substantially outweighed by the danger of confusing or misleading the jury with extraneous issues and wasting trial time. *State v. Perry, 144 Idaho 665, 168 P.3d 49 (Ct. App. 2007)*.

Evidence of defendant's prior conduct was admissible as evidence of impeachment by contradiction and its probative value was not outweighed by its prejudicial effect, which was limited when the trial court limited the inquiry to asking defendant about the prior instances and not allowing any followup questions. *State v. Hayes, 166 Idaho 646, 462 P.3d 1110 (2020)*.

**In General.**

This rule does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case; it protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis. *State v. Floyd, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994)*.

**Inflammatory Evidence.**

It was not reversible error to admit four photographs taken of the victim lying on an autopsy table; whether to admit allegedly inflammatory evidence is within the sound discretion of the trial

court and will not be disturbed on appeal absent an abuse of discretion. *State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992)*.

**Judge As Witness.**

The trial court did not abuse its discretion in prohibiting a judge's testimony on behalf of attorney sued for malpractice, as a judge brings the authority of his office to the stand, and jurors might be likely to give greater weight to his testimony than to the testimony of other witnesses; furthermore, the trial court reached its conclusion with consideration to the fact that other competent experts who were not sitting judges could be called. *Fuller v. Wolters, 119 Idaho 415, 807 P.2d 633 (1991)*.

**Medical Testimony.**

In view of the deference that the jury may have held for "nonexpert" doctor's testimony, the probative value of his opinion regarding alleged sexual abuse was substantially outweighed by the danger of unfair prejudice and should have been excluded from evidence. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

**Photographs.**

Trial judge did not abuse his discretion by admitting several photographs, including one depicting victim's bruised face and neck, into evidence since the existence of physical bruises was clearly relevant to the material issue of whether "great bodily harm" had been inflicted, as alleged in the prosecutor's information, and since the one photograph was sobering but not gruesome. *State v. Clark, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989)*.

Although a photograph of a victim's scalp lying in the snow on the side of the road should not have been admitted into evidence since the photograph had no probative value, and carried with it some prejudicial impact not necessary to prove the vehicular manslaughter charges against defendant, when viewed against the totality of the evidence, the erroneous admission of the photograph was harmless. *State v. Phillips, 117 Idaho 609, 790 P.2d 390 (Ct. App. 1990)*.

Where, in a murder prosecution, a total of ten photographs were presented to the trial court by the State for admission into evidence, and where of those ten photographs the trial court admitted four, the trial court properly balanced the unfair prejudicial value of the photographs with their relative probative value and concluded that the four photographs allowed into evidence were less inflammatory than the others, and that they also clearly contained relevant evidence to a contested issue in the case, there was no abuse of discretion in admitting the four photographs. *State v. Enno, 119 Idaho 392, 807 P.2d 610 (1991)*.

The fact that photographs offered in evidence during a murder trial depicted the actual body of the victim and the wounds inflicted on the victim, and that they may have tended to excite the emotions of the jury, was not a basis for excluding them. *State v. Pizzuto, 119 Idaho 742, 810*

P.2d 680 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

There was no abuse of discretion in the district court's admission of photographs where such photographs were relevant and, since the photographs were not particularly gruesome, and the enlargements did not show greater amounts of detail than were visible in the originals, the moderate increase in size alone did nothing to turn otherwise admissible photographs into prejudicial, inflammatory exhibits. State v. Birkla, 126 Idaho 498, 887 P.2d 43 (Ct. App. 1994).

In a first-degree murder prosecution, the trial court did not abuse its discretion by admitting three photographs of the victim that showed the crime scene and were probative of the cause of death. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

In a first-degree murder prosecution, trial court's admission of a photograph showing speaker wire in a car parked near where the body was found was not error because it was relevant to show that defendant had access to wire similar to that used in the murder. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

Where the state had the burden of showing that the victim was murdered by torture and there was testimony that the victim had suffered dozens of injuries, the use of 28 photographs was not excessive. State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009).

Hospital and autopsy photographs showing the number and extent of child/victim's internal and external injuries were admissible as they were relevant to the state's burden of proving the identity of the victim, connected those who testified with their work to revive the victim at the hospital and supported the testimony of those witnesses as to the condition of the victim upon her arrival at the hospital, and assisted in proving the chain of custody of the victim's body from the time she was pronounced dead until the body bag was opened before the autopsy. State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009).

Photographic evidence of a homicide victim, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, is admissible at the discretion of the trial court, as an aid to the jury in arriving at a fair understanding of the evidence; proof of the corpus delicti; extent of injury, condition and identification of the body; or for its bearing on the question of the degree of the crime, even though it may have the additional effect of tending to excite the emotions of the jury State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009).

Photographs of the victims were admissible because they were relevant to the manner in which the victims died, the time of death, corroboration of the coconspirators' testimony about the fatal injuries, and about how the coconspirators attempted to dispose of the bodies. State v. Reid, 151 Idaho 80, 253 P.3d 754 (2011).

Photos of the victim were properly admitted because the state was required to prove that defendant shot and killed the victim, they were relevant to prove the manner in which the victim died, and they illustrated the testimony of the emergency room physician. State v. Branigh, 155 Idaho 404, 313 P.3d 732 (2013).

During defendant's trial for battery, the court did not err in admitting photographs of the victim's injuries because defendant did not identify any unfair prejudice; the photographs were probative in showing the degree of injury caused by the punch, and the photographs supported the state's contention that defendant used more force than was reasonable. *State v. Iverson, 155 Idaho 766, 316 P.3d 682 (Ct. App. 2014)*.

Trial court did not abuse its discretion by finding that the prejudicial effect of the in-life photographs of the murder victim did not substantially outweigh their probative value, because the court recognized that it had discretion in admitting or excluding the photographs and reasoned that the two photographs would not create any undue prejudice. *State v. Garcia, 166 Idaho 661, 462 P.3d 1125 (2020)*.

**Prejudicial Effect.**

If it appears that a party is seeking the introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment or any other purpose, certainly the trial court should disallow the evidence; however, the trial court is in the best position to assess the prejudicial effect of the evidence. If the trial court is satisfied that the evidence has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute, it should be allowed, and a limiting instruction can aid the jury, but if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence it should properly be excluded. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

The fact that the prosecution has a very strong case does not lead to the conclusion that the probative value of relevant evidence of prior misconduct is inherently outweighed by undue prejudicial impact. *State v. Nichols, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)*.

Where much of the videotape of victims contained highly prejudicial, detailed statements about defendant's conduct that had little or no relevance to the issue raised on cross-examination, i.e., credibility or consistency, under this rule, admissibility of the entire videotape was error. *State v. Bingham, 124 Idaho 698, 864 P.2d 144 (1993)*.

Although defendant was not directly responsible for striking the victim, the injuries suffered in the robbery were due in part to defendant's role in keeping the victim's companion from helping him. Therefore, no unfair prejudice resulted from the admission of the photograph showing injuries which were also described by several witnesses who testified at the trial. *State v. Waggoner, 124 Idaho 716, 864 P.2d 162 (Ct. App. 1991)*.

The trial court did not abuse its discretion in excluding diagnosis testimony where it was based almost entirely on allegations and statements that the court had ruled inadmissible because of its prejudicial value, and where the court considered all the relevant evidence, recognized the probative value, and exercised its discretion in concluding that the probative value was outweighed by the prejudicial effect. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

The district court erred in determining the photographs offered by defendant were irrelevant, but did not err in excluding the photographs on the basis that their prejudicial impact outweighed their probative value. *State v. Page, 135 Idaho 214, 16 P.3d 890 (2000)*.

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained" incident. *State v. Cook, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007)*.

Trial court did not err in a medical malpractice action in excluding the Idaho Administrative Code rules governing physician assistants in 2003 because those rules did not establish the standard of care in the case and their probative value was substantially outweighed by the danger of confusing the jury. *Schmechel v. Dille, M.D., 148 Idaho 176, 219 P.3d 1192 (2009)*.

Testimony elicited at trial concerning defendant's alleged prior acts and hearsay statements, allegedly made by the victim in the weeks leading up to her death, unfairly prejudiced defendant, where the majority of the state's asserted state of mind evidence was simply an attempt to present to the jury the defendant's alleged past conduct. That testimony was properly excluded by the trial judge. *State v. Herrera, 159 Idaho 615, 364 P.3d 1180 (Idaho 2015)*.

**Prior Convictions.**

Trial court did not abuse its discretion in allowing the state to cross-examine defendant about his prior felony conviction for leaving the scene of an accident and about his probation for that offense, where the defendant opened the door to such questioning with his own testimony, which alluded to the earlier crime. *State v. Hoy, 159 Idaho 875, 367 P.3d 270 (2016)*.

**Prior Similar Acts.**

Testimony by former wife of a murder defendant as to defendant's activities while on hunting trips was admissible as relevant where those activities included his removing the sexual organs of game animals, and where defendant was charged with the mutilation and removal of the sexual organs of the victim. *State v. Leavitt, 116 Idaho 285, 775 P.2d 599 (1989)*, cert. denied, *493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989)*.

The passage of time between two different criminal acts is one of the circumstances for a trial court to consider in determining whether there are sufficient similarities between the two acts to justify an inference that the same person committed both acts. *State v. Martin, 118 Idaho 334, 796 P.2d 1007 (1990)*.

The fact that defendant's prior sex offenses occurred ten and twelve years before the charged sex offense does not make evidence of those prior wrongful acts irrelevant or unfairly prejudicial due to remoteness in time where the defendant was incarcerated for nearly the entire period,

and where within one or two months after being released he continued to employ the same modus operandi demonstrated in the earlier sex offenses. *State v. Martin, 118 Idaho 334, 796 P.2d 1007 (1990)*.

In a case regarding the murder of a bail bondsman, the district court did not abuse its discretion in determining that the probative value of evidence of a prior incident where defendant pointed a gun toward a door where a police officer stood was not substantially outweighed by the danger of unfair prejudice, as the probative value of the incident was great in that it was strong evidence from which premeditation for the charged crime could be inferred. *State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)*.

Idaho Rules of Evidence required that trial courts treat the admission of evidence of uncharged misconduct in child sex crimes no differently than the admission of such evidence in other cases; where defendant was charged with sexually abusing his live-in girlfriend's daughter, the trial court erred in admitting evidence that defendant had similarly abused his ex-wife's daughter because it incorrectly determined that the proffered evidence was governed by a body of law unique to sexual abuse cases. *State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009)*.

Defendant was found guilty under this section of engaging in improper touching of a minor child while providing therapeutic massage services to her; testimony of other massage clients who had similar experiences with the defendant was properly admitted as showing common scheme or intent and lack of accidental touching. *State v. Parmer, 147 Idaho 210, 207 P.3d 186 (2009)*.

In defendant's trial on a charge of lewd conduct with a child under the age of 16, evidence that he had similarly molested his girlfriend's other children was admissible because evidence of instances involving similar touching of the victim's sisters and friend was relevant to demonstrate that defendant had the opportunity to engage in that type of touching under uniquely similar circumstances and was further relevant to establish the victim's credibility. *State v. Gomez, 151 Idaho 146, 254 P.3d 47 (2011)*.

**Probative Value Outweighed Prejudicial Impact.**

Where prosecution simply presented the fact that the defendant admitted to having used makeup to cover his birthmark in a prior robbery as well as some other similar methods of operation, and the prosecution did not focus on any other details of prior robbery, there was no abuse of discretion in the implicit conclusion that the probative value of the evidence outweighed the risk of unfair prejudicial impact. *State v. Nichols, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)*.

Corroborated testimony of witnesses relating conversations they had had with minor victim's grandmother, where grandmother related that defendant was "interested in" and "after" the victim, was properly admitted in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant, and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia, 127 Idaho 249, 899 P.2d 959 (1995)*.

In a prosecution for lewd conduct with a minor under sixteen the trial court did not abuse its discretion in admitting evidence of the defendant's flight from the state, as the defendant was allowed to explain his reasons for leaving the state so the evidence of flight was not unfairly prejudicial, and the probative value of the evidence outweighed any prejudicial affect. *State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)*.

Where the evidence highlighted the defendant's preoccupation and attraction toward female children, even though it was arguably prejudicial, it was probative on the contested issue of the defendant's state of mind at the time of the alleged acts, and the trial court did not err in ruling it admissible. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

The testimony of the victim and the DNA evidence proving defendant's paternity of the victim's child in a charge of rape, were both relevant to a determination of the parties' credibility and to show a common intent or plan on the part of the defendant, and the probative value of such evidence outweighed any potential unfair prejudice to defendant. *State v. Spor, 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000)*.

Defendant's statement that he had carried methamphetamine in the bag in the past was relevant to both his knowledge of whether the substance found in the gym bag was methamphetamine and to his knowledge of possession of the substance; based upon the probative value of defendant's admission, and the evidence of defendant's drug involvement already presented to the jury, the probative value was not substantially outweighed by the danger of unfair prejudice. *State v. Dreier, 139 Idaho 246, 76 P.3d 990 (Ct. App. 2003)*.

Trial court did not err when it precluded defendant from testifying that she consented to take a breath test because trial court had previously excluded the State's evidence of the breath test results as a sanction for the State's discovery violation in failing to disclose a witness; to have allowed defendant's testimony that she consented to the test while excluding the test results would have misled the jury into thinking that defendant passed the test or that officers declined to administer the test because they believed she would pass it. *State v. Davis, 139 Idaho 731, 85 P.3d 1130 (Ct. App. 2003)*.

Evidence of defendant's prior misconduct toward the victim was highly probative to show that defendant's subsequent stalking behavior would have alarmed the victim and caused the victim substantial emotional distress, plus it was relevant to show that the stalking was done maliciously, the mens rea element of the stalking charge; the court could not say that the trial court's decision to admit the evidence exceeded the boundaries of its discretion. *State v. Hoak, 147 Idaho 919, 216 P.3d 1291 (2009)*.

A physician could testify regarding the nature and extent of the victim's injuries because, although the testimony would result in prejudice to defendant and could be cumulative to some extent, the injuries received by the victim were relevant in determining whether they were consistent with being hit by a fast-moving car and dragged, with being simply struck, or struck and run over. *State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011)*.

During defendant's trial for sexual abuse of a child and rape, the court properly allowed the testimony of alleged prior (20 to 40 years prior), uncharged sexual conduct of defendant to be presented; considering that defendant made statements identifying the targets of his criminal behavior and his reasons for targeting those individuals, the trial court did not err in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Pepcorn, 152 Idaho 678, 273 P.3d 1271 (2012)*.

Evidence that a witness and defendant associated with each other, although members of different gangs, bore directly on the witness's credibility and was, therefore, relevant as impeachment evidence for the purpose of showing bias. Evidence that they were closely associated, and that their respective gang memberships were a component of that affiliation, was relevant. Also relevant was evidence that it was a tenet of the gangs that they cover for each other, including lying on behalf of other gang members. *State v. Thumm, 153 Idaho 533, 285 P.3d 348 (2012)*.

District court did not err in finding that the evidence of defendant's rape fantasies and defendant's collecting pornography that was consistent with those fantasies was relevant to defendant's motive in a case wherein defendant was tried for rape, first degree kidnapping, and burglary. Moreover, the court did not err in admitting the evidence after the court balanced the danger of unfair prejudice against the relevance of the evidence. *State v. Russo, 157 Idaho 299, 336 P.3d 232 (2014)*.

Defendant did not demonstrate that the district court abused its discretion when it admitted the audio recording of his conduct while being transported to the jail, because the district court explicitly evaluated the probative value of the evidence and weighed it against the danger of unfair prejudice. *State v. Kralovec, 161 Idaho 569, 388 P.3d 583 (2017)*.

**Prosecutor As Witness.**

Court properly allowed testimony of assistant city attorney as eyewitness to defendant's arrest for driving while under the influence of alcohol, since the attorney did not appear before the court and jury in his prosecutorial role, but rather the state called him as an independent eyewitness to the defendant's conduct at the time of arrest, and it was the defense, not the prosecution, that elicited the evidence that he was a "prosecutor." *State v. Bradley, 120 Idaho 566, 817 P.2d 1090 (Ct. App. 1991)*.

**Rape Prosecution.**

While on trial for the rape of defendant's half-sister, another relative testified that defendant raped her in 1982, and despite defendant's objection to the testimony as prejudicial, the district court properly admitted the evidence regarding the uncharged misconduct as evidence of credibility or a common plan or scheme, and where the district court considered the similarity of the occurrences and their proximity in time and found that the evidence regarding the 1982 rape was relevant and not more prejudicial than probative, the admission of such evidence was not

an abuse of the court's discretion. *State v. Pugsley, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995)*.

**--Physical Injury.**

Evidence of physical injury is not necessary to establish the use of force in a rape prosecution. It was relevant, however, where it tended to corroborate the complaining witness's version of the events surrounding the alleged rape and to contradict the defendant's claim of consent. The photographs showing the existence of physical bruises were clearly relevant to the critical factual issue to be decided by the jury. *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*.

**Redactions.**

District court properly admitted an exhibit as a handwriting exemplar, where the primary issue at trial was whether an enforceable contract bound the defendant to pay the plaintiff. The district court redacted the exhibit so that only the defendant's signature on the exhibit was submitted to the jury and admonished the jury that the exhibit was to be considered for the limited purpose of considering what the defendant's signature was and the exhibit was offered to impeach the defendant's denial that he signed two other exhibits, which did not need not be disclosed before trial. *Safaris Unlimited, LLC v. Jones, 163 Idaho 874, 421 P.3d 205 (2018)*.

**Taped Conversation.**

The trial court did not err by allowing the state to introduce, in rebuttal to evidence presented by the defense, a tape-recorded conversation between defendant and the victim's mother where the tape contradicted defendant's testimony on issues relevant to the case as, inter alia, even though defendant admitted to making the statements on the tape, its use was probative with regard to determining whether, as defendant claimed, his taped remarks were not meant to be taken seriously. *State v. Sorrell, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989)*.

It was not an abuse of discretion to allow English translations of Spanish audio recordings to be read to a jury without playing the recordings, because (1) letting a presumably English-speaking jury hear audio recordings in a foreign language posed a substantial risk of misleading the jury and confusing the issues, (2) jurors could not likely discern any inflections in defendant's words in the recordings, (3) defendant did not show how defendant's spoken words contradicted the words' transcribed meaning, and (4) defendant did not show why playing the recordings would provide discernable, relevant, evidence. *State v. Rodriguez, 161 Idaho 368, 386 P.3d 509 (2016)*.

**Two-Tiered Analysis.**

This rule creates a balancing test. On one hand, the trial judge must measure the probative worth of the proffered evidence by focusing upon the degree of relevance and materiality of the

evidence, and the need for it on the issue on which it is to be introduced. At the other end of the equation, the trial judge must consider whether the evidence amounts to unfair prejudice. *Davidson v. Beco Corp., 114 Idaho 107, 753 P.2d 1253 (1987)*.

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal unless that discretion has been abused. *State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991)*.

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs or acts; the trial court must determine that the evidence is relevant and if the trial court finds that the evidence is relevant it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

**Uncharged Crimes.**

In a murder prosecution based largely upon circumstantial evidence involving defendant's alleged use of the same firearm in homicides in both Idaho and Arizona, the trial court did not abuse its discretion in allowing the testimony of witnesses concerning defendant's shooting of a police officer in Arizona, as without showing that the gun held by defendant was fired into the officer's body, the state could not link the bullets in the officer's body with the bullet in the Idaho victim's brain; the trial court demonstrated that it understood the necessary balancing test as it balanced the relevancy of the testimony against the prejudice to defendant and concluded that the probative value of the evidence outweighed the prejudice. *State v. Smith, 117 Idaho 891, 792 P.2d 916 (1990)*.

Where, in a murder prosecution, uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. *State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991)*, overruled on other grounds, *State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)*.

Where a witness's credibility was called into question by the defendant, evidence that witness had been sexually abused by the defendant for over a year prior to being charged was relevant for the purpose of explaining why she could not clearly remember specific times and dates relating to the charged conduct. *State v. Cross, 132 Idaho 667, 978 P.2d 227 (1999)*.

**Cited in:**

Masters v. Dewey, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985); *Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986)*; McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); State v. Danson, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987); State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988); Chenery v. Agri-Lines Corp., 115 Idaho 281, 766 P.2d 751 (1988); State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989); Earl v. Cryovac, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989); State v. Smith, 117 Idaho 225, 786 P.2d 1127 (1990); Needs v. Hebener, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); State v. Rodriguez, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990); State v. Peters, 119 Idaho 382, 807 P.2d 61 (1991); State v. Rodgers, 119 Idaho 1047, 812 P.2d 1208 (1991); State v. Grinolds, 121 Idaho 673, 827 P.2d 686 (1992); Ryan v. Beisner, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992); State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993); State v. Velasquez-Delacruz, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); State v. Blackstead, 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994); State v. McAway, 127 Idaho 54, 896 P.2d 962 (1995); Martin v. Hackworth, 127 Idaho 68, 896 P.2d 976 (1995); State v. Martinez, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995); State v. Kay, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996); State v. Cochran, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997); LaRue v. Archer, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997); State v. Byington, 132 Idaho 589, 977 P.2d 203 (Ct. App. 1999); State v. Mace, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000); Cook v. Skyline Corp., 135 Idaho 26, 13 P.3d 857 (2000); Beard v. George, 135 Idaho 685, 23 P.3d 147 (2001); State v. Eytchison, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001); Jen-Rath Co. v. KIT Mfg. Co., 137 Idaho 330, 48 P.3d 659 (2002); State v. Pearce, 146 Idaho 241, 192 P.3d 1065 (2008); State v. Wright, 147 Idaho 150, 206 P.3d 856 (2009); State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009); Idaho Dep't of Health & Welfare v. Doe, 150 Idaho 103, 244 P.3d 247 (2010); State v. Truman, 150 Idaho 714, 249 P.3d 1169 (2010); State v. Betancourt, 151 Idaho 635, 262 P.3d 278 (2011); State v. McClain, 154 Idaho 742, 302 P.3d 367 (2012); State v. Jones, 154 Idaho 412, 299 P.3d 219 (2013); State v. Russo, 157 Idaho 299, 336 P.3d 232 (2014); State v. Cruz-Romero, 160 Idaho 565, 376 P.3d 769 (2016); Ballard v. Kerr, 160 Idaho 674, 378 P.3d 464 (2016); Idaho Dep't of Health and Welfare v. Doe (In re Doe Children), 161 Idaho 745, 390 P.3d 866 (2017); State v. Hayes, 166 Idaho 646, 462 P.3d 1110 (2020); State v. Jones, 167 Idaho 353, 470 P.3d 1162 (2020); State v. Chambers, 166 Idaho 837, 465 P.3d 1076 (2020).

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix -- prior offenses. *86 A.L.R.5th 59*.

Admissibility, in rape case, of evidence that accused raped or attempted to rape, person other then prosecutrix -- subsequent acts, *87 A.L.R.5th 181*.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix -- offenses unspecified as to time. *88 A.L.R.5th 429*.

Admissibility in state criminal case of results of polygraph (lie detector) test-Post-Daubert cases. 10 A.L.R.6th 463.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. *24 A.L.R.6th 747*.

Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. *79 A.L.R.6th 351*.

Idaho Court Rules Annotated
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# *I.R.E. Rule 404*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 404. Character Evidence; Crimes or Other Acts.

**(a) Character Evidence.**

**(1) Prohibited Uses.** Evidence of a person's character or trait of character is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

**(2) Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:

**(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

**(B)** a defendant may offer evidence of an alleged victim's pertinent trait of character, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

**(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

**(3) Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608 and 609.

**(b) Crimes, Wrongs, or Other Acts.**

**(1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, the prosecutor must:

**(A)** file and serve reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

**(B)** do so reasonably in advance of trial - or during trial if the court, for good cause shown, excuses lack of pretrial notice.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

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**Abuse of Discretion Standard.**

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice the appellate court uses an abuse of discretion standard. *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

Since whether evidence is relevant is a matter of law when considering trial court's admission of evidence under subsection (b) of this rule, the appellate court exercises free review of the trial court's determination; however, when reviewing the determination that the probative value of the evidence substantially outweighs the danger of unfair prejudice -- the second tier of the analysis, the appellate court will use an abuse of discretion standard. *State v. Cochran, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997)*.

**"Bad Act Evidence."**

To admit "bad act evidence" under this rule it must be shown that the evidence is relevant to a material issue concerning the crime charged. Secondly, a determination must be made that the probative value of the evidence substantially outweighs the danger of unfair prejudice. In the course of the trial, it was learned that the act of swinging a "child carrier with a baby in it" at the defendant occurred almost one year after the date upon which the victim in this case was injured. There were no other times attributed to the offer of proof by the defendant. The defendant never established relevance of the acts contained in his offer of proof to the issue of opportunity for the mother of the child to have committed the act of injury to the victim. *State v. Anderson, 129 Idaho 763, 932 P.2d 886 (1997)*.

Evidence of a party's "bad conduct" was properly excluded from a trial regarding specific performance of an oral contract to convey land because it was not relevant under the provisions of Idaho R. Evid. 404(b). *Thorn Springs Ranch, Inc. v. Smith, 137 Idaho 480, 50 P.3d 975 (2002)*.

Admissibility of evidence of prior bad acts hinges on the question of whether its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Evidence of an uncharged sex offense is relevant, and may be admissible, where it proves motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Gomez, 151 Idaho 146, 254 P.3d 47 (2011)*.

**Booking Photographs.**

Booking photographs and lineup photographs have the potential to unfairly prejudice a jury against a defendant by suggesting that the defendant is a "bad guy." This is because they are indicative of past criminal conducts. However, booking photographs are only prejudicial if they are actually identifiable as booking photographs, either because of placards, identification numbers, or other notations. If all incriminating indicia are concealed or removed, booking photographs may be introduced over the defendant's objection. *State v. Alwin, 164 Idaho 160, 426 P.3d 1260 (2017)*.

**Character of Defendant.**

Before the adoption of the Idaho Rules of Evidence, which were not yet in effect when this action was tried, proof of good character was limited to the defendant's reputation in the community. The new rules permit a defendant to prove good character either by reputation or by opinion testimony; however, proof of good character through specific instances of good conduct is generally impermissible under both the rules and general case law. *State v. Lawrence, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986)*.

**Character of Victim.**

In a prosecution against bookkeeper/office manager for forgery and embezzlement, evidence as to company owner's extramarital affair was properly not admitted as evidence of the character of a crime victim; the evidence was irrelevant to the crime charged and was offered merely to impugn the owner's character. *State v. Vierra, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994)*.

Admission of the victim's prior conviction for aggravated assault was not admissible under this Rule where the defendant sought to admit it to question the truth and veracity of the victim and to show the victim's reputation for "quarrelsomeness, violence and dangerousness." *State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999)*.

A defendant in a criminal prosecution may introduce evidence of a pertinent trait of the victim's character in order to raise an inference that the victim acted consistently with that trait on the occasion in question. *State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999)*.

When character evidence is offered to show conforming behavior by the victim, the defendant need not show that he had prior knowledge of the victim's violent disposition because whether he was aware of the victim's propensity for violence has no bearing upon the likelihood that the victim acted in conformity with that propensity on a particular occasion. *State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999)*.

It was error for the district court to exclude evidence of the victim's reputation for violence on the ground that the defendant was unaware of that reputation where the defense sought to offer the evidence in order to show that the victim was the aggressor. *State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999)*.

In a case involving battery, a defendant can offer reputation or opinion evidence about the victim's character trait for violence to show that the victim was the initial aggressor or that the force used against the victim was necessary for self-protection. *Marr v. State, 163 Idaho 33, 408 P.3d 31 (2017)*.

In self-defense cases, this rule permits a defendant to present evidence of a victim's propensity for violence for certain purposes. However, Evidence Rule 405 limits the form of such evidence to opinion and reputation testimony, because the victim's propensity for violence is not an essential element of the claim. *State v. Godwin, 164 Idaho 903, 436 P.3d 1252 (2019)*.

**Credibility of Witness.**

Where a witness's credibility was called into question by the defendant, evidence that she had been sexually abused by the defendant for over a year prior to defendant being charged was relevant for the purpose of explaining why witness could not clearly remember specific times and dates relating to the charged conduct. *State v. Cross, 132 Idaho 667, 978 P.2d 227 (1999)*.

In defendant's accessory case, a witness's testimony regarding a drug buy was relevant to explain why she initially gave an untruthful account to the police, and the testimony was thus probative for a purpose other than to show defendant's poor character. In addition, because the witness's credibility was essential to the jury's determination, a rational explanation as to why the witness would alter her story to the police was highly probative; any prejudice to defendant was slight since the witness did not implicate defendant in the drug purchase. *State v. Hauser, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006)*.

**Evidence Held Admissible.**

Where, in a prosecution for robbery of a store, the central issue at trial was the identity of persons who robbed the store, testimony regarding the capture of the defendant, yielding articles connected with the robbery, was admissible as relevant and highly probative of the defendant's identity as one of those persons. *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*.

In a prosecution for rape and kidnapping, trial court did not err in denying defendant's objection to testimony by the victim's sister that victim would not have left her children home alone from midnight to 4:00 a.m., as the testimony could reasonably have been perceived as pertaining to victim's habits in making arrangements for her children when she left them at night rather than with her general character trait for being a good mother. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because, although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator,

and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

The district court correctly applied the Rules of Evidence when it allowed three women, who were not victims in this case, to testify regarding their accusations of defendant's sexual misbehavior with them when they were minors, where the trial court weighed the proffered testimony and determined that it would be more helpful to the jury in determining the credibility of the victim's testimony than it would be prejudicial to defendant. *State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993)*.

The district court's decision to admit evidence of prior uncharged misconduct was proper in a sexual abuse case because the testimony was relevant to proving intent where said testimony came from a girl who claimed that she was sexually molested. *State v. Matthews, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993)*.

Where defense counsel attacked victim's credibility as to her allegations of lewd and lascivious contact against her father, the prosecution was allowed, upon redirect examination, to elicit from the victim testimony regarding other incidents of uncharged sexual misconduct. *State v. Drennon, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994)*.

The district court did not err in allowing acquaintances of murder defendant to testify about conversations they had with defendant in which defendant made references to, or asked about, the victim. The evidence proffered by these acquaintances tended to prove matters of consequence to the case, that is, that the defendant knew the victim and was interested in her; this was directly contrary to a statement given by the defendant to the police in which he denied any acquaintance with, or interest in, the victim. *State v. Grube, 126 Idaho 377, 883 P.2d 1069 (1994)*, cert. denied, *514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995)*.

Where the allegations in case before the court and the prior uncharged sexual misconduct involved the same victim and similar acts committed within a relatively brief span of time, court concluded that the evidence was relevant and that the district court did not abuse its discretion in finding it more probative than prejudicial, and the district court did not err in admitting the evidence of prior uncharged misconduct under subsection (b) of this rule. *State v. Hansen, 127 Idaho 675, 904 P.2d 945 (Ct. App. 1995)*.

Corroborated testimony of witnesses relating conversations they had had with minor victim's grandmother, where grandmother related that defendant was "interested in" and "after" the victim, was properly admitted in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant, and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia, 127 Idaho 249, 899 P.2d 959 (1995)*; *State v. Castillo, 127 Idaho 257, 899 P.2d 967 (1995)*.

Where, prior to charged offense of forgery and burglary, evidence showed another business's check had been paid which was signed by the defendant, who had no authorized power of endorsement, and it was paid by the same bank where defendant had attempted to pass the

unauthorized check at issue, such proffered evidence was probative and admissible under subsection (b) of this section to prove the absence of mistake or accident. *State v. McAbee, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997)*.

Where, in its analysis, the district court considered several factors, including the similarity of prior occurrences to the offenses charged as to the method of enticement and the age of the children, where the court noted the probative value of the evidence, and where a limiting instruction was given to the jury prior to contested testimony and a general instruction was given in final instructions, the court utilized reason and proper legal standards in deciding to admit the testimony, and did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

Where defendant's defense was that he did not premeditate killing his wife and merely acted in a rage attributable to post-traumatic stress disorder, the prior acts evidence was relevant to show his capacity to premeditate, while the evidence of his apparently conscious abuse of his daughter fifteen years before was relevant to show that his prior conduct had been volitional. *State v. Whipple, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000)*.

Evidence of defendant's prior drug use was admissible because it was not presented to show his character or to show that he acted in conformity with a particular trait of character, rather, the challenged evidence was relevant to prove the specific intent element of the charged offense of possession of drug paraphernalia. *State v. Williams, 134 Idaho 590, 6 P.3d 840 (Ct. App. 2000)*.

Magistrate did not err in admitting testimony of witnesses concerning a prior incident for which the juvenile was acquitted, as the proffered testimony was relevant to a material disputed issue and the probative value of the evidence was not substantially outweighed by unfair prejudice. *State v. Doe, 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001)*.

Where defendant argued that the State's Idaho R. Evid. 404(b) notice did not adequately describe the incidents about which testimony would be given, the appellate court held that the notice was sufficient to alert the defense to the general nature of the additional testimony and to thereby avoid surprise; the witnesses were identified in the notice, and the general type of conduct alleged to have been committed was revealed also. That information was sufficient to allow the admissibility issue to be raised by defendant although the trial court elected not to rule on admissibility before the trial. *State v. Jones, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003)*.

Where State presented evidence of two incidents of improper touching of the victim that were not the bases of the charges and were not described at the preliminary hearing, that did not amount to a fatal variance because the jury could not have used that evidence to convict defendant where that testimony was specifically admitted as evidence of other misconduct for purposes that were permissible under paragraph (b) of this rule; immediately after presentation of this evidence, the court gave the jurors a limiting instruction. *State v. Jones, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003)*.

Witness's testimony that defendant attempted to cover up his accomplice's use of the stolen card, by claiming the credit card as his own, was probative to show defendant's awareness that

the credit card was stolen. The evidence addressed the State's burden to prove that defendant used the credit card with intent to defraud, I.C. *§ 18-3123*, and there was no risk of unfair prejudice from its introduction. *State v. Waller, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004)*.

Defendant was found guilty of engaging in improper touching of a minor child while providing therapeutic massage services to her; testimony of other massage clients who had similar experiences with the defendant was properly admitted as showing common scheme or intent and lack of accidental touching. *State v. Parmer, 147 Idaho 210, 207 P.3d 186 (2009)*.

During defendant's trial for sexual abuse of a child and rape, the court properly allowed the testimony of alleged prior (20 to 40 years prior), uncharged sexual conduct of defendant to be presented; the evidence showed that defendant made a conscious choice to deliberately molest or abuse his wife's siblings and their children. *State v. Pepcorn, 152 Idaho 678, 273 P.3d 1271 (2012)*.

The district court did not abuse its discretion in admitting evidence about the criminality of gangs under this rule and Idaho R. Evid. 403. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013)*.

In a case involving aggravated assault and burglary, character evidence was admitted because it was proper for the State to introduce evidence to establish that it was part of defendant's plan to steal items before he entered a store; although defendant's subsequent flight from officers did not tend to show a motive or intent to enter the store to steal a television, it was admissible to show a consciousness of guilt. The evidence was not shown to be unfairly prejudicial. *State v. Passons, 158 Idaho 286, 346 P.3d 303 (Ct. App. 2015)*.

Trial court did not abuse its discretion in admitting evidence of defendant's gang affiliation, because the evidence was probative of why defendant's conduct occurred and the trial court took measures to mitigating the potential for unfair prejudice by limiting the scope of witness testimony. *State v. Wilson, 159 Idaho 412, 361 P.3d 1275 (Ct. App. 2015)*.

Trial court did not abuse its discretion by admitting evidence that defendant was on probation, because it was relevant for a non-propensity purpose of explaining the police officers' actions of searching defendant's underwear during an arrest. *State v. Jones, 167 Idaho 353, 470 P.3d 1162 (2020)*.

**--Absence of Mistake.**

Evidence was relevant to prove the absence of mistake or accident where the testimony of witnesses tended to corroborate the testimony of the victim, whose evidence conflicted with that of the defendant. *State v. Cardell, 132 Idaho 217, 970 P.2d 10 (1998)*.

Where adult witnesses who had been massage clients of the defendant were older than the minor victim, the age difference did not render the adults' testimony regarding absence of mistake or accident irrelevant. *State v. Cardell, 132 Idaho 217, 970 P.2d 10 (1998)*.

Evidence of defendant's prior acts supported the permissible inference that defendant's actions were intentional and not accidental. *State v. Ortega, 157 Idaho 782, 339 P.3d 1186 (Ct. App. 2014)*.

Trial court did not err by admitting evidence of defendant's prior abusive parenting because the evidence was material given that the state was unable to produce a witness who could describe the precise means by which the child was injured and because defendant presented argument and evidence in support of the contention that the injury was accidental. *State v. Ortega, 157 Idaho 782, 339 P.3d 1186 (Ct. App. 2014)*.

**--Chain of Conduct.**

In prosecution for three counts of lewd conduct with a minor, district court did not err in holding that other acts of lewd conduct with a minor were not so remote that their probative value was not substantially outweighed by the danger of unfair prejudice where evidence of defendant's engaging in lewd conduct beginning in 1977 showed a continuous chain of such conduct by defendant. *State v. Labelle, 126 Idaho 564, 887 P.2d 1071 (1994)*.

While on trial for the rape of defendant's half-sister, another relative testified that defendant raped her in 1982, and despite defendant's objection to the testimony as prejudicial, the district court properly admitted the evidence regarding the uncharged misconduct as evidence of credibility or a common plan or scheme, and where the district court considered the similarity of the occurrences and their proximity in time and found that the evidence regarding the 1982 rape was relevant and not more prejudicial than probative, the admission of such evidence was not an abuse of the court's discretion. *State v. Pugsley, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995)*.

**--Credibility.**

In a prosecution for lewd conduct with a minor, victim's testimony of prior sexual misconduct with defendant was admissible where the parties' credibility was at issue. *State v. Lewis, 123 Idaho 336, 848 P.2d 394 (1993)*.

In prosecution for driving under the influence of alcohol, testimony as to prior DUI convictions by girlfriend of defendant might have been admissible as evidence impeaching her credibility where she first testified that she, not defendant, had been driving which contradicted what she had first told police officers. *State v. Pilik, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996)*.

**--Dismissed Charges.**

Trial court did not err by failing to strike from the record all evidence pertaining to the grand theft and kidnapping charges after those charges had been dismissed for lack of jurisdiction since the circumstances of the acts indicated the hostility of the defendant toward the victim. *State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989)*, cert. denied, *493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989)*, cert. denied, *493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989)*, overruled on other grounds, *State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)*, cert. denied, *506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)*.

**--Lewd Conduct.**

Trial court properly admitted testimony by daughter of defendant convicted of lewd conduct with a minor, that defendant had digitally penetrated her, where the court made clear that her testimony was permitted as a direct rebuttal to defendant's claim that he had never digitally penetrated anyone and not as evidence of other crimes. *State v. Lewis, 126 Idaho 77, 878 P.2d 776 (1994)*.

In the trials of her grandmother and grandmother's boyfriend for conspiracy to commit lewd conduct with a minor, the district court did not abuse its discretion in admitting minor victim's testimony concerning two subsequent acts of sexual intercourse by the boyfriend which occurred in the grandmother's house because, pursuant to subsection (b) of this rule, the testimony was highly probative, explained the victim's delay in reporting, and clearly reflected a common scheme or plan to use the grandmother's influence over the victim to compel her actions, and, pursuant to *§ 18-1701*, it was evidence of the conspiracy itself. *State v. Tapia, 127 Idaho 249, 899 P.2d 959 (1995)*; *State v. Castillo, 127 Idaho 257, 899 P.2d 967 (1995)*.

**--Prior Drug Transactions.**

In trial of defendant convicted of delivery of a controlled substance, district court did not err in admitting evidence of prior drug transaction with undercover officer because it was relevant to the state's rebuttal of defendant's affirmative defense of entrapment and was relevant to prove defendant's motive or intent. *State v. Canelo, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996)*.

**--Prior Uncharged Conduct.**

District court did not err in admitting evidence of defendant's prior uncharged sexual misconduct in his trial for lewd conduct with a minor; there were sufficient similarities between the two incidents to demonstrate a general plan by defendant to exploit and sexually abuse minor females who were friends of his children and visited his home; the evidence was relevant, and probative value did not substantially outweigh the danger of unfair prejudice. *State v. Hoots, 131 Idaho 592, 961 P.2d 1195 (1998)*.

Evidence that defendant spoke to child sexual battery victim about a prior sexual scenario involving a stripper immediately before he touched the victim's breast was relevant and

admissible to prove intent and because it was interconnected with the charged offense. *State v. Avila, 137 Idaho 410, 49 P.3d 1260 (Ct. App. 2002)*.

In a lewd conduct with a minor under 16 case, the evidence of defendant's behavior towards the victim, including his first sexual comments towards her when she was 12 years old, showing her pornography, the use of rewards and punishments depending on whether she gave in to his sexual demands, as well as the sexual acts the two engaged in, was admissible evidence under subsection (b) to establish defendant's continuing criminal design to cultivate a relationship with the victim, such that she would concede to his sexual demands. *State v. Truman, 150 Idaho 714, 249 P.3d 1169 (2010)*.

In a lewd conduct with a minor under 16 case, evidence of sexual contacts between another woman and defendant that occurred in the minor victim's presence was admissible under subsection (b) because the testimony that the victim witnessed his sexual activity with the other woman, that defendant asked the victim to film that sexual activity, and that the first sexual encounter between the victim and defendant occurred when the other woman was present, largely corroborated the victim's testimony. *State v. Truman, 150 Idaho 714, 249 P.3d 1169 (2010)*.

Trial court did not err by allowing the state to present defendant's daughter's, not the victim in the charged rape count, testimony that she had also been molested by the defendant, because the evidence was relevant to dispute defendant's claim that he had no opportunity to commit the offenses as alleged because of the large number of people that were occupying his home when the charged molestations allegedly occurred. *State v. Marks, 156 Idaho 559, 328 P.3d 539 (2014)*.

**--Probative Value.**

The probative value of testimony of three adult massage clients that they believed the defendant's contact with their vaginal areas was not accidental was not substantially outweighed by the prejudice to the defendant, where he had introduced evidence in his trial on a charge of sexual battery of a minor that his massages were not sexual in nature. *State v. Cardell, 132 Idaho 217, 970 P.2d 10 (1998)*.

Defendant's statement that he had carried methamphetamine in the bag in the past was relevant to both his knowledge of whether the substance found in the gym bag was methamphetamine and to his knowledge of possession of the substance; based upon the probative value of defendant's admission and the evidence of defendant's drug involvement already presented to the jury, the probative value was not substantially outweighed by the danger of unfair prejudice. *State v. Dreier, 139 Idaho 246, 76 P.3d 990 (Ct. App. 2003)*.

Trial court erred by holding that defendant's trial counsel was ineffective for failing to object to testimony from defendant's former cellmate regarding threats defendant allegedly made against the cellmate's family under this rule because the testimony was relevant to show consciousness of guilt and the cellmate's credibility. The probative value of the testimony was not substantially outweighed by the danger of unfair prejudice because it was not unfair to allow the jury to known

that defendant had attempted to influence evidence by making threats against the victim and a potential witness's testimony. *Cook v. State, 157 Idaho 775, 339 P.3d 1179 (Ct. App. 2014)*.

In the context of a series of text messages, the statement that "it had been 7 years" met the threshold for relevance; it had a tendency to make a fact that was of consequence - whether defendant inappropriately touched the victim - more likely, as it provided some information about why defendant engaged in inappropriate touching. As such, the "it had been 7 years" portion of the text message was admissible under the first tier of subsection (b) analysis. State v. Wright, -- Idaho --, -- P.3d --, *2023 Ida. App. LEXIS 9 (Apr. 10, 2023)*.

**Evidence Held Inadmissible.**

In trial on charge of lewd and lascivious conduct with a 14-year-old boy, defendant's sexual misdeed with victim's mother was not relevant to prove the conduct committed with the son. *State v. Roach, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985)*.

Absent evidence that the specific contents of the reports contained in newspaper clippings of unrelated arrests and charges pending against defendant, which were in defendant's possession at the time of alleged rape and which he displayed to the victim, were known to the victim, and had been communicated to the victim in the form of a threat, the danger of unfair prejudice so outweighed the probative value of the evidence that the content of the clippings, charging defendant with various violent acts, should have been excluded. *State v. Winkler, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987)*.

Where the prior uncharged burglaries and the crimes charged were not shown to be progressive stages of a single plan formed in the minds of the defendants, but were connected only in the sense that they shared the common goal of getting money, neither did the burglaries have a distinctively similar modus operandi where the "plan" for the uncharged burglaries included more premeditation and greater professionalism than was exhibited during the charged crimes, and the potential for unfair prejudice was outweighed by probative value, the evidence of uncharged crimes should not have been admitted to prove the crimes charged. *State v. Bussard, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988)*.

Using evidence of a person's character in the prosecution's case in rebuttal, when no character evidence has been proffered by the defendant, simply to support the ultimate conclusion that the defendant acted in conformance with those characteristics in committing a crime, is inadmissible. *State v. Fisher, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989)*.

Evidence of other acts was inadmissible under this rule to prove that informant acted in conformity with a character trait of being an overreaching government informant who would coerce innocent people into dealing in drugs, and was not a sufficient indication of the existence of a habit to permit admission of the evidence under *I.R.E., Rule 406. State v. Rodriguez, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990)*.

Where the State should not have been permitted to elicit testimony by victim's mother about defendant's alleged attempt to choke mother in the first instance, the State could not predicate

the admissibility of otherwise inadmissible testimony by mother's coworker upon its value to impeach other evidence that was itself inadmissible and should have been excluded. *State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)*.

In prosecution for driving under the influence of alcohol, admission of judgments of defendant's prior convictions introduced late in trial during the state's case in chief and which served no purpose other than to prove defendant's prior bad acts was error. *State v. Pilik, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996)*.

Officer's testimony about defendant's conduct while allegedly intoxicated on prior occasions provided little, if any, probative value on defendant's ability to form the necessary intent on the night in question and, considering the nature of the testimony, there was a significant danger of unfair prejudice; therefore, even if the evidence was relevant, because the danger of unfair prejudice of the evidence substantially outweighed its probative value, the district court erred in admitting officer's testimony. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

The trial court erred when it allowed the prosecutor to ask the defendant's ex-wife why she had divorced him, where the court apparently believed evidence of the reason was already in evidence, but the answer the witness gave introduced evidence that was not admissible. *State v. Thompson, 132 Idaho 628, 977 P.2d 890 (1999)*.

In prosecution for child abuse, trial court properly excluded testimony that defendant's girlfriend (child's mother) had slapped child on one previous occasion; evidence was improper character evidence. *State v. Shutz, 143 Idaho 200, 141 P.3d 1069 (2006)*.

In defendant's lewd conduct and sexual battery case, the court erred by admitting evidence of defendant's prior bad acts against a witness because the comments to the witness were of a different type and under different circumstances; the testimony did not show either that the witness experienced the same type of inappropriate sexual touching that the complainant did, or that the complainant was subjected to the same sort of comments that the witness was. The testimony regarding other "bad acts" committed by defendant was not relevant to a material issue of the crimes charged. *State v. Field, 144 Idaho 559, 165 P.3d 273 (2007)*.

Petition for postconviction relief was properly dismissed because there was no ineffective assistance of counsel; a hearing impairment alone did not amount to ineffective assistance of counsel, and a failure to object to inadmissible testimony relating to a statement that the defendant liked to fight and a reference to his speculated sexual past was not prejudicial or fell within the scope of permissible trial strategy and tactics. *Ramsey v. State, 159 Idaho 887, 367 P.3d 711 (Ct. App. 2015)*.

**--Prior Imprisonment.**

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State resulted from the jury being uninformed, and such evidence would have impermissibly invited

the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996)*.

**--Traits of Child Abusers.**

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers; however, this rule prohibits the admission of evidence of a person's character (even if in the form of an expert opinion) if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

In the absence of some other reason for its admission, besides that prohibited by subdivision (a)(1) of this rule, evidence regarding the traits typically exhibited by child abusers is not admissible; neither is evidence that a particular defendant possesses those same characteristics admissible. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

The fact that child victim had learned of another accusation of molestation against defendant was irrelevant to any material issue before the jury, and lacking relevance, the statement that defendant had molested another boy, even if only an accusation, was inadmissible, and its introduction during victim's testimony by the state was not harmless. *State v. Shepherd, 124 Idaho 54, 855 P.2d 891 (Ct. App. 1993)*.

In prosecution for three counts of lewd conduct with a minor, evidence in the form of testimony of defendant's daughter and step-daughter that defendant had committed other acts of molestation was relevant to show general plan to exploit and sexually abuse an identifiable group of young female victims. *State v. Labelle, 126 Idaho 564, 887 P.2d 1071 (1994)*.

**--Truthfulness.**

Admission of character evidence as to truthfulness of a defendant was improper and warranted a new trial where a direct attack on the truthfulness of defendant could not be inferred from the tone of cross-examination questions posed to the defendant nor from the fact that defendant was asked to explain some apparent inconsistencies between his testimony and previous statements. *Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989)*.

**Failure To Appear Before Court.**

The district court did not clearly abuse its discretion in admitting the evidence of defendant's failures to appear before the court where the district court concluded that there was no other inference that could be drawn from defendant's failures to appear other than consciousness of guilt. *State v. Friedley, 122 Idaho 321, 834 P.2d 323 (Ct. App. 1992)*.

**Fundamental Error.**

Fundamental error is one that so profoundly distorts the proceedings that it produces manifest injustice, depriving the criminal defendant of the fundamental right to due process; error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived *State v. Rozajewski, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997)*.

District court's alleged error in admitting evidence of uncharged crimes in instant case did not rise to the level of fundamental error. Therefore, because defendant failed to object under subsection (b) of this rule to the challenged evidence, the appellate court would not consider the issue for the first time on appeal. *State v. Rozajewski, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997)*.

Defendant failed to demonstrate that a prosecutor's alleged misconduct under subsection (b), in disobeying a pretrial order that no mention be made regarding a televised law enforcement inquiry regarding defendant, violated defendant's constitutional rights; no fundamental error was shown. *State v. Jackson, 151 Idaho 376, 256 P.3d 784 (2011)*.

An abuse of discretion in admitting evidence is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense; therefore, appellate review of a claimed error, to which no objection was made in the trial court, on the basis that it constituted fundamental error is the exception, not the rule, as the fundamental error doctrine is not a mechanism for criminal defendants to obtain judicial review of every plausible claim of trial error. *State v. Norton, 151 Idaho 176, 254 P.3d 77 (Ct. App. 2011)*.

**Harmless Error.**

Although the testimony about defendant's drug addiction should not have been admitted to show motive to commit burglary and battery with the intent to commit robbery, the error was harmless. *State v. Boman, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993)*.

Although evidence of prior unspecified murder was admitted in error, where, beyond a reasonable doubt, the evidence did not influence the jury's verdict, the error was harmless. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

Where the evidence against defendant, who was convicted of felony injury to child, was wholly circumstantial, the improper testimony about defendant's temper and his alleged choking of victim's mother was not harmless error; this evidence may have led the jury to a guilty verdict based upon an impermissible inference that defendant had a propensity to violence, rather than upon the evidence as to his guilt or innocence of the crime charged. *State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)*.

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unpresented alibi testimony, such evidence would not have likely produced an acquittal and denial of defendant's motion for a new

trial was proper. State v. Roberts, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996).

Evidence of witness that two months after the alleged drug transaction arresting officer found more marijuana in the same desk where informant said that defendant was storing marijuana when informant made the buy was not relevant because it did not show intent, identity, or absence of mistake or accident and thus admission of such testimony was error; however, since both the informant and the officer involved in the undercover operation testified regarding the incident, court was convinced beyond a reasonable doubt that the jury would have reached the same result absent the error and thus district court's err in admitting witness's testimony was harmless. State v. Cochran, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

Although the interjection of the "couple other shootings" statement was plainly improper, it was harmless beyond a reasonable doubt where the witness who made the statement was the state's twentieth witness, and prior to his testimony the jury had been told by the defense that defendant had a prior felony conviction, and had heard testimony from numerous other witnesses that linked defendant to the murder. State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

Court did not err in refusing to grant defendant a mistrial after dismissing conspiracy charges because, even if the conspiracy evidence was not relevant to an issue other than propensity in regard to the remaining charges, the admission was harmless error given the extensive and convincing evidence of defendant's guilt. State v. Gamble, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Although the prosecutor's reference to defendant as a clown was meant to improperly impugn defendant's character, there was no need to determine whether the prosecutor's misconduct rose to the level of fundamental error, since the result of the trial would not have been different considering all of the other evidence presented against defendant. State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009).

Assuming without deciding that a district court erred in defendant's trial for rape and attempted strangulation when it allowed defendant's ex-wife to testify about an earlier incident wherein defendant entered the ex-wife's home and strangled and raped her, any such error was harmless, because the result in the case would have been the same even without the alleged error. The entire record demonstrated overwhelming evidence upon which the jury rested its guilty verdict, independent of the testimony. State v. Joslin, 166 Idaho 191, 457 P.3d 172 (2019).

Any error in the admission of evidence that defendant possessed drug paraphernalia and had used heroin on the day of his arrest was harmless because the unfairly prejudicial effect of the evidence was it would communicate to the jury that defendant used illegal drugs, potentially leading to juror bias against him, but, prior to the admission of that evidence, defendant himself had already revealed to the jury that he was a drug user; and the State's evidence showing defendant's guilt eclipsed any residual, unfair prejudice arising from the challenged evidence. State v. Chacon, 168 Idaho 524, 484 P.3d 208 (2021).

While the trial court erred in admitting evidence that drugs and drugs paraphernalia were found in defendant's residence under this rule, because the state failed to show it was relevant for a non-propensity purpose, the error was harmless given significant evidence that the drugs and paraphernalia found in the car belonged to defendant. *State v. Fox, 170 Idaho 846, 517 P.3d 107 (2022)*.

**Identity.**

Evidence of other crimes may be relevant to a question of identity if it shows that the charged and uncharged crimes were linked together as stages in the execution of an underlying plan developed by the defendants; under this test, the nexus among the crimes must be clear and direct. *State v. Bussard, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988)*.

Evidence of male bank robber applying makeup to disguise a distinguishing facial birthmark was tantamount to a "signature" identifying the perpetrator; thus, the evidence of a prior bank robbery did bear logical relevance to the identity of the robber. *State v. Nichols, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)*.

Evidence of prior misconduct is relevant on the issue of identity when the evidence demonstrates sufficiently similar, as well as distinctive, characteristics or patterns between the prior misconduct and the charged crime. However, even if there are numerous similarities between the uncharged misconduct and the charged crime, no inference of identity can arise if the similar characteristics, considered either singly or together, are not unusual. *State v. Porter, 130 Idaho 772, 948 P.2d 127 (1997)*, cert. denied, *523 U.S. 1126, 118 S. Ct. 1813, 140 L. Ed. 2d 951 (1998)*.

**Impeachment Evidence.**

Evidence offered for the purpose of impeachment may be admissible even though not listed in this rule. *State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999)*, cert. denied, *529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000)*.

Where the defendant opened the door for the admission of prior act evidence by testifying that he had never fired the gun used in this crime before, that he had never seen anyone shot before, and that he had never pointed a gun at anyone, evidence contradicting that testimony was relevant and admissible to impeach his credibility. *State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999)*, cert. denied, *529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000)*.

**Impeachment of Defendant's Testimony.**

The evidence of a prior DUI conviction was relevant to directly impeach and contradict defendant's testimony that he did not engage in that type of behavior when he said in his testimony, "I don't drink and drive." *State v. Mace, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000)*.

**In General.**

If the trial judge finds the evidence relevant to motive, intent, absence of mistake or accident, common scheme or plan, identity of the accused, or other similar issues, he or she must weigh the probative value of such evidence against any unfair prejudice it may cause to the defendant; the weighing process is committed to the judge's sound discretion. *State v. Buzzard, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986)*.

Evidence of a defendant's criminal past is generally inadmissible to prove the character of a person in order to show criminal propensity or guilt of the crime charged; however, such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*.

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite introduction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989)*.

To admit evidence of other crimes, wrongs or acts, the evidence must be relevant to a material and disputed issue concerning the crime charged, other than propensity, and if the evidence is deemed relevant, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of causing unfair prejudice to the defendant; this balancing process is within the discretion of the trial judge. *State v. Medina, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996)*.

**Intent.**

Intent is not always sufficiently at issue in the prosecution of a specific intent crime to allow admission of evidence of other crimes. *State v. Roach, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985)*.

Where the defendant threatened the murder victim with a machete only hours before the stabbing and the machete incident was the basis of the argument which eventually led to the stabbing, the machete incident was relevant to the defendant's motive and intent toward the victim, and the trial judge did not abuse his discretion in permitting the testimony into evidence. *State v. Buzzard, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986)*.

Testimony from a witness/informant that she had purchased up to twenty pounds of marijuana from defendant in the past was admissible under the intent exception to subsection (b) of this rule, as defendant's theory of defense at trial was that the marijuana belonged to a woman who was at his residence at the time of the arrest and evidence of prior marijuana transactions was clearly relevant to show defendant's intent to deliver because it increased the likelihood that the marijuana seized in this case was awaiting sale. *State v. Gauna, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989)*.

In order to prove the defendant's guilt of the charged offense, the state bore the burden to show that he harbored the specific intent to rape the victim. Evidence bearing upon his capacity to form such a specific intent was therefore relevant to a material issue, particularly in light of the defendant's intoxication-based defense. *State v. Dopp, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996)*.

In a case in which defendant was convicted of lewd conduct with a minor child under sixteen, the district court erred by admitting evidence of two prior convictions, and the error was not harmless. The conviction related to an incident in 1992 was not relevant to prove motive or intent, while the conviction related to an incident in 1999 was not relevant to prove motive, opportunity, or intent. *State v. Folk, 157 Idaho 869, 341 P.3d 586 (Ct. App. 2014)*.

The testimony of defendant's former girlfriends was relevant and admissible, because their evidence was probative of defendant's intent to inflict suffering or to establish his sadistic nature and intent to torture. *State v. Ehrlick, 158 Idaho 900, 354 P.3d 462 (2015)*.

District court did not err in permitting testimony about defendant's statement that he had previously gotten away with stealing at a retailer. The jury could have inferred from the testimony that, because defendant had shoplifted in the past, he was less likely to have entered the store with innocent intent, and the jury was properly instructed as to the use of such evidence. *State v. Rawlings, 159 Idaho 498, 363 P.3d 339 (2015)*.

**Joinder of Offenses.**

A joinder that would allow a jury to hear evidence that would be inadmissible under subsection (b), because it is irrelevant, is not necessarily unfairly prejudicial, requiring that the charges be tried separately. A court still must determine whether hearing such inadmissible evidence in a joined trial might lead the jury to conclude a defendant is guilty of one crime and then find him guilty of the other simply because of his criminal disposition. *State v. Wilske, 158 Idaho 643, 350 P.3d 344 (Ct. App. 2015)*.

Trial court properly denied defendant's motion to sever because the allegations showed a common scheme or plan, including assertions that defendant showed the victim images of child pornography while he sexually abused her, and defendant's girlfriend testified that defendant would look at pornographic images of children while engaging in sexual intercourse; the allegations against defendant suggested that he used child pornography as stimulation, and, thus, possession of child pornography was part and parcel of his abuse of the victim. *State v. Anderson, 168 Idaho 758, 487 P.3d 350 (2021)*.

**Motive.**

District court did not err in finding that the evidence of defendant's rape fantasies and defendant's collecting pornography that was consistent with those fantasies was relevant to defendant's motive in a case wherein defendant was tried for rape, first degree kidnapping, and burglary. Moreover, the court did not err in admitting the evidence after the court balanced the

danger of unfair prejudice against the relevance of the evidence. *State v. Russo, 157 Idaho 299, 336 P.3d 232 (2014)*.

In a threats against a public servant case, the district court did not abuse its discretion in admitting evidence of defendant's prior conviction for injury to a child, as it was relevant to show defendant's motive and intent in writing the letter to the prosecutor. The state's theory was that defendant was motivated to write the threatening letter due to the prosecution of defendant's injury to a child charge and to show that his intent in writing the letter was to influence the prosecutor's handling of the ongoing child protection proceeding. *State v. Sanchez, 165 Idaho 563, 448 P.3d 991 (2019)*.

**Not Reversible Error.**

Where minor victim's mother blurted out a reference to defendant's prior felony connection on direct examination during the state's case in chief, but the testimony was not solicited by the prosecutor's questioning nor introduced for the improper purpose of showing character evidence, or for any other admissible purpose, and the defense's objection came after the witness had answered, and the defense did not thereafter make a motion to strike or a motion for mistrial, admission of mother's testimony was not reversible error. *State v. Frederick, 126 Idaho 286, 882 P.2d 453 (Ct. App. 1994)*.

Where defendant argued that it was error for the trial court to admit the testimony of a witness describing his observations of the reckless driving patterns of defendant's truck ten minutes before an accident occurred as the testimony was prejudicial under subsection (b) of this rule, the Supreme Court held that the alleged error in admitting the witnesses' testimony did not rise to the level of fundamental error. *State v. Johnson, 126 Idaho 892, 894 P.2d 125 (1995)*.

Prosecutor could not mention, during opening statements, defendant's statements to his cousin because of the statement's implicit admission of prior misconduct that was inadmissible under Idaho R. Evid. 404(b); however, reversible error was not shown as testimony about defendant's statement was later presented at trial without objection, so it was impossible to attribute independent harm to the prosecutor's revelation of this testimony in her opening statement. *State v. Pickens, 148 Idaho 554, 224 P.3d 1143 (2010)*.

**Notice.**

The notice requirement of subsection (b) is mandatory, and the failure to comply creates a bar to admissibility. *State v. Whitaker, 152 Idaho 945, 277 P.3d 392 (2012)*.

**"Opening the Door."**

Where, in a narcotics prosecution defense counsel in questioning defendant's wife elicited whether the witness had ever known her husband to have possessed drugs in their home, while this inquiry may have implied that defendant possessed a character trait of temperance, the thrust of the question focused upon the witness' awareness of the presence of drugs in the

residence she shared with her husband, and did not "open the door" regarding evidence of good character of the accused. *State v. Rupp, 118 Idaho 17, 794 P.2d 287 (Ct. App. 1990)*.

This rule prohibits introduction of any evidence of a pertinent character trait unless it is offered by the accused, however, since such evidence had been introduced and admitted by the accused, the state was allowed to rebut that evidence. *State v. Enno, 119 Idaho 392, 807 P.2d 610 (1991)*.

The state did not offer the testimony of defendant's prior bad acts. It was defendant, not the state, who presented evidence of defendant's wife's infidelity and her opinion that defendant had induced a miscarriage by striking her womb. Therefore, because defendant either offered the challenged testimony himself or opened the door for the state to do so, the admission of this evidence did not provide a basis to overturn defendant's convictions. *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992)*.

Where defendant-appellant argued that testimony concerning evidence which was the subject of a motion in limine and which was excluded under this rule by the district court should not have been elicited by the plaintiff's attorney at trial, and further, that the plaintiff's attorney was guilty of misconduct, and that these actions by plaintiff's attorney should justify a new trial, the Supreme Court opined that the defendant-appellant had opened the door by testifying, at trial about the matter which he sought to have excluded in his motion. *Spence v. Howell, 126 Idaho 763, 890 P.2d 714 (1995)*.

Couple's testimony as to having seen defendant, convicted of felony injury to a child, disciplining child in a restaurant by squeezing his head until he cried, was properly admitted under this section because defense counsel had opened the door to the testimony by eliciting testimony from mother that father had not ever inappropriately disciplined the child. *State v. Gardiner, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995)*.

**Other Crimes, Wrongs, or Acts.**

In a murder prosecution based largely upon circumstantial evidence involving defendant's alleged use of the same firearm in homicides in both Idaho and Arizona, the trial court did not abuse its discretion in allowing the testimony of witnesses concerning defendant's shooting of a police officer in Arizona, as without showing that the gun held by defendant was fired into the officer's body, the state could not link the bullets in the officer's body with the bullet in the Idaho victim's brain; the trial court demonstrated that it understood the necessary balancing test as it balanced the relevancy of the testimony against the prejudice to defendant and concluded that the probative value and necessity of the evidence outweighed the prejudice. *State v. Smith, 117 Idaho 891, 792 P.2d 916 (1990)*.

The fact that the defendant's prior sex offenses occurred ten and twelve years before the charged sex offense did not make evidence of those prior wrongful acts irrelevant or unfairly prejudicial due to remoteness in time where the defendant was incarcerated nearly the entire period, and where, within one or two months after being released, he resumed the same modus

operandi demonstrated in the earlier sex offenses. State v. Martin, 118 Idaho 334, 796 P.2d 1007 (1990).

While subsection (b) of this rule does not specifically authorize the introduction of bad acts or crimes other than the one for which defendant; being prosecuted to be used for impeachment purposes, neither does it prohibit such use. State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Generally, subsection (b) of this rule forbids the introduction of other crimes, wrongs or acts if the purpose in doing so is to prove the character of the person in order to show that he acted in conformity therewith, however, such acts may be admissible if relevant to prove motive, opportunity, intent, preparation, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident. State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Where, in a murder prosecution, uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Instruction informing the jury that defendant had no right to refuse to submit to a Blood Alcohol Concentration test was proper, despite defendant's contention that this language amounted to evidence of prior bad acts prohibited by subsection (b) of this rule and that it raised an inference that defendant was guilty of other offenses, thereby prejudicing him. State v. Tate, 122 Idaho 366, 834 P.2d 883 (Ct. App. 1992).

Where defendant was charged with violating § 18-1501 for injuring a child, the question of defendant's intent under § 18-1501 opened the door for introduction of evidence of prior bad acts, where such evidence was logically relevant to the crime charged, and where evidence from approximately nine years earlier was not too remote in time since defendant had been incarcerated during part of that time. State v. Hassett, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

In order to admit evidence of other acts, crimes, or wrongs, the trial court must initially determine whether the evidence is relevant to a material issue other than propensity. If the evidence is deemed relevant, then the court must, in the exercise of its discretion, determine whether the probative value of the evidence is substantially outweighed by the danger of causing unfair prejudice to the defendant. State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

In cases where uncharged criminal acts of the defendant were in furtherance of an underlying plan to commit the charged crime, those acts are admissible to show the accomplishment of the criminal goal. *State v. Blackstead, 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994)*.

Where all of the missing business and payroll checks were "part of the whole scheme" and where the four checks defendant was charged with forging "came within that framework", evidence of the additional missing checks was relevant even though it potentially implicated defendant in the commission of other crimes not charged. *State v. Wallmuller, 125 Idaho 196, 868 P.2d 524 (Ct. App. 1994)*.

In prosecution for driving under the influence of alcohol, admission of the defendant's prior convictions, introduced late in the trial during the state's case in chief, and which served no purpose other than to prove defendant's prior bad acts, was error. *State v. Pilik, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996)*.

Evidence of juvenile defendant's misconduct at school was admissible solely for impeachment purposes, where it was relevant to credibility, there was no evidence that the judge considered the testimony for anything other than impeachment, and there was, thus, no danger of unfair prejudice. *State v. Doe (In re Doe), 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004)*.

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to *§ 18-1506(1)(b)*, regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant's actions as evidence that his touching was for sexual gratification rather than being accidental or innocent. *State v. Marsh, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004)*.

Victim's testimony that defendant tried to molest the victim's younger brother was admissible to explain why the victim decided to tell his mother about the abuse that he had received, and went to the victim's credibility; as limited by the court's instructions; the testimony was not improperly introduced as evidence of the defendant's character. *State v. Diggs, 141 Idaho 303, 108 P.3d 1003 (Ct. App. 2005)*.

For purposes of paragraph (b), some of defendant's prior acts that were placed in evidence were unnerving and carried with them a potential for unfair prejudice; therefore, it was necessary for the trial court to evaluate whether the danger of unfair prejudice from that evidence substantially outweighed its probative value, for purposes of *Idaho R. Evid. 403. State v. Hoak, 147 Idaho 919, 216 P.3d 1291 (2009)*.

Evidence of defendant's prior misconduct toward the victim was highly probative to show that defendant's subsequent stalking behavior would have alarmed the victim and caused the victim substantial emotional distress, plus it was relevant to show that the stalking was done maliciously, the mens rea element of the stalking charge; the court could not say that the trial court's decision to admit the evidence exceeded the boundaries of its discretion. *State v. Hoak, 147 Idaho 919, 216 P.3d 1291 (2009)*.

In defendant's trial on charges of lewd and lascivious conduct for molesting his daughter, evidence that defendant had molested his eight-year-old sister when he was 15 or 16 years old

was inadmissible because the similarities were far too unremarkable to demonstrate a common scheme or plan in defendant's behavior. *State v. Johnson, 148 Idaho 664, 227 P.3d 918 (2010)*.

Trial court did not abuse its discretion in admitting statements that defendant made during a police interview, because they did not likely fall within the purview of Idaho R. Evid. 404(b) as evidence of "character" or "other crimes, wrongs or acts," when they were little more than acknowledgements of normal human foibles. The statements were not a type of evidence that would present a risk of unfairly prejudicing the jury, because they were brief and vague and included no admission of any particular misconduct. *State v. McClain, 154 Idaho 742, 302 P.3d 367 (2012)*.

When defendant's uncle testified that defendant was a moral person and that the uncle would trust defendant, it was not an abuse of discretion to allow the admission of defendant's convictions for stalking and violation of a no contact order because, (1) while morality and trustworthiness could encompass honesty, common sense dictated morality and trustworthiness were not confined to that single quality, and (2) the prior convictions were relevant, as such evidence certainly would make a reasonable person doubt the uncle's unequivocal opinion. *State v. Ormesher, 154 Idaho 221, 296 P.3d 427 (2012)*.

Trial court properly allowed evidence that defendant offered the victim methamphetamine in exchange for sexual intercourse, because it showed that he was cultivating a controlling relationship over her to achieve submission to his sexual demands, and the trial court provided the jury with a limiting instruction. *State v. Osterhoudt, 155 Idaho 867, 318 P.3d 636 (Ct. App. 2013)*.

Trial court properly allowed evidence of defendant's prior acts of sexual intercourse with the victim, because it rebutted the defendant's allegation of recent fabrication and corroborated a detective's testimony. *State v. Osterhoudt, 155 Idaho 867, 318 P.3d 636 (Ct. App. 2013)*.

In determining the admissibility of evidence of other crimes, wrongs or acts, the supreme court has utilized a two-tiered analysis. The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity. *Ramsey v. State, 159 Idaho 887, 367 P.3d 711 (Ct. App. 2015)*.

**Plan.**

A desire for money is not a unifying "plan" within the meaning of subsection (b) of this rule. *State v. Bussard, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988)*.

The trial court did not err in permitting evidence of prior uncharged sex acts between the defendant and each of the three victims because such testimony was indeed admissible to show a common scheme or plan; although such evidence was still subject to the limitations imposed by I.R.E. 403 which proscribes both the "needless presentation of cumulative evidence," and evidence whose "probative value is substantially outweighed by the danger of unfair prejudice,"

the trial court found that neither of these limitations was violated in the instant case. *State v. Tolman, 121 Idaho 899, 828 P.2d 1304 (1992)*.

The outer boundary of the admissibility of conduct offered to prove a plan is whether that plan is a fact of consequence to the determination of the action. The facts of consequence in this action were the elements of first-degree kidnapping and there is no plan element in a first-degree kidnapping. The existence of facts that support an inference that defendant had a plan to pick up young girls was irrelevant to any issue in dispute. Therefore, the court exceeded the bounds of its discretion when it chose to apply the legal standard of "common scheme or plan" to facts that were not relevant to any disputed issue. *State v. Medrano, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992)*.

Under Idaho R. Evid. 404(b), the trial court did not abuse its discretion in admitting evidence of a prior incident where defendant pointed a gun toward a door where a police officer stood because the incident was relevant to the existence of premeditation or plan, as both incidents involved an authority that could take defendant into custody, who came to his residence after his failure to appear at pretrial conferences and after warrants were issued for his arrest. *State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)*.

**Pornographic Images.**

Pornographic images and incest stories found on the defendant/father's computer were admissible in a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, involving his daughter, as they were relevant to, and corroborated, the victim's testimony that she was shown pornography prior to and during the sexual abuse and helped prove the intent element of the crime. *State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009)*.

In a rape case, the trial court correctly determined that evidence of other acts was relevant to prove defendant's motive, intent, or plan, where defendant was charged with raping a woman at knifepoint, had admitted to having fantasies involving rape, and had in his possession pornographic materials depicting simulated rape. *State v. Russo, 157 Idaho 299, 336 P.3d 232 (2014)*.

**Preservation for Appeal.**

Defendant did not preserve the right to raise on appeal whether the trial court violated this section by admitting the testimony of the state's child abuse expert concerning the profile of an offender in an incestuous family to show that defendant fit this profile. *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992)*.

Where appellant framed issue of applicability of permissible purposes enumerated under this rule as they applied to the admission of evidence in her brief, the issue was sufficiently preserved for review. *State v. McAbee, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997)*.

Appellate court disavowed *State v. Avila, 137 Idaho 410, 49 P.3d 1260*, and *State v. Teasley, 138 Idaho 113, 58 P.3d 97*, to the extent they held that a bare relevance objection, by itself, was

sufficient to preserve a challenge to the admission of evidence under Idaho R. Evid. 404(b) for appeal. *State v. Chacon, 168 Idaho 524, 484 P.3d 208 (2021)*.

Because defendant's evidentiary objections before the district court did not cite Idaho R. Evid. 404(b), other than a bald, conclusory assertion that he objected to the paraphernalia evidence on both the relevance and prejudice prongs of the Rule 404(b) analysis, and the record did not show that the district court either understood from the context that defendant's objection was one based on Rule 404(b) or that it resolved his objections on that basis, defendant failed to preserve his arguments under Rule 404(b) for review. *State v. Chacon, 168 Idaho 524, 484 P.3d 208 (2021)*.

**Prior Acts.**

Where defendant's prior bad acts of stalking and harassing his girlfriend were not similar to the aggravated assaults committed against police officers, the admission of the acts was erroneous but harmless. *State v. Alsanea, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003)*.

Trial court did not err in admitting evidence of defendant's argument with the victim three days before the murder, and his arrest due to trespassing on her property, as the evidence was clearly relevant to demonstrate that he had a motive to shoot the victim where she had rejected him and had precipitated his arrest. The evidence also provided the jury a more complete picture of the hostility that existed between defendant and the victim. *State v. Cherry, 139 Idaho 579, 83 P.3d 123 (Ct. App. 2003)*.

Under Idaho R. Evid. 404(b), the trial court did not abuse its discretion in admitting evidence that defendant removed plastic bags placed on his hands by law enforcement because it was relevant as an inference could be drawn from the incident that defendant was trying to destroy evidence, and the probative value was not outweighed by the danger of unfair prejudice. *State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)*.

Where defendant was tried for a series of burglaries, the court did not err by admitting the testimony of a victim who saw defendant at her home on the day of the burglaries; the evidence was relevant because it showed that defendant was in the vicinity of the burglaries on the date they occurred. *State v. Dixon, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004)*.

Court erred, during a trial for trafficking in methamphetamine, in allowing a confidential informant to testify that the informant had previously purchased methamphetamine from defendant, because it was highly doubtful that the evidence was relevant to any substantive facts of the case other than propensity: the evidence was highly prejudicial and of low probative value. *State v. Naranjo, 152 Idaho 134, 267 P.3d 721 (Ct. App. 2011)*.

Defendant's viewing pornography on an occasion entirely separate from the charged offenses was not part of the charged criminal episode, nor was it necessary in order to provide a complete account of the charged crimes. As that evidence implicated defendant's character, but was not intrinsic to the crimes charged, it was subject to the strictures of subsection (b). *State v. Whitaker, 152 Idaho 945, 277 P.3d 392 (2012)*.

The district court erred in admitting evidence of two prior incidents under subsection (b), where the two incidents that the state presented at trial did not tend to show that the defendant had a prior plan, design, or system which included the doing of the act charged as part of its consummation nor show steps allegedly effectuating a plan to accomplish the charged offense, sexual abuse of a child under the age of 16. *State v. Coleman, 152 Idaho 872, 276 P.3d 744 (2012)*.

**Reversible Error.**

Trial court committed reversible error by admitting rebuttal evidence concerning defendant's reputation since, under the circumstances of this case, defendant did not "open the door" with regard to evidence of good character, and where, because the case turned largely on the jury's assessment of witness' testimony and the amount of credibility the jury gave those witnesses, including the rebuttal witness testimony regarding defendant's reputation, it could not be held beyond a reasonable doubt, that the jury would have found defendant guilty without the reputation testimony given by the rebuttal witness. *State v. Rupp, 118 Idaho 17, 794 P.2d 287 (Ct. App. 1990)*.

Admission of testimony by victim's mother, in a felony injury to child prosecution, about defendant's alleged attempt to choke mother or about defendant's temper, was in error where the only logical relevance of this evidence was to show defendant's propensity for violence--the very purpose for which use of other misconduct evidence is prohibited by this rule. *State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)*.

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained" incident. *State v. Cook, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007)*.

State's failure to provide notice of its intent to present other acts evidence was reversible error, as defendant suffered substantial prejudice due to its admission. Defendant's statements regarding past dealings in methamphetamine did not prove he knew of the methamphetamine in the vehicle the night of his arrest. *State v. Sheldon, 145 Idaho 225, 178 P.3d 28 (2008)*.

**Review.**

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under this section. *State v. Atkinson, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)*, cert. denied, *511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994)*.

**Rule Inapplicable to Evidence of Habit.**

In a medical malpractice action, defendant doctor's referral patterns and referral of other patients to other doctors were not evidence of the doctor's character; they were evidence of his habit of making referrals. *Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)*.

In a medical malpractice action, the trial court should not have excluded, pursuant to subsection (a) of this rule, evidence concerning defendant's habit of referring patients to other doctors, but under the circumstances of this case the exclusion of this evidence was harmless error. *Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)*.

**Standard of Review.**

When reviewing a trial court's admission of evidence under this rule, the appellate court exercises free review of the admissibility determination. *State v. Byington, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998)*, aff'd, *132 Idaho 589, 977 P.2d 203 (1999)*.

**Subsequent Conduct.**

Where defendant argued that the trial court erred by admitting testimony as to an incident which apparently occurred subsequent to the incidents charged in the information, the Idaho Supreme Court rejected the notion that evidence of subsequent misconduct is per se inadmissible. *State v. Tolman, 121 Idaho 899, 828 P.2d 1304 (1992)*.

**Two-Tiered Analysis.**

The decision to admit evidence of other crimes involves a two-tiered analysis. First, as with all evidence, the proof must be relevant to a material issue concerning the crime charged. Second, and only if the evidence is deemed relevant, it must be determined whether the probative value of the evidence is outweighed by unfair prejudice to the defendant. This balancing is left to the discretion of the trial judge and will be disturbed only if his discretion is abused. *State v. Roach, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985)*; *State v. Whitaker, 152 Idaho 945, 277 P.3d 392 (Ct. App. 2012)*

Proof of good acts, like bad acts, should be admitted if it is relevant to a material issue; however, the trial judge may exclude the evidence if its probative value is substantially outweighed by such dangers as confusing the issues or misleading the jury. *State v. Lawrence, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986)*.

The decision to admit or exclude evidence of other crimes involves a two-tiered analysis. First, the evidence must be relevant to a material and disputed issue concerning the crime charged. Second, and only if the evidence is deemed relevant, it must be determined whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. *State v. Winkler, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987)*.

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991)*.

Applying the two-tiered analysis, where defendant's intent to sexually abuse his adopted daughter was at issue, evidence of contemporaneous sexual abuse of another minor female relative in his home was relevant to show that defendant had the requisite intent at the time of the incident involving his adopted daughter, and the probative value of the evidence outweighed the danger of unfair prejudice because of the similarities in time, place, opportunity and age of the victims in the two incidents. *State v. Marks, 120 Idaho 727, 819 P.2d 581 (Ct. App. 1991)*.

The trial court did not abuse its discretion in denying defendant's motion in limine to suppress evidence of alleged prior uncharged sexual misconduct, where, applying the two-tiered analysis of this rule used to determine admissibility of evidence concerning other crimes, the evidence was (a) relevant to: demonstrating a common criminal plan, showing defendant's motives or lustful disposition, indicating specific intent, and was relevant to the issue of credibility and corroboration of the victim's testimony, and (b) evidence was not too remote in time to be probative or relevant, despite gaps of 11 and three years prior to the present charged offense, because the opportunity for defendant to enact his plan or scheme of sexual abuse allegedly occurred only when there was a minor female present in his household and she reached the appropriate age for defendant's design. *State v. Moore, 120 Idaho 743, 819 P.2d 1143 (Ct. App. 1991)*.

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs, or acts; first the trial court must determine if the evidence is relevant and second, if the trial court finds that the evidence is relevant, it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Cochran, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997)*.

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs or acts; the trial court must determine that the evidence is relevant and if the trial court finds that the evidence is relevant it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

The trial court must determine whether the evidence is relevant for a purpose other than that prohibited by Idaho R. Evid. 404(b), and if so, the court must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dixon, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004)*.

There is a two-step analysis that is used to determine whether evidence is admissible under subsection (b) of this rule. First, the evidence must be sufficiently established as fact and must be relevant to a material and disputed issue other than the character or criminal propensity of the defendant. Second, the court must apply the balancing test from Idaho R. Evid. 403 to

determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *State v. Jones, 167 Idaho 353, 470 P.3d 1162 (2020)*.

**Uncharged Conduct.**

To determine whether evidence of a defendant's uncharged misconduct should be admitted, the court must determine whether the evidence is relevant to a material and disputed issue concerning the crime charged. *State v. Cardell, 132 Idaho 217, 970 P.2d 10 (1998)*.

Testimony of defendant's daughter that 23-years earlier defendant had been a willing and vigorous participant in sexual assaults on her daughter, in concert with defendant's husband, had substantial probative value addressing the issue of whether defendant knowingly and intentionally committed the charged offense against her grandson. *State v. Law, 136 Idaho 721, 39 P.3d 661 (Ct. App. 2002)*.

State supreme court clarified that the Idaho Rules of Evidence require that trial courts treat the admission of evidence of uncharged misconduct in child sex crimes no differently than the admission of such evidence in other cases. *State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009)*.

Evidence of uncharged misconduct may not be admitted pursuant to Idaho R. Evid. 404(b) when its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. *State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009)*.

Evidence of uncharged offenses that is offered for the purpose of corroboration must actually serve that purpose; courts must not permit the introduction of impermissible propensity evidence merely by relabeling it as corroborative or as evidence of a common scheme or plan. *State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009)*.

Where defendant was charged with lewd conduct based on manual-genital contact, there was a fatal variance because the jury was instructed that defendant could be found guilty for "any other lewd or lascivious act," after hearing testimony that defendant touched the victim's breast area. There was no indication that the testimony was admitted under *Idaho R. Evid. 404. State v. Day, 152 Idaho 945, 277 P.3d 392 (Ct. App. 2013)*.

**Uniqueness.**

Evidence of prior misconduct is admissible if it establishes a distinct, though not completely unique, method or pattern of behavior *State v. Porter, 130 Idaho 772, 948 P.2d 127 (1997)*, cert. denied, *523 U.S. 1126, 118 S. Ct. 1813, 140 L. Ed. 2d 951 (1998)*.

**Cited in:**

*State v. Dallas, 109 Idaho 670, 710 P.2d 580 (1985)*; *State v. Palmer, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985)*; *State v. Simonson, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987)*; *State v. Danson, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987)*; *Aragon v. State, 114 Idaho 758, 760 P.2d 1174 (1988)*; *State v. Smith, 117 Idaho 225, 786 P.2d 1127 (1990)*; *State v. Peters, 119*

*Idaho 382, 807 P.2d 61 (1991)*; *State v. Velasquez-Delacruz, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994)*; *State v. Floyd, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994)*; *Reynolds v. State, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994)*; *State v. Parkinson, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996)*; *State v. Kay, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996)*; *Smith v. State, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996)*; *State v. Welker, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997)*; *State v. Muraco, 132 Idaho 130, 968 P.2d 225 (1998)*; *State v. Eytchison, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001)*; *State v. Siegel, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002)*; *State v. Payne, 146 Idaho 548, 199 P.3d 123 (2008)*; *State v. Jones, 154 Idaho 412, 299 P.3d 219 (2013)*; *Bias v. State, 159 Idaho 696, 365 P.3d 1050 (2015)*; *State v. Sams, 160 Idaho 917, 382 P.3d 366 (Idaho Ct. App. 2016)*; *State v. Kralovec, 161 Idaho 569, 388 P.3d 583 (2017)*; *State v. Sanchez, 161 Idaho 727, 390 P.3d 453 (2017)*; *State v. Chambers, 166 Idaho 837, 465 P.3d 1076 (2020)*; *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

## Research References & Practice Aids

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**Law Reviews.**

Non-Criminal Behavior: Why Idaho's Domestic Violence Laws Are Inaccurate and Inefficient, Madison E. Basterrechea, *57 Idaho L. Rev. 193 (2021)*.

**A.L.R.**

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix, -- prior offenses. *86 A.L.R.5th 59*.

Admissibility, in rape case, of evidence that accused raped or attempted to rape, person other than prosecutrix -- subsequent acts. *87 A.L.R.5th 181*.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix -- offenses unspecified as to time. *88 A.L.R.5th 429*.

Admissibility of evidence of other crimes, wrongs, or acts under *Rule 404(b) of the Federal Rules of Evidence*, in civil cases. *171 A.L.R. Fed. 483*.

Idaho Court Rules Annotated
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# I.R.E. Rule 405

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 405. Methods of Proving Character.

**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Character of Victim.
Proof of Good Character.
Two-Tiered Analysis.
Victim's Reputation.

**Character of Victim.**

Proof of a pertinent trait of character may be made by testimony as to the person's reputation or by testimony in the form of an opinion. *State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999)*.

In a case involving battery, a defendant can offer reputation or opinion evidence about the victim's character trait for violence to show that the victim was the initial aggressor or that the force used against the victim was necessary for self-protection. *Marr v. State, 163 Idaho 33, 408 P.3d 31 (2017)*.

**Proof of Good Character.**

Before the adoption of the Idaho Rules of Evidence, which were not yet in effect when this action was tried, proof of good character was limited to the defendant's reputation in the community. The new rules permit a defendant to prove good character either by reputation or by opinion testimony; however, proof of good character through specific instances of good conduct is generally impermissible under both the rules and general case law. *State v. Lawrence, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986)*.

Because Idaho R. Evid. 405(a) permits inquiry into relevant specific instances of conduct on cross-examination, the prospect of such cross-examination did not justify exclusion of evidence that was offered to show that defendant did not have the character of a child molester. *State v. Rothwell, 154 Idaho 125, 294 P.3d 1137 (2013)*.

**Two-Tiered Analysis.**

Proof of good acts, like bad acts, should be admitted if it is relevant to a material issue; however, the trial judge may exclude the evidence if its probative value is substantially outweighed by such dangers as confusing the issues or misleading the jury. *State v. Lawrence, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986)*.

**Victim's Reputation.**

Where a victim's prior conviction was ruled inadmissible, the defendant was nevertheless permitted to testify, without mentioning any specific acts, about his knowledge of the victim's reputation for being quarrelsome, violent and dangerous, the jury being instructed that this reputation evidence could be used to determine the reasonableness of the defendant's beliefs under the circumstances then apparent to him. *State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999)*.

In self-defense cases, Evidence Rule 404(a) permits a defendant to present evidence of a victim's propensity for violence for certain purposes. However, this rule limits the form of such evidence to opinion and reputation testimony, because the victim's propensity for violence is not an essential element of the claim. *State v. Godwin, 164 Idaho 903, 436 P.3d 1252 (2019)*.

**Cited in:**

*State v. Dallas, 109 Idaho 670, 710 P.2d 580 (1985)*; *State v. Ormesher, 154 Idaho 221, 296 P.3d 427 (2012)*.

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# *I.R.E. Rule 406*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 406. Habit; Routine Practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Distinguished from Character Evidence.
Evidence Held Admissible.
Evidence Not Admissible.
Evidence of Habit Excluded.
Insufficient Evidence of Habit.

**Distinguished from Character Evidence.**

In a medical malpractice action defendant doctor's referral patterns and referral of other patients to other doctors were not evidence of the doctor's character; they were evidence of his habit of making referrals. *Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)*.

**Evidence Held Admissible.**

In a prosecution for rape and kidnapping, trial court did not err in denying defendant's objection to testimony by the victim's sister that victim would not have left her children home alone from midnight to 4:00 a.m., as the testimony could reasonably have been perceived as pertaining to victim's habits in making arrangements for her children when she left them at night rather than with her general character trait for being a good mother. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

**Evidence Not Admissible.**

While the neuropathologist testified regarding her laboratory's routine procedures, she also testified that those procedures were followed in the instant case, exceeding that which was allowed under this rule. *State v. Stanfield, 158 Idaho 327, 347 P.3d 175 (2015)*.

**Evidence of Habit Excluded.**

Where, in a medical malpractice action, defendant doctor was allowed to testify as to his referrals of plaintiff to other doctors, and where the medical charts of the doctor concerning his treatment of plaintiff that were admitted in evidence indicated that the doctor had suggested consultations with others, including a neurological consultation, if the patient would agree, in light of this evidence the exclusion of evidence of defendant's habit of referring patients to other doctors was not inconsistent with substantial justice and did not affect the substantial rights of the doctor; accordingly, such an exclusion did not warrant a new trial. *Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)*.

**Insufficient Evidence of Habit.**

Evidence of other acts was inadmissible under I.R.E., Rule 404 to prove that informant acted in conformity with a character trait of being an overreaching government informant who would coerce innocent people into dealing in drugs and was not a sufficient indication of the existence of a habit to permit admission of the evidence under this rule. *State v. Rodriguez, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990)*.

**Cited in:**

*Idaho First Nat'l Bank v. David Steed & Assocs., Inc., 121 Idaho 356, 825 P.2d 79 (1992)*; *Gillingham Constr., Inc. v. Newby-Wiggins Constr., Inc., 136 Idaho 887, 42 P.3d 680 (2002)*.

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# *I.R.E. Rule 407*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 407. Subsequent Remedial Measures.

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;

- culpable conduct;

- a defect in a product or its design; or

- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or - if disputed - proving ownership, control, or the feasibility of precautionary measures.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Discretion of Court.
Impeachment Purposes.
Probative Value.

**Discretion of Court.**

The question of whether or not to admit or exclude evidence of subsequent remedial measures taken by a third party is a matter of the trial court's discretion and will not be overturned on appeal absent clear abuse of that discretion. A new trial is merited only if an error in excluding evidence affects a substantial right of one of the parties. *Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009)*.

**Impeachment Purposes.**

Where the trial court admitted exhibit for impeachment purposes only, and recognizing exhibit as a document that might be interpreted as a "remedial measure," gave a proper limiting instruction instructing the jury to consider the evidence for impeachment purposes only, there was no error. *Hopkins v. Duo-Fast Corp., 123 Idaho 205, 846 P.2d 207 (1993)*.

**Probative Value.**

If it appears that a party is seeking the introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment or any other purpose, the trial court should disallow the evidence; however, the trial court is in the best position to assess the prejudicial effect of the evidence; if the trial court is satisfied that the evidence has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute it should be allowed and a limiting instruction can aid the jury, but if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence it should properly be excluded. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

**Cited in:**

*Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1990)*.

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# *I.R.E. Rule 408*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 408. Compromise Offers and Negotiations.

**(a) Prohibited Uses.** Evidence of the following is not admissible - on behalf of any party - either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

**(1)** furnishing, promising, or offering - or accepting, promising to accept, or offering to accept - a valuable consideration in compromising or attempting to compromise the claim; and

**(2)** conduct or a statement made during compromise negotiations about the claim. Compromise negotiations encompass mediation.

**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 23, 1990, effective July 1, 1990; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Applicability.
Discretion of Court.
-- Admissible.
--Factors Considered.
--Inadmissible.
Harmless Error.
Prior Inconsistent Statements.

**Applicability.**

Because this rule applies in both civil and criminal proceedings, the district court erred in allowing the state to admit evidence of a civil settlement agreement between a defendabt and a corporation that she stole money from in order to prove her criminal offense. *State v. Munson, 167 Idaho 98, 467 P.3d 462 (2020)*, review denied, -- *Idaho --, 2020 Ida. LEXIS 145 (Idaho July 14, 2020)*.

**Discretion of Court.**

In cases where there is an agreement between a plaintiff and one of the defendants relating to trial procedures, which does not include a guarantee to the plaintiff of a minimum sum, or create an incentive on the agreeing defendant's part to increase plaintiff's damage award, the decision whether such an agreement will or will not be disclosed is committed to the broad discretion of the trial court; the trial court shall make this determination in accordance with the rules governing the admissibility of evidence involving compromises, offers to compromise, and relevancy. *Soria v. Sierra Pac. Airlines, 111 Idaho 594, 726 P.2d 706 (1986)*.

Trial judges have broad discretion in determining the admissibility of evidence relating to compromises or offers to compromise and their decision will not be overturned absent a clear showing of abuse. *Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986)*.

District court did not commit reversible error by excluding any evidence regarding a settlement agreement between a suregon and a patient, where a medical center offered the settlement as evidence of the surgeon's bias and to impeach his credibility. However, any error was harmless where exclusion of the settlement agreement did not affect the center's ability to defend its case, because the surgeon was no longer a party. *Brauner v. AHC of Boise, LLC, 166 Idaho 398, 459 P.3d 1246 (2020)*.

**-- Admissible.**

This rule does not require exclusion of evidence relating to compromises or offers to compromise if the evidence being introduced is used to show witness bias or prejudice. *Soria v. Sierra Pac. Airlines, 111 Idaho 594, 726 P.2d 706 (1986)*.

A trial judge may admit statements contained in settlement negotiations to be used to impeach contrary testimony given at trial, only after deciding their probative value outweighs the resulting prejudicial effect. *Davidson v. Beco Corp., 114 Idaho 107, 753 P.2d 1253 (1987)*.

Where construction partner was to sell partnership property, but rescinded approval of sale and had to pay real estate broker who had negotiated the sale, evidence of the amount of an actual settlement with real estate broker was admissible to show the amount of out-of-pocket damages suffered by investment partners. *Jensen v. Westberg, 115 Idaho 1021, 772 P.2d 228 (Ct. App. 1988)*.

The trial court did not abuse its discretion in admitting evidence of a settlement agreement where it carefully limited the use of the agreement, where the defendant was invited to submit a jury instruction stating that the settlement could be considered for bias and not for liability, and

where such an instruction was given. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

In an easement dispute, the district court did not err in considering pre-trial settlement negotiations to establish that defendants were trying to drive up the costs of the litigation so the plaintiffs would give up their legitimate claims and dismiss the case. *Millard v. Talburt, -- Idaho --, 544 P.3d 748 (2024)*.

**--Factors Considered.**

This rule by its terms does not operate to exclude evidence of compromise and offers of compromise unless it is offered to prove liability or invalidity of claim, and whether to admit evidence for another purpose is within the discretion of the trial court; whether the evidence is admissible shall be determined by rules concerning relevancy and possible outweighing prejudice. *Soria v. Sierra Pac. Airlines, 111 Idaho 594, 726 P.2d 706 (1986)*.

**--Inadmissible.**

Statement in letter that "a similar offer" had been "refused" should not have been admitted, where the letter did not rise to the level of strongly suggesting perjury, and the risk of unfair prejudice was insubstantial and manifest. *Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986)*, modified on other grounds, *Davidson v. Beco Corp., 114 Idaho 107, 753 P.2d 1253 (1987)*.

From a general partner's attempt to dissociate from an LLP, the district court erred by admitting a settlement letter into evidence under this rule where it was offered to prove liability for, or the amount of the LLP's wrongful dissociation claim against the partner. *St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 224 P.3d 1068 (2009)*.

District court did not abuse its discretion in finding that a party's proposed contract was a settlement offer, and therefore inadmissible, because the conditions concerning the use of a business name coupled with the offer to continue the parties' business relationship was sufficient consideration. *Profits Plus Capital Mgmt. v. Co. V., 156 Idaho 873, 332 P.3d 785 (2014)*.

**Harmless Error.**

Even if the trial court did err in refusing to disclose contents of the agreement between the plaintiff and certain defendants to the jury, there was no prejudice resulting from the district court's decision which would warrant reversal. *Soria v. Sierra Pac. Airlines, 111 Idaho 594, 726 P.2d 706 (1986)*.

**Prior Inconsistent Statements.**

Prior inconsistent statements made during settlement negotiations may be used for the purpose of impeachment, but only if they strongly suggest that a witness is perjuring himself at trial or if any unfair prejudice is likely to be insubstantial. *Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986)*, modified on other ground, *Davidson v. Beco Corp., 114 Idaho 107, 753 P.2d 1253 (1987)*.

Where statement in settlement letter, indicating that the defendant's offer of a tractor to the plaintiff had previously been rejected, was contrary to the defendant's trial testimony, that the plaintiff had accepted the tractor in full satisfaction of the debt, the probative value of the statement in the settlement letter was great in that it tended to show the defendant's testimony was unreliable. *Davidson v. Beco Corp., 114 Idaho 107, 753 P.2d 1253 (1987)*.

**Cited in:**

*Doty v. Bishara, 123 Idaho 329, 848 P.2d 387 (1992)*.

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# *I.R.E. Rule 409*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 409. Offers to Pay Medical and Similar Expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, funeral, or similar expenses resulting from an injury or death, or damage to or loss of property of another, is not admissible to prove liability for the injury, death, damage or loss.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 410*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 410. Pleas, Plea Discussions, and Related Statements.

**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

**(1)** a guilty plea that was later withdrawn;

**(2)** a nolo contendere plea;

**(3)** a statement made during a proceeding on either of those pleas under Idaho Criminal Rule 11 or a comparable federal or state procedure; or

**(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

**(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4):

**(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

**(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present; or

**(3)** under subsection (a)(3) above, in the same criminal action or proceeding for impeachment purposes.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018; amended and effective January 13, 2021.)

Annotations

## Case Notes

Nolo Contendere Plea.
Payment of Traffic Citation.

**Nolo Contendere Plea.**

Magistrate properly refused to accept defendant's nolo contendere plea to a charge of vehicular manslaughter because such pleas are no longer accepted in *Idaho. State v. Salisbury, 143 Idaho 476, 147 P.3d 108 (Ct. App. 2006)*.

**Payment of Traffic Citation.**

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor, 141 Idaho 459, 111 P.3d 144 (2005)*.

**Cited in:**

*State v. Simonson, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987)*.

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# *I.R.E. Rule 411*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Evidence Not Admissible.
Harmless Error.
Purpose.
Voir Dire.

**Evidence Not Admissible.**

The trial judge properly excluded testimony that the defendants had a careless attitude because they were insured. *Evans v. Park, 112 Idaho 400, 732 P.2d 369 (Ct. App. 1987)*.

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered statements were not rendered inadmissible by this rule as evidence of liability insurance but were inadmissible under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test. *Loza v. Arroyo Dairy, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002)*.

**Harmless Error.**

Although a comment in closing argument by the defense attorney that a verdict would ruin the defendant intimated that the defendant had no insurance and thus violated this rule, because the jury was instructed not to consider insurance and was instructed by the court that counsel's comment's are not evidence, the violation did not warrant a new trial. *Leavitt v. Swain, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998)*.

Where the trial court both instructed the jury prior to trial, and admonished it to disregard testimony regarding insurance immediately after such testimony was presented, no prejudicial error was committed, and the refusal to grant a motion for mistrial was not abuse of discretion. *Inama v. Brewer, 132 Idaho 377, 973 P.2d 148 (1999)*.

**Purpose.**

The purpose of this rule is to assure that jurors reach their conclusions on liability based solely upon the facts at issue and upon the merits of the case, rather than upon passion or prejudice which may arise from unwarranted consideration of insurance coverage. *Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988)*.

**Voir Dire.**

A party may properly make a good faith inquiry into issues on voir dire such as whether potential jurors have had media exposure to commercials on the "medical malpractice crisis" issues, subject to appropriate limitations imposed by the trial court, and upon a proper showing that members of the prospective jury panel may have been exposed to media accounts concerning allegations about the effect of jury awards on insurance costs. *Kozlowski v. Rush, 121 Idaho 825, 828 P.2d 854 (1992)*.

**Cited in:**

*Bramwell v. S. Rigby Canal Co., 136 Idaho 648, 39 P.3d 588 (2001)*; *McCandless v. Pease, 166 Idaho 865, 465 P.3d 1104 (2020)*.

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# I.R.E. Rule 412

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 412. Sex crime cases; Relevance of alleged victim's past sexual behavior.

**(a) Prohibited Uses.** Notwithstanding any other provision of law, in a criminal case in which a defendant is accused of a sex crime, reputation or opinion evidence of the alleged victim's past sexual behavior is not admissible.

**(b) Additional Prohibited Uses and Exceptions.** Notwithstanding any other provision of law, in a criminal case in which a defendant is accused of a sex crime, evidence of an alleged victim's past specific instances of sexual behavior is also not admissible, but the following such evidence may be admitted:

**(1)** an alleged victim's past sexual behavior, if offered to prove that someone other than the defendant was the source of semen or injury or other physical evidence; or

**(2)** an alleged victim's past sexual behavior with respect to the person accused of the sex crime, if offered by the defendant to prove consent; or

**(3)** an alleged victim's prior false allegations of sex crimes made at an earlier time; or

**(4)** an alleged victim's sexual behavior with someone other than the defendant that occurred at the time of the event giving rise to the sex crime charged; or

**(5)** evidence whose exclusion would violate the defendant's constitutional rights.

**(c) Procedure to Determine Admissibility.**

**(1) Motion.** If a defendant intends to offer evidence under Rule 412(b), the defendant must:

**(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

**(B)** do so at least five (5) days before trial unless the court, based on a determination either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case, allows the motion to be made at a later date; and

**(C)** serve the motion on all parties.

**(2) Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing at which the parties may call witnesses, including the alleged victim, and offer other relevant evidence. Notwithstanding the provisions of Rule 104(b), if the

relevance of the evidence which the defendant seeks to offer depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent in camera hearing scheduled for such purpose, must accept evidence on the issue of whether such condition of fact is fulfilled and determine the issue.

**(3)** If the court determines on the basis of the hearing described in paragraph (2) that the evidence that the defendant intends to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, the evidence must be admitted to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the parties may examine or cross-examine the alleged victim.

**(d)** For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sexual misconduct is alleged.

**(e)** For purposes of this rule, the term "sex crime" means --

**(1)** rape, the infamous crime against nature, forcible penetration with a foreign object; sexual abuse of a child under age sixteen years, sexual exploitation of a child, lewd conduct with a minor child under sixteen, or sexual battery of a minor child sixteen or seventeen years of age;

**(2)** any other crime under the law of the state of Idaho that involved: contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; or contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

**(3)** assault with intent to commit any of the crimes included in subsections (1) and (2);

**(4)** battery with intent to commit any of the crimes included in subsections (1) and (2);

**(5)** kidnaping for the purpose of committing any of the crimes included in subsections (1) and (2); or

**(6)** any attempt or conspiracy to commit any of the crimes included in subsections (1) and (2).

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended February 26, 1997, effective July 1, 1997; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Admissibility Test.
Alleged Lies of Victim.
Ineffective Assistance of Counsel.
Past Behavior.

Prosecutor's Remarks.
Recantations.
Sex Crime.
Similar Allegations.

**Admissibility Test.**

There is a three-part test to determine the admissibility of allegations of sex crimes under this rule. The first step requires the district court to determine whether the allegations of the purported victim are false. A defendant must establish by a preponderance of the evidence that the prior allegation of a sex crime is false. The second part of the analysis requires the district court to determine whether the evidence is relevant. The third step of the analysis requires the district court to weigh the probative value determined in step two with the unfair prejudice of that evidence. *State v. Chambers, 166 Idaho 837, 465 P.3d 1076 (2020)*.

The Idaho supreme court has adopted a three-part test to determine the admissibility of an alleged victim's prior false allegations of sex crimes under this rule. The first step of the analysis requires the trial court to determine whether the defendant established, by a preponderance of the evidence, that the prior allegation is false. If the defendant meets this threshold of establishing falsity, the trial court must determine whether the evidence is relevant. Generally under this second step, evidence of prior false allegations will be highly probative. Finally, under the third step, the trial court must balance the probative value of the evidence with the danger of undue prejudice pursuant to paragraph (c)(2). If the court determines that the probative value of such evidence outweighs the danger of unfair prejudice, the evidence is admissible. State v. Wright, -- Idaho --, -- P.3d --, *2023 Ida. App. LEXIS 9 (Apr. 10, 2023)*.

**Alleged Lies of Victim.**

In child sexual abuse prosecution, trial court was within its discretion to deny defendant's request to present evidence that one of his minor victims had lied when she initially reported to her foster mother that defendant refused to stop. The evidence was not relevant either to rebut the foster mother's statement that the victims had never lied to her about a matter of significance, or to impeach the victims, and any marginal probative value of that evidence was substantially outweighed by the danger of confusing or misleading the jury with extraneous issues and wasting trial time. *State v. Perry, 144 Idaho 665, 168 P.3d 49 (Ct. App. 2007)*.

**Ineffective Assistance of Counsel.**

Inmate's claim that his counsel had been ineffective due to trial court's exclusion of evidence his counsel had failed to disclose was without merit. The testimony about the two victims engaging in sexual acts with one another would have been just as likely to corroborate the boys' claims of abuse as it would have been to exonerate the inmate. *Curless v. State, 146 Idaho 95, 190 P.3d 914 (2008)*.

**Past Behavior.**

The evidence of complaining witness' sexual advances, over a period of several years, toward some of the men she had met in a bar was not relevant, in itself, to establish that she consented to have sex with defendant. *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*.

District court properly excluded evidence of a rape victim's sexual contact with someone other than defendant, as the evidence did not establish that someone else was responsible for semen that matched defendant's genetic markers and that was found on the victim's quilt. *State v. Self, 139 Idaho 718, 85 P.3d 1117 (Ct. App. 2003)*.

Defendant was not allowed to introduce evidence at trial that the sexual assault victim had an STD at the time of the offense. His argument that he had been told she had the STD, that he would not have had contact with the victim because of that information, and that he subsequently tested negative for that STD, while potentially exculpatory, did not outweigh the danger of unfairly prejudicing the jury against the witness. *State v. Ozuna, 155 Idaho 697, 316 P.3d 109 (2013)*.

Defendant's conviction for sexual exploitation of a child was vacated, because the district court abused its discretion by denying his motion seeking to introduce evidence of the complainant's sexual history with a third man: defendant should have been permitted to ask whether the complainant was with this man when the photographs at issue were taken. *State v. Ogden, 171 Idaho 258, 519 P.3d 1198 (2022)*.

Defendant's conviction for sexual battery was affirmed, because the district court did not abuse its discretion by denying his motion to introduce evidence of the complainant's sexual history with another man, as that conduct did not relate back to the date of the offenses defendant allegedly committed. *State v. Ogden, 171 Idaho 258, 519 P.3d 1198 (2022)*.

Excluding evidence of a specific instance of the past sexual behavior of an alleged victim of a sex offense was not error because the prosecution had not introduced an impeachable prior inconsistent statement and, without allowing an improper inquiry into the victim's past sexual history, there would be nothing to impeach and no basis to introduce a statement made by the victim during a forensic interview; moreover, defendant failed to provide timely notice of intent to use the evidence. *State v. Martin, -- Idaho --, 554 P.3d 69, 2024 Ida. LEXIS 86 (Aug. 7, 2024)*.

**Prosecutor's Remarks.**

In trial where defendant was convicted of lewd conduct, the prosecutor's statement, in closing argument, that defendant murdered the victim's innocence was beyond the permissible bounds of proper argument. *State v. Reynolds, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991)*.

It was not improper for prosecutor to say in opening remarks that the jurors would get to judge the victim for themselves to see what kind of a 13-year old girl she was, as this was a request that the jurors disregard any generalized biases or prejudices that they may hold concerning young teen-aged girls and that they judge the victim as presented. *State v. Reynolds, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991)*.

**Recantations.**

In defendant's trial for lewd and lascivious conduct with defendant's minor child, where defendant was allowed to present testimony that the child was not a truthful person, and instances of the child's alleged recantations of prior accusations of sexual abuse occurred several years earlier, evidence of the alleged recantations was properly excluded to avoid a mini-trial of the child's prior allegations. *State v. Harshbarger, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003)*.

**Sex Crime.**

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under this rule and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. *State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010)*.

Where defendant appealed his conviction for lewd conduct with a minor child under sixteen, in violation of *§ 18-1508*, his Sixth Amendment right to present a defense could be limited by Idaho R. Evid. 412. Admission of evidence of an alleged victim's past sexual behavior was constitutionally required only in extraordinary circumstances; accordingly, trial judges retained wide discretion under the Confrontation Clause to impose reasonable limits on cross-examination and introduction of evidence based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that was repetitive or only marginally relevant. *State v. Ozuna, 155 Idaho 697, 316 P.3d 109 (2013)*.

**Similar Allegations.**

District court did not abuse its discretion by excluding evidence that the victim had made a false allegation of rape against a different individual approximately six months after the alleged rape by defendant, even though it erroneously interpreted this rule to include a temporal requirement precluding alleged false allegations made after the charged conduct. Defendant failed to prove at the evidentiary hearing that the evidence showed that the victim's allegations against the other individual were false, as nothing in the police reports defendant submitted proved demonstrable falsity. *State v. Chambers, 166 Idaho 837, 465 P.3d 1076, (2019)*.

**Cited in:**

*State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998)*.

## Research References & Practice Aids

## RESEARCH REFERENCES

### A.L.R.

Admissibility in sex offense case, under *Rule 412 of Federal Rules of Evidence*, of evidence of victim's past sexual behavior. *166 A.L.R. Fed. 639*.

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# *I.R.E. Rule 413*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 413. Proceedings of Medical Malpractice Screening Panels.

Evidence of the proceedings or of conduct or statements made in proceedings before a hearing panel for prelitigation consideration of medical malpractice claims, or the results of or any findings or determinations made in the proceedings is not admissible in a civil action or proceeding by, against or between the parties to or any witness in the hearing panel proceedings.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 414*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS.***

## Rule 414. Expressions of Condolence or Sympathy.

**(a) Prohibited Uses.** In any civil action brought by or on behalf of a patient who experiences an unanticipated outcome of medical care, or in any arbitration proceeding related to, or in lieu of, such civil action, all statements and affirmations, whether in writing or oral, and all gestures or conduct expressing sympathy, commiseration, condolence, or compassion, made by a health care professional or an employee of a health care professional to a patient or family member or friend of a patient, which relate to the care provided to the patient, or which relate to the discomfort, pain, suffering, injury, or death of the patient as the result of the unanticipated outcome of medical care is not admissible as evidence of an admission of liability or on the issue of damages.

**(b) Exceptions.** Notwithstanding subsection (1) of this rule, a statement of fault which is otherwise admissible and is part of or in addition to a statement identified in subsection (a) may be admissible.

**(c) Definitions.** For purposes of this rule:

**(1)** "Health care professional" means any person licensed, certified, or registered by the state of Idaho to deliver health care and any clinic, hospital, nursing home, ambulatory surgical center or other place in which health care is provided. The term also includes any professional corporation or other professional entity comprised of such health care professionals as permitted by the laws of Idaho.

**(2)** "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected, hoped for or desired result.

## History

(Adopted March 21, 2007, effective July 1, 2007; amended March 26, 2018, effective July 1, 2018).

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# *I.R.E. Rule 501*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 501. Privileges Recognized only as Provided.

Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

**(a)** Refuse to be a witness;

**(b)** Refuse to disclose any matter;

**(c)** Refuse to produce any object or writing; or

**(d)** Prevent another from being a witness or disclosing any matter or producing any object or writing.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 502*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 502. Lawyer-Client Privilege.

**(a) Definitions.** As used in this rule:

**(1) Client.** A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

**(2) Representative of the client.** A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.

**(3) Lawyer.** A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

**(4) Representative of the lawyer.** A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal service.

**(5) Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

**(b) General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

**Comment: IRE 502(b)(3) is intended to provide that when clients who share a common interest in a legal matter are represented by different lawyers they can communicate with each other in an effort to develop a joint strategy or otherwise advance their interests, and their communications in that endeavor will be**

**privileged; that each client involved has a privilege for all such communications; and that this privilege will survive a later falling-out among the parties. The privilege does not, however, extend to communications solely between the clients or their representatives when no lawyer is present. The rationale for this privilege was stated in *In Re: Grand Jury Subpoenas, 902 F.2d 244, 249*, *28 A.L.R.5th 775* (4th Cir. 1990): "[P]ersons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." The original IRE 502(b)(3) was amended to expand the scope of the privilege to include all communications among clients, their representatives, their lawyers, and their lawyer's representatives when engaged in discussion of common legal concerns.**

**(c) Who may claim the privilege.** The privilege may be claimed by the client or for the client through the client's lawyer, the guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the lawyer or lawyer's representative to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Furtherance of crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

**(2) Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

**(3) Breach of duty by a lawyer or client.** As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer;

**(4) Document attested by a lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

**(5) Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

**(6) Shareholder actions.** As to a communication between a corporation and its lawyer or a representative of the lawyer, which was not made for the purpose of facilitating the rendition of professional legal services to the corporation during the litigation and concerning the litigation in which the privilege is asserted:

**(A)** in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or

**(B)** in a derivative action by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this

exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Application of Privilege.
Confidentiality.

**Application of Privilege.**

In order for the attorney-client privilege to apply, two findings are requisite: (1) the communication must be confidential within the meaning of the rule, and (2) the communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client. *State v. Allen, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993)*, overruled on other grounds, *State v. Priest, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995)*.

Documents that fell into the category of confidential communications made for the purpose of facilitating professional legal services to the client were properly held to be privileged documents and not subject to discovery. *Star Phoenix Mining Co. v. Hecla Mining Co., 130 Idaho 223, 939 P.2d 542 (1997)*.

In a product liability case, a trial court did not compel the production of suspension orders regarding the preservation of test data since they were not subject to discovery because they were protected by the attorney-client privilege; the communications were confidential and were made for the purpose of rendering professional legal advice. *Kirk v. Ford Motor Co., 141 Idaho 697, 116 P.3d 27 (2005)*.

Order granting independent conflict counsel access to the state appellate public defender's (SAPD) client file on defendant violated defendant's attorney-client privilege, because it gave counsel carte blanche to access all of the SAPD's files relating to its representation of defendant, which undoubtedly contained some privileged information. *Hall v. State, 155 Idaho 610, 315 P.3d 798 (2013)*.

District court erred by requiring defendant to meet an initial burden at trial to show that he was prejudiced by the state's presentation of evidence or argument gained from its intrusion into his constitutional right to counsel by obtaining notes during a search of defendant's prison cell. The

court concluded that the notes constituted confidential communications, intended to facilitate counsel's legal representation, and that the prosecuting attorney had prolonged access to the privileged notes; therefore, the burden should have shifted to the state to show that defendant's rights had not been violated. *State v. Robins, 164 Idaho 425, 431 P.3d 260 (2018)*.

**Confidentiality.**

Letter to attorney from seller of business regarding relationship with former client was not a "confidential communication" within the meaning of this rule where the letter was kept in a file which was turned over to buyers of business as part of business' assets; seller did not act in a manner indicating letter was confidential where he failed to remove the letter prior to sale of business. *Farr v. Mischler, 129 Idaho 201, 923 P.2d 446 (1996)*.

**Cited in:**

*Bradbury v. City of Lewiston, -- Idaho --, 533 P.3d 606 (2023)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Application of Attorney-Client Privilege to Electronic Documents. *26 A.L.R.6th 287*.

Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege. *47 A.L.R.6th 255*.

Applicability of attorney-client privilege to communications made in presence of or solely to or by other attorneys, coparties, and their staff. *47 A.L.R.6th 255*.

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## Rule 503. Physician and Psychotherapist-Patient Privilege.

**(a) Definitions.** As used in this rule:

**(1) Patient.** A "patient" is the person who consults or is examined or interviewed by a physician or psychotherapist for the purpose of obtaining diagnosis or treatment of a physical, mental or emotional condition, including alcohol or drug addiction.

**(2) Physician.** A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

**(3) Psychotherapist.** A "psychotherapist" is (A) a physician while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

**(4) Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

**(b) General rules of privilege.**

**(1) Civil action.** A patient has a privilege in a civil action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

**(2) Criminal action.** A patient has a privilege in a criminal action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

**(c) Who may claim the privilege.** The privilege may be claimed by the patient or for the patient through the patient's lawyer, guardian or conservator, or the personal

representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication may claim the privilege but only on behalf of the patient. The authority of the physician or psychotherapist to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.**

**(1) Proceedings for guardianship, conservatorship or hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a patient for mental illness or to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

**(2) Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

**(3) Condition an element of claim or defense.** There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

**(4) Child related communications.** There is no privilege under this rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Application.
Child Related Communications.
Repeal of Insanity Defense.
Testimony Improper.
Waiver.

**Application.**

This rule does not apply to communications by a psychotherapist that have become part of the court records in a juvenile proceeding; the privilege or confidentiality of these records is governed by the provisions of former I.C. *§ 16-1816* (now *§ 20-525*). *State v. Brown, 121 Idaho 385, 825 P.2d 482 (1992)*.

Any physical injury is likely to have a mental component in the form of pain suffered by an injured person, and to allow a defendant to claim that statements he made during medical treatment for physical injuries are privileged would defeat the plain language of paragraph (b)(2) of this rule. *State v. Langford, 136 Idaho 334, 33 P.3d 567 (Ct. App. 2001)*.

Victim's statement to a doctor that defendant caused the injuries was not barred by doctor-patient privilege, in defendant's domestic battery case, where the statement was not related to the victim's treatment. *State v. Hoover, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003)*.

Defendant's Fifth Amendment rights were not violated when he was ordered to undergo an examination by a state expert in an attempted murder case, because defendant had indicated an intent to introduce psychiatric evidence in his defense; moreover, Idaho R. Evid. 503 was not violated either since the communications were not confidential and his defense was based on a mental condition. *State v. Santistevan, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006)*.

Defendant's Fifth Amendment rights were not violated when he was ordered to undergo an examination by a State expert in an attempted murder case because defendant had indicated an intent to introduce psychiatric evidence in his defense; moreover, Idaho R. Evid. 503 was not violated either since the communications were not confidential and his defense was based on a mental condition. *State v. Santistevan, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006)*.

**Child Related Communications.**

Where a father is accused of child molestation and the child is in therapy, presumably to deal with the emotional aftermath of the alleged molestation, the accused parent should not be entitled to access to the communications made by the child to the therapist. *State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009)*.

**Repeal of Insanity Defense.**

In the wake of Idaho's repeal of the insanity defense, mental defect is no longer an assertable defense and thus, this rule, and pre-repeal case law recognizing the State's right to compel a psychological evaluation of a defendant who pleads the defense of insanity, no longer apply. *State v. Odiaga, 125 Idaho 384, 871 P.2d 801*, cert. denied, *513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994)*.

**Testimony Improper.**

The trial court improperly required defendant's personal psychiatrist to testify at the sentencing hearing, invading privileged communications with the defendant. *State v. Wilkins, 125 Idaho 215, 868 P.2d 1231 (1994)*.

**Waiver.**

Where it appears from the trial record that the defendant gave his counselor permission to discuss his therapy and progress with the state's presentence investigator and where the record shows that at no time during the trial did defendant object to the counselor's testimony or assert his psychotherapist-patient privilege, his privilege is considered waived, and defendant is estopped from asserting on appeal that the trial court erred in the admission of this evidence. *State v. Gallipeau, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994)*.

**Cited in:**

*State v. Wood, 132 Idaho 88, 967 P.2d 702 (1998)*.

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# *I.R.E. Rule 504*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 504. Husband-Wife Privilege.

**(a) Definition.** A communication is "confidential" if it is made during marriage privately by any person to the person's spouse, and is not intended for disclosure to any other person.

**(b) General rule of privilege.** A person has a privilege to prevent testimony as to any confidential communication between the person and his or her spouse made during the marriage.

**(c) Who may claim the privilege.** The privilege may be claimed by the person or by the spouse on behalf of the person, or by the lawyer for the person on behalf of the person. The authority of the spouse or the lawyer to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

**(2) Criminal action.** In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a person residing in the household of either spouse, or (C) a third person committed in the course of committing a crime against the other spouse or a person residing in the household of either spouse.

**(3) Special proceeding.** In proceedings (A) under the Reciprocal Enforcement of Support Act, or (B) concerning desertion or non-support of a spouse.

**(4) Civil action.** In a civil action or proceeding by one spouse against the other involving the person or property of the other.

**(5) Proceedings for guardianship, conservatorship or hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a person for mental illness or to hospitalize the person for mental illness.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 18, 1998, effective July 1, 1998; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes



**Harmless Error.**

Although the district court erred when it admitted testimony by a defendant's wife about a conversation in which he told her that he had been contacted by the police and had agreed to an interview with an officer, the error was harmless as numerous other witnesses, including the defendant himself, testified that he had been contacted by the police and that an interview had been scheduled. *State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)*.

**Letter from Defendant to Spouse.**

Subsection (b) of this rule only addresses compelled testimony from a spouse with regard to a privileged communication; hence, no marital privilege was applicable to the prosecution's use of a letter from defendant to his wife where the letter was confiscated while defendant was in jail awaiting trial, and where defendant denied that the document was a letter to his wife and further denied any intent to deliver it to his wife. *State v. Leavitt, 116 Idaho 285, 775 P.2d 599 (1989)*, cert. denied, *493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989)*.

**Meaningful Glance.**

"Meaningful glance" that passed between defendant and his wife at the viewing of a news story on the murder, although communicative, occurred in the presence of wife's parents and was therefore far from confidential. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

**Scope of Privilege.**

Where defendant asserted that his motion to suppress evidence found in the search of his residence was meritorious in that the search warrant was based upon confidential communications between defendant and his wife which were subject to the marital privilege under this rule, the Court of Appeal held that this rule is an evidentiary rule that governs only

testimony given by one spouse against the other in an action or proceeding and it does not preclude one spouse from reporting the criminal activity of the other to police. *Dunlap v. State, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995)*.

**Surveillance of Property.**

The surveillance of victim's property by defendant and his wife could not be regarded as a privileged marital communication. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

**A.L.R.**

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. *119 A.L.R.5th 275*.

"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse. *23 A.L.R.6th 1*.

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# I.R.E. Rule 505

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 505. Religious Privilege.

**(a) Definitions.** As used in this rule:

**(1) Clergyman.** A "Clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed to be a clergyman by the person consulting.

**(2) Confidential communication.** A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

**(b) General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in the clergyman's professional character as spiritual adviser.

**(c) Who may claim the privilege.** The privilege may be claimed by the person, or for the person by the person's lawyer, the guardian or conservator, or by the personal representative if that person is deceased. The clergyman at the time of the communication may claim the privilege but only on behalf of the person. The authority of the clergyman to do so is presumed in the absence of evidence to the contrary.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**No Privilege.**

Conversation between a rape defendant and minister was not a privileged confidential communication where the conversation did not take place in private and a third person was present. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

Defendant's objections to testimony by a minister and by an outpatient counselor at a substance abuse treatment facility were properly overruled where defendant made no showing of any confidential communication with either witness upon which to base a privilege. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

Where hospital chaplain also described his duties as being a liaison between hospital staff and families, and where statements made to chaplain by defendant were made in presence of another family member, with the door open and other personnel just outside the room and did not appear that they were intended to be confidential, such communication was not received in the chaplain's "professional character as spiritual adviser," nor "made privately" and therefore did not constitute privileged communication protected by this rule. *State v. Gardiner, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995)*.

**Cited in:**

*Jones v. Whiteley, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. *93 A.L.R.5th 327*.

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## Rule 506. Political Vote.

**(a) General rule of privilege.** Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot.

**(b) Exceptions.** This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the State of Idaho.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 507*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 507. Conduct of Mediations.

**(1) Definitions.** In this Rule:

**(a)** "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

**(b)** "Mediation communication" means a statement, whether oral or in a records or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

**(c)** "Mediator" means an individual who conducts a mediation.

**(d)** "Nonparty participant' means a person, other than a party or mediator, that participates in a mediation.

**(e)** "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

**(f)** "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; government subdivision, agency or instrumentality; public corporation, or any other legal or commercial entity.

**(g)** "Proceeding" means any proceeding referenced in Idaho Rule of Evidence 101(c).

**(h)** "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**(i)** "Sign" means:

**(1)** to execute or adopt a tangible symbol with the present intent to authenticate a record; or

**(2)** to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record; or

**(3)** to assent on a record with the present intent to authenticate a record.

**(2) Scope.**

**(a)** Except as otherwise provided in subsection (b) or (c), this Rule applies to a mediation in which:

**(1)** the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

**(2)** the mediation parties and the mediator agree to mediate in a record that demonstrates an exception that mediation communications will be privileged against disclosure; or

**(3)** the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

**(b)** The Rule does not apply to a mediation:

**(1)** relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

**(2)** relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the Rule applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

**(3)** conducted by a judge who might make a ruling on the case; or

**(4)** conducted under the auspices of:

**(A)** a primary or secondary school if all parties are students or

**(B)** a correctional institution for youths if all the parties are residents of that institution.

**(C)** If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under subparts 3 through 5 do not apply to the mediation or part agreed upon. However, subparts 3 through 5 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

**(3) Privilege against disclosure; admissibility; discovery.**

**(a)** Except as otherwise provided in subpart 5, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in subpart 4.

**(b)** In a proceeding, the following privileges apply:

**(1)** A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

**(2)** A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

**(3)** A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

**(c)** Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

**(4) Waiver and preclusion of privileges.**

**(a)** A privilege under subpart 3 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

**(1)** in the case of the privilege of a mediator, it is expressly waived by the mediator; and

**(2)** in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

**(b)** A person that discloses or makes representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under subpart 3, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

**(c)** A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under subpart 3.

**(5) Exceptions to privilege.**

**(a)** There is no privilege under subpart 3 for a mediation communication that is:

**(1)** in an agreement evidenced by a record signed by all parties to the agreement;

**(2)** available to the public under the Idaho Open Records Act or made during a session of a mediation which is open, or is required by law to be open, to the public;

**(3)** a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

**(4)** intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

**(5)** sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

**(6)** except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

**(7)** sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the mediation.

**(b)** There is no privilege under subpart 3 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

**(1)** a court proceeding involving a felony or misdemeanor; or

**(2)** except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation. This exception to privilege does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.

**(c)** A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

**(d)** If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

**(6) Application to existing agreements or referrals.**

**(a)** The privileges created in this rule apply to communication made in the course of a mediation pursuant to a referral or an agreement to mediate made on or after the effective date of this Rule.

**(b)** On or after one year following the effective date, the privileges created in this rule apply to any mediation regardless of when the referral or agreement to mediate was made.

## History

(Adopted January 3, 2008, effective July 1, 2008; amended April 27, 2012, effective July 1, 2012; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Party to Subsequent Proceeding.
Prevailing Party.

**Decisions Under Prior Rule or Statute**

**Party to Subsequent Proceeding.**

Because the privilege found in this rule cannot be invoked in a subsequent proceeding unless the mediation client is a party to that proceeding, a district court erred when it determined that a statement made by the defendant's wife, who was a witness in his criminal trial, was subject to the mediator privilege. *State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999)*.

**Prevailing Party.**

District court correctly refused to consider mediation communications in making its prevailing party determination. *Jorgensen v. Coppedge, 148 Idaho 536, 224 P.3d 1125 (2010)*.

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## Rule 508. Secrets of State and Other Official Information; Governmental Privileges.

**(a) Federal.** If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

**(b) State.** No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

**(c) Effect of sustaining claim.** If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# I.R.E. Rule 509

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 509. Identity of Informer.

**(a) Rule of privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

**(b) Who may claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

**(c) Exceptions:**

**(1) Voluntary disclosure.** No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action.

**(2) Informer as a witness.** If an informer appears as a witness for the public entity disclosure of the informer's identity shall be required unless the court finds, in its discretion, that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure. Any disclosure under this subsection shall be subject to any protective order deemed necessary by the court.

**(3) Testimony on relevant issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: (A) requiring the prosecuting attorney to comply, (B) granting the defendant additional time or a continuance, (C) relieving the defendant from making disclosures otherwise required of the defendant, (D) prohibiting the prosecuting attorney from introducing specified evidence, or (E) dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the

appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes



**Discretion of Court.**

The government's privilege to withhold from disclosure the identity of confidential informers gives way if the informant is produced as a witness at trial or if otherwise ordered by the court, and the decision whether to require disclosure of the identity of the confidential informant is left to the discretion of the trial court. *State v. Davila, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995)*.

**Extension of Privilege.**

Although this privilege belongs to the law enforcement agencies of the United States, there was no logical reason not to extend it to a Canadian officer where the defense counsel elicited testimony about the Canadian officer's confidential source; otherwise, the purposes of this rule would be defeated. *State v. Burke, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986)*.

**Hearing on Disclosure Warranted.**

A district court erred in failing to hold an in camera hearing under this section after the defendant had requested an in camera determination as to the identity of an informer, allowing the defendant to explore the relevant issue of the informer's reliability as it related to probable cause for the warrantless automobile search which led to the defendant's arrest. *State v. Hosey, 132 Idaho 117, 968 P.2d 212 (1998)*.

Where a district court found that the facts in a drug case showed that a confidential informant (CI) could have possibly given testimony relevant to the issues at trial, it erred by failing to conduct an in-camera review upon defendant's motion to disclose the identify of the CI. A remand was necessary to determine if a new trial was warranted. *State v. Farlow, 144 Idaho 444, 163 P.3d 233 (Ct. App. 2007)*.

**Presence of Defendant.**

Defendant failed to demonstrate that participation by his counsel in the I.R.E. 509 hearing was either required or necessary where the trial judge addressed the issues of the credibility and reliability of the confidential informant in the in camera hearing and determined that disclosure of the informant's identity was not necessary because the informant could provide no relevant testimony on the issue of probable cause. *State v. Hosey, 134 Idaho 883, 11 P.3d 1101 (2000)*.

**Purpose.**

The privilege against identifying informers is founded upon the general proposition that an informer -- whether motivated by good citizenship, promise of leniency or prospect of pecuniary reward -- may condition his cooperation upon an assurance of anonymity to protect himself or his family. *State v. Burke, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986)*.

**Request for Disclosure Denied.**

The magistrate at the preliminary hearing determined, contrary to defendant's argument, that the informant was not a participant in the commission of the crime of possession with intent to deliver; rather, the informant's activities confirmed the presence of controlled substances in the defendant's trailer, upon which the magistrate based his assessment that there was probable cause to have defendant answer for the crime; therefore, the magistrate and the district judge did not abuse their discretion in denying defendant's requests for disclosure of the informant's identity in pre-trial proceedings. *State v. Fairchild, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992)*.

In prosecution for delivery and trafficking in methamphetamine in violation of *§§ 37-2732* and 38-2732B, where defendant failed to articulate any basis for her assertion that the in camera hearing was insufficient to protect her rights and also failed to demonstrate how the informant's identity would have presented her with necessary information that the in camera hearing did not, trial court did not err in refusing to disclose the informant's identity. *State v. Kopsa, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994)*.

Defendant's claim that he was entitled to an in-camera interview to determine if a confidential informant could provide testimony relevant to an issue in his case was without merit where informant's veracity was of no consequence in defendant's prosecution, where state did not call informant at trial, proof that informant had lied would not have invalidated search warrant, and an attack on informant's truthfulness would not have benefitted defendant at trial. *Fairchild v. State, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996)*.

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# I.R.E. Rule 510

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 510. Waiver of Privilege by Voluntary Disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Psychotherapist-Patient Privilege.**

Where it appears from the trial record that the defendant gave his counselor permission to discuss his therapy and progress with the state's presentence investigator and where the record shows that at no time during the trial did defendant object to the counselor's testimony or assert his psychotherapist-patient privilege, his privilege is considered waived, and defendant is estopped from asserting on appeal that the trial court erred in the admission of this evidence. *State v. Gallipeau, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994)*.

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# *I.R.E. Rule 511*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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## Rule 512. Comment Upon or Inference From Claim of Privilege; Instruction.

**(a) Comment or inference not permitted.** The claim of any privilege, created by these rules, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel and no inference may be drawn therefrom.

**(b) Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

**(c) Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended April 27, 2011, effective July 1, 2011; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 513*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 513. Lawyer May Exercise Claim of Privilege.

Whenever a person has a right to claim a privilege on behalf of the person or for another, it may be exercised by the lawyer for such person. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# Rule 514. Parent-Child; Guardian or Legal Custodian-Ward Privilege.

**(a) Definition.** A communication is "confidential" if it is made by a minor child to the child's parent or a minor ward to the ward's guardian or legal custodian, and is not intended for disclosure to any other person.

**(b) General rule of privilege.** A child or ward has a privilege in a civil or criminal action or proceeding to which the child or ward is a party to refuse to disclose and to prevent the child's or ward's parent, guardian or legal custodian from disclosing any confidential communication made by the child or ward to the parent, guardian or legal custodian of the child or ward.

**(c) Who may claim the privilege.** The privilege may be claimed by the child or ward, the lawyer for the child or ward, or by the parent, guardian or legal custodian on behalf of the child or ward. The authority of the lawyer, parent, guardian or ward to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Civil action.** In a civil action or proceeding by one of the parties to the confidential communication against the other.

**(2) Criminal action.** In a criminal action or proceeding for a crime committed by one of the parties to the confidential communication against the person or property of the other.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# I.R.E. Rule 515

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE V. PRIVILEGES.***

## Rule 515. Accountant-Client Privilege.

**(a) Definitions.** As used in this rule:

**(1) Client.** A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional accounting services by an accountant, or who consults an accountant with a view to obtaining professional accounting services from the accountant.

**(2) Representative of the client.** A "representative of the client" is one having authority to obtain professional accounting services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the accountant of the client.

**(3) Accountant.** An "accountant" is any licensed public accountant or certified public accountant authorized, or reasonably believed by the client to be authorized, to engage in the practice of accounting in any state or nation.

**(4) Representative of the accountant.** A "representative of the accountant" is one employed by the accountant to assist the accountant in the rendition of professional accounting service.

**(5) Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional accounting services to the client or those reasonably necessary for the transmission of the communication.

**(b) General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional accounting services to the client which were made (1) between the client or the client's representative and the accountant or the accountant's representative, (2) between the accountant and the accountant's representative, or (3) by the client or the client's representative or the client's accountant or a representative of the accountant to an accountant or a representative of an accountant representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among accountants and their representatives representing the same client.

**(c) Who may claim the privilege.** The privilege may be claimed by the client or for the client through the client's lawyer, accountant, guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of

a corporation, association, or other organization, whether or not in existence. The person who was the accountant or the accountant's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the accountant or the accountant's representative to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Furtherance of crime or fraud.** If the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

**(2) Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

**(3) Breach of duty by an accountant or client.** As to a communication relevant to an issue of breach of duty by the accountant to the client or by the client to the accountant;

**(4) Document attested by an accountant.** As to a communication relevant to an issue concerning an attested document to which the accountant is an attesting witness;

**(5) Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an accountant retained or consulted in common, when offered in an action between or among any of the clients.

**(6) Shareholder actions.** As to a communication between a corporation and its accountant or a representative of the accountant, which was not made for the purpose of facilitating the rendition of professional accounting services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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## Rule 516. School Counselor-Student Privilege.

**(a) Definitions.** As used in this rule:

**(1) Student.** A "student" is a person regularly enrolled on a part-time or full-time basis in any public or private school located in the State of Idaho, who consults or is examined or interviewed by a school counselor.

**(2) School counselor.** A "school counselor" is any person duly appointed, regularly employed and designated for the purpose of counseling students by any public or private school located in the State of Idaho, or reasonably believed by the student so to be.

**(3) Confidential communication.** A communication is "confidential" if made to the school counselor while acting in the counselor's capacity as a school counselor or reasonably believed by the student to be so acting, and if not intended to be disclosed to third persons except persons present to further the interest of the student in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the student under the direction of the school counselor, including members of the student's family.

**(b) General rule of privilege.** A student has a privilege in any civil or criminal action to which the student is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of counseling services to the student, among the student, the student's school counselor, and persons who are participating in the counseling under the direction of the school counselor, including members of the student's family.

**(c) Who may claim the privilege.** The privilege may be claimed by the student, or for the student through the student's counselor, lawyer, parent, guardian or conservator, or the personal representative of a deceased student. The authority of the counselor, lawyer, parent, guardian, or conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

**(2) Proceeding for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian

or conservator for a student for mental illness or to hospitalize the student for mental illness.

**(3) Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

**(4) Contemplation of crime or harmful act.** If the communication reveals the contemplation of a crime or harmful act.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

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## Rule 517. Licensed Counselor-Client Privilege.

**(a) Definitions.** As used in this rule:

**(1) Client.** A "client" is a person who is rendered licensed counselor services.

**(2) Licensed counselor.** A "licensed counselor" is any person licensed to be a licensed professional counselor or a licensed counselor in the State of Idaho pursuant to Title 54, Chapter 34, Idaho Code, or reasonably believed by the client so to be.

**(3) Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the client under the direction of the licensed counselor, including members of the client's family.

**(b) General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed counseling services to the client, among the client, the client's licensed counselor, and persons who are participating in the licensed counseling under the direction of the licensed counselor including members of the client's family.

**(c) Who may claim the privilege.** The privilege may be claimed by the client, or for the client through the client's licensed counselor, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed counselor, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

**(2) Proceedings for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a client for mental illness or to hospitalize the client for mental illness.

**(3) Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional

condition, of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

**(4) Licensing board proceedings.** In an action, case or proceeding under *Idaho Code § 54-3404*.

**(5) Contemplation of crime or harmful act.** If the communication reveals the contemplation of a crime or harmful act.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Cited in:**

*State v. Young, 136 Idaho 113, 29 P.3d 949 (2001)*.

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## Rule 518. Licensed Social Worker-Client Privilege.

**(a) Definitions.** As used in this rule:

**(1) Client.** A "client" is the person who is rendered licensed social worker services.

**(2) Licensed social worker.** A "licensed social worker" is any person licensed to be a licensed certified social worker or a licensed social worker in the State of Idaho pursuant to Title 54, Chapter 32, Idaho Code.

**(3) Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation or interview, or persons reasonably necessary to the transmission of the communication, or persons who are participating in the rendition of social services to the client under the direction of the licensed social worker, including members of the client's family.

**(b) General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed social services to the client, among the client, the client's licensed social worker, and persons who are participating in the licensed social work under the direction of the licensed social worker, including members of the client's family.

**(c) Who may claim the privilege.** The privilege may be claimed by the client, or for the client through the client's licensed social worker, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed social worker, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** There is no privilege under this rule:

**(1) Contemplation or execution of crime or harmful act.** If the communication reveals the contemplation or execution of a crime or harmful act.

**(2) Charges against licensee.** When the client waives the privilege by bringing charges against the licensee.

**(3) Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

**(4) Proceedings for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian

or conservator for a client for mental illness or to hospitalize the client for mental illness.

**(5) Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 519*

State and Federal through Rules promulgated through January 31, 2022

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## Rule 519. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege.

**(a) Definitions.** As used in this rule:

**(1) Hospital.** A "hospital" is a facility defined in *Idaho Code § 39-1301(a)(1)* and either licensed under *Idaho Code §§ 39-1301* through *39-1314* or similarly licensed in another jurisdiction.

**(2) In-hospital medical staff committee.** An "in-hospital medical committee" is any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors or hospital employees, or any combination thereof, who are duly designated a committee by hospital staff by-laws, by action of an organized hospital staff, or by action of the board of directors of a hospital, and which committee is authorized by said by-laws, staff or board of directors, to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases.

**(3) Medical society.** A "medical society" is any duly constituted, authorized and recognized professional society or entity made up of physicians licensed to practice medicine in Idaho, having as its purpose the maintenance of high quality in the standards of health care provided in Idaho or any region or segment of the state, operating with the approval of the Idaho State Board of Medicine, or any official committee appointed by the Idaho State Board of Medicine.

**(4) Confidential communication.** A communication is a "confidential communication" under this Rule if it (A) is made in connection with a proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho; (B) is a statement of opinion or conclusion concerning the subject matter of the proceeding; and (C) is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

**(b) General rule of privilege.** A hospital, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.

**(c) Who may claim the privilege.** The privilege may be claimed by the maker of the confidential communication, by a representative of the hospital, in-hospital medical staff committee or medical society, or for the holder of the privilege by its lawyer. The authority of the representative or lawyer to do so is presumed in the absence of evidence to the contrary.

**(d) Exception.** There is no privilege under this rule as to a communication made in connection with the on-going provision of medical care to a patient.

**(e) Waiver of privilege by testimony.** The privilege as to a confidential communication under this rule is waived if the maker of the confidential communication gives evidence of his opinion or conclusion concerning the subject matter of the confidential communication.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Cited in:**

*State v. Young, 136 Idaho 113, 29 P.3d 949 (2001)*.

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## Rule 520. Medical Malpractice Screening Panel Privilege.

**(a) Confidential communication.** A communication is a "confidential communication" under this rule if it is made in a proceeding conducted or maintained under the authority of *Idaho Code §§ 6-1001* to *6-1011* and is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

**(b) General rule of privilege.** In any civil action or proceeding, a medical malpractice screening panel or any member thereof, any party to the medical malpractice screening panel proceeding, and any witness or other person who participated in the medical malpractice screening panel proceedings has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication under this rule.

**(c) Who may claim the privilege.** The privilege may be claimed by any holder of the privilege or for such person through the person's lawyer. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# *I.R.E. Rule 601*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 601. Competency to Testify in General.

Every person is competent to be a witness except:

**(a) Incompetency Determined by Court.** Persons whom the court finds are incapable of receiving just impressions of the facts about which they are examined, or of relating them accurately.

**(b) Claim Against Estate.**

**(1)** Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against a personal representative,

**(2)** upon a claim or demand against the estate of a deceased person,

**(3)** as to any communication or agreement, not in writing, with the deceased person.

**(c) Other Exceptions.**

If these rules provide otherwise.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Child Witness.
Construction with Other Laws.
Defense Against Claim.
Evidence Offered to Defend.
Incompetent.
Not Incompetent.
Out-of-Court Statements by Children.
Testimony of Deceased Witness.

**Child Witness.**

In prosecution for sexual molestation, the child victim's alleged lack of competency and the court's failure to administer a formal oath did not represent fundamental error where, after a thorough inquiry of the witness, the trial judge reasonably could conclude that the child was competent to perceive, recall and accurately retell past events, and mere lack of formal oath did not destroy fairness of the trial for the court's lengthy qualifying inquiry adequately impressed upon the child the importance of telling the truth. *State v. Mader, 113 Idaho 409, 744 P.2d 137 (Ct. App. 1987)*.

Where trial court excluded child's testimony in lewd conduct case based on the Confrontation Clause, the trial court should have first ruled whether or not child was competent under this rule. *State v. Poole, 124 Idaho 346, 859 P.2d 944 (1993)*.

**Construction with Other Laws.**

This rule repealed I.C. *§ 19-3002*; this rule clearly takes precedence over I.C. *§ 19-3002* by virtue of *Idaho Rule of Evidence 1102. State v. Martinez, 125 Idaho 445, 872 P.2d 708 (1994)*.

Where defendant filed motion asserting that a search warrant was invalid because it was based upon information provided by spouse-witness given in violation of *§ 19-3002*, and that spouse-witness's preliminary hearing testimony and potential trial testimony were inadmissible for the same reasons, the Supreme Court held in *State v. Martinez, 125 Idaho 445, 872 P.2d 708 (1994)* that this rule and I.R.E. 1102 repealed § 19-3002 when the Idaho Rules of Evidence became effective in 1985, and, as such, the Court of Appeals opined the spousal incompetency provision was ineffective when defendant originally pleaded guilty, and *§ 19-3002* would not have prevented the state's use of the spouse-witnesses' testimony. *Dunlap v. State, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995)*.

**Defense Against Claim.**

Subdivision (b) of this section does not apply to evidence used to defend against a claim. *Lowry v. Ireland Bank, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989)*.

**Evidence Offered to Defend.**

Exclusion of evidence regarding the alleged right of first refusal was an abuse of discretion, but harmless; because the evidence was being offered to defend against a claim, the district court abused its discretion in misapplying the appropriate legal standard, and no valid right of first refusal existed, as a description of the real property subject to the right of first refusal did not exist for statute of frauds purposes. *Tricore Invs. LLC v. Estate of Warren, 168 Idaho 596, 485 P.3d 92 (2021)*.

**Incompetent.**

In prosecution for second-degree murder and aggravated burglary, the trial court erred in admitting the testimony of a witness who expressed uncertainty as to whether his testimony was based on actual memories or on "dreams" after the shootings, even though the court admonished the jury that the witness's testimony was to be disregarded except as it was specifically corroborated. *State v. Hall, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986)*.

**Not Incompetent.**

Defendant's grand theft conviction in violation of *§§ 18-2403(3)* and *18-2407(1)(b)* was proper pursuant to Idaho R. Evid. 601 because the trial court considered the testimony of the victim's guardian as well as the victim's treating physician in determining the victim's competency on the day of her deposition. To the extent that the deposition responses were inconsistent or incorrect, that went more to the weight and credibility of her testimony than to its admissibility. State v. Vondenkamp, *141 Idaho 878, 119 P.3d 653 (Ct. App. 2005)*.

**Out-of-Court Statements by Children.**

Out-of-court statements by child who was an alleged victim of sexual abuse were not per se unreliable, or presumptively unreliable, on the ground that the trial court found the child incompetent to testify at trial. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

**Testimony of Deceased Witness.**

Although the trial court erred in admitting testimony regarding a telephone conversation with a party that died before trial, the error was harmless because the testimony was repetitive of other properly admitted evidence. *Lunders v. Estate of Snyder, 131 Idaho 689, 963 P.2d 372 (1998)*.

District court did not abuse its discretion by admitting evidence concerning a beneficiary's intent when signing a promissory note on behalf of a relative because the action did not concern a demand against an estate or a claim against an executor or administrator under I.C. *§ 9-202(3)*; moreover, the evidence did not constitute hearsay because it was offered for the purpose of showing the beneficiary's state of mind. *Rowan v. Riley, 139 Idaho 49, 72 P.3d 889 (2003)*.

**Cited in:**

*State v. Ransom, 124 Idaho 703, 864 P.2d 149 (1993)*; *State v. Durst, 126 Idaho 140, 879 P.2d 603 (Ct. App. 1994)*.

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# I.R.E. Rule 602

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Discretion of Court.
Lack of Foundation.
Personal Knowledge.

**Discretion of Court.**

The trial court did not abuse its discretion in admitting owner's testimony concerning the fair market value of her business or her opinion of the loss of profits due to defendant's breach of contract. *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc., 127 Idaho 41, 896 P.2d 949 (1995)*.

It was not an abuse of discretion to decline to strike parts of summary judgment affidavits on grounds of the affiant's lack of personal knowledge, because this rule does not require a witness's testimony to establish personal knowledge. *Taft v. Jumbo Foods, Inc., 155 Idaho 511, 314 P.3d 193 (2013)*.

**Lack of Foundation.**

In the trial for the murder of a bail bondsman, there was clearly no foundation for the habit testimony of the bondsman's business partner that the bondsman never used a weapon to apprehend anyone, because the partner testified that the bondsman had never taken a bail

jumper into custody, and he could not say how the victim would have acted in attempting to apprehend; however, the error in admission of the testimony was harmless, as it was equally clear that the jury knew that fact. *State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)*.

**Personal Knowledge.**

An affidavit need not contain an explicit recital of personal knowledge when it can be reasonably inferred from its contents that the material parts thereof are within the affiant's personal knowledge. *Mitchell v. State, 160 Idaho 81, 369 P.3d 299 (2016)*.

Trial court did not abuse its discretion in allowing a witness's testimony regarding a fence as a barrier, because the witness had personal knowledge of the way in which the property had been managed. *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

Declarants, based on their considerable personal knowledge and experience with the initiative and referendum processes in Idaho, provided both facts and opinion that complied with the requirements of the rules. Their opinions were not unduly speculative. *United States v. Bartley, 9 F.4th 1128 (9th Cir. 2021)*.

Plaintiffs' declarations as to whose property a tree was on were not supported by personal knowledge as required by this rule, because there was no evidence in the record that plaintiffs' neighbor, from whom plaintiffs had acquired their knowledge of the location of the tree and property lines, had personal knowledge of the location of the property line. *Sankey v. Ivey, -- Idaho --, 535 P.3d 198 (2023)*.

District court abused its discretion in granting a city's hearsay objection over a citizen's testimony that the manager of an aquatic center stated "people fall down there all the time" because it prejudiced the citizen's substantial right to present her case in an effective manner; by precluding the citizen from testifying the manager made the statement, but allowing the manager to later testify she did not, the district court impermissibly took a credibility determination away from the jury. *Oksman v. City of Idaho Falls, -- Idaho --, 549 P.3d 1086, 2024 Ida. LEXIS 50 (June 4, 2024)*.

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# I.R.E. Rule 603

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 603. Oath or Affirmation to Testify Truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Prosecutor's Comments.
Refusal.

**Cited in:**

**Prosecutor's Comments.**

By contradicting a witness's testimony in front of the jury, the prosecutor, in effect, presented his own unsworn testimony in violation of this rule and in violation of I.R.E. 103(c). *State v. Gerardo, 147 Idaho 22, 205 P.3d 671 (2009)*.

**Refusal.**

Defendant could have refused to raise his hand when making his affirmation, but he failed to make his objection clear, the act complained of was not outside of defendant's preventive or corrective powers, and there was no indication that the court would have refused defendant's option not to raise his hand if defendant had made his objection clearly known, therefore, it appeared to the court that defendant was voluntarily giving up his right to testify. *State v. Hardman, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991)*.

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# *I.R.E. Rule 604*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 604. [Reserved.]

Annotations

## Commentary

### STATUTORY NOTES

**Compiler's notes.**

The Supreme Court's order of March 27, 2018, effective July 1, 2018, made this rule reserved. The previous rule concerned interpreters.

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# *I.R.E. Rule 605*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 605. Judge's Competency as a Witness.

The presiding judge may not testify as a witness in the trial. A party need not object to preserve the issue.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Evidence.
--Admissible.

**Evidence.**

**--Admissible.**

Trial judge did not err by directing the court clerk to correct the certification on an exhibit because the judge's direction did not add to the evidence adduced, nor did the direction display antagonism that rendered fair judgment impossible. Furthermore, nothing in the judge's statement offered extrajudicial facts to the jury, nor did the judge's direction suggest that if the trial judge had not intervened, the proposed version of the exhibit would not have been admitted. *State v. Augerlavoie, -- Idaho --, 539 P.3d 981 (2023)*.

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# *I.R.E. Rule 606*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 606. Juror's Competency as a Witness.

**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

**(b) During an Inquiry into the Validity of a Verdict or Indictment.**

**(1) Prohibited Testimony or Other Evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.

The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

**(2) Exceptions.** A juror may testify about whether:

**(A)** extraneous prejudicial information was improperly brought to the jury's attention;

**(B)** an outside influence was improperly brought to bear on any juror; or

**(C)** the jury determined any issue by resort to chance; or

**(D)** a mistake was made in entering the verdict on the verdict form.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Affidavits.
Discretion of Court.
Impeachment of Verdict.
Inquiry into Verdict.
--Prejudicial Information.

Intent.
Juror Affidavits.
Juror Interviews.
Jury Instructions Misunderstood.
New Trial Properly Denied.
Purpose.
Quotient Verdict.

**Affidavits.**

Even if affidavits from every juror are not presented with the motion for a new trial, the affidavits filed with the court must establish by a clear showing that all jurors agreeing to the "quotient verdict" were impermissibly bound. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

Evidence of one juror's brief expression of opinion that the defendant would receive light punishment is not admissible to challenge the validity of the verdict. *State v. Setzer, 136 Idaho 477, 36 P.3d 829 (Ct. App. 2001)*.

The testimony of the jurors regarding the alleged compromise by which the verdict was reached was precisely the type of evidence that was rendered inadmissible by this rule. *State v. Setzer, 136 Idaho 477, 36 P.3d 829 (Ct. App. 2001)*.

**Discretion of Court.**

The determination of whether the conduct of the jury in returning a verdict based on averaging has deprived a party of a fair trial, and whether to grant or deny a new trial, is left to the sound discretion of the trial court. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

**Impeachment of Verdict.**

Jurors may not impeach their verdict by the use of affidavit or otherwise, unless the verdict was determined by chance. *State v. Bell, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988)*.

Where the juror's alleged statements regarding the rationale behind the jury's verdict were clearly inadmissible to impeach the verdict, and defendants presented no evidence to show that the extraneous prejudicial information was improperly brought to the jury's attention, that any outside influence was improperly brought to bear upon juror, or that the jury determined any issue by resort to chance, the district court correctly concluded that the defendants had failed to present any evidence upon which the jury's verdict would be impeached. *State v. Webster, 123 Idaho 233, 846 P.2d 235 (Ct. App. 1993)*.

**Inquiry into Verdict.**

In a personal injury action, the juror affidavits offered in an attempt to demonstrate that the jury reached its decision based upon the belief that a verdict against the defendant would force him to personally pay for any damages and alleging that this belief arose from the court's instructions that no insurance was involved or was to be considered were not admissible to impeach the jury's verdict and could not be considered as a basis for a motion for new trial. *Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988)*.

The reasons for excluding evidence attempting to impeach the verdict include insuring the freedom of deliberations, the stability and finality of verdicts and the protection of jurors. *Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988)*.

Where no information was presented suggesting that extraneous prejudicial information was improperly brought to the jury's attention, that outside influence was improperly brought to bear on any juror, or that the jury resorted to chance, the evidence of a juror's statement contained in the affidavit, to the effect that several jurors refused to participate in deliberations, was inadmissible. *Myers v. A.O. Smith Harvestore Prods., Inc., 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988)*.

The proper standard in determining whether to grant a new trial on the basis of extraneous prejudicial information is whether prejudice reasonably could have occurred, rather than whether prejudice actually has occurred. *Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989)*.

In the determination of whether to grant a new trial on the basis of extraneous prejudicial information, a rebuttable presumption of prejudice is unnecessary; the judge needs simply to determine whether prejudice reasonably could have occurred. *Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989)*.

Where the trial judge implicitly found that extraneous information had reached the jury and where the judge denied a new trial because he believed that no prejudice actually had resulted, since the judge did not apply the test of whether prejudice reasonably could have resulted, the proper appellate response was to vacate his decision and to remand the case for reconsideration. *Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989)*.

Where court remanded case to the trial court to reconsider motion denying new trial, judge was to distinguish between those parts of the jurors' affidavits which would be admissible in evidence under this rule and those parts which would not; the judge was to consider those parts which would identify the extraneous information and the circumstances under which it reached some or all of the jurors; however, the judge was not to consider the affiants' statements as to whether the extraneous information affected their votes on the verdict. *Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989)*.

Where defendant argued that the judgment of conviction should have been set aside because, after the trial, a juror submitted an affidavit which stated he felt pressured into finding defendant guilty of possessing psilocybin mushrooms with the intent to deliver, jury's verdict could not be impeached by affidavit or otherwise except where the verdict was determined by chance or

where extraneous prejudicial information or outside influence was identified. *State v. Burnside, 115 Idaho 882, 771 P.2d 546 (Ct. App. 1989)*.

The distinction the appellants attempted to draw between "directly" attacking a verdict and "indirectly" attacking a verdict by challenging juror conduct during voir dire was one which was not legally cognizable when analyzing the applicability of this rule, thus, the district court properly struck the juror's responses to the voir dire questionnaire. *Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995)*.

Trial court's refusal, pursuant to subsection (b) of this rule, to consider juror's testimony that the jury had considered the defendant's failure to testify in his trial for sexual abuse of a minor, did not violate the *Fifth Amendment of the U.S. Constitution*; the instruction not to consider the defendant's failure to testify was sufficient to protect the defendant's constitutional privilege not to testify. *State v. DeGrat, 128 Idaho 352, 913 P.2d 568 (1996)*.

**--Prejudicial Information.**

Where the district court recognized the proper standard, stating that the court could still make the determination that certain evidence, if presented, would have a likelihood of changing the jurors' minds, the district court did not err in refusing to allow jurors to testify how the prejudicial information affected their verdict or whether the result would have been different had more evidence on the victim's credibility been adduced. *Reynolds v. State, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994)*.

**Intent.**

The focus of subsection (b) of this section on outside evidence or influence to prove jury misconduct manifests an intent to avoid the policy concerns articulated by the courts that verdicts be final and that jury deliberations not be the subject of post-trial inquiry or harassment; not only does subsection (b) of this section have a sound basis in policy, but it also attempts to avoid the practical concern that an affidavit by a juror to impeach his or her own verdict is potentially unreliable. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

**Juror Affidavits.**

Because the reason a juror abstained from deliberation was unrelated to whether the verdict was one of chance or any of the other exceptions governed by this section, the general rule prohibiting evidence of "any matter or statement occurring during the course of the jury's deliberations" is applicable; a court may not consider juror affidavits indicating reasons that certain jurors abstained from the deliberations. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

Where the district judge found that juror affidavits were offered to demonstrate the effect that having certain information would have had on certain jurors' minds while deliberating, he did not err in striking the affidavits. *Roberts v. State, 132 Idaho 494, 975 P.2d 782 (1999)*.

When a doctor sued a hospital under the Americans with Disabilities Act of 1990, *42 U.S.C.S § 12101* et seq., and the Rehabilitation Act of 1973, *29 U.S.C.S. § 701* et seq., for terminating his hospital privileges due to his bipolar illness diagnosis, Idaho R. Evid. 606(b) did not bar the introduction of a juror's affidavit stating that another juror made a prejudicial comment during voir dire to show the second juror's dishonesty, but the doctor's motion for a new trial under Idaho R. Civ. P. 59(a)(2), which alleged juror misconduct, did not point to a material question the juror failed to answer honestly on voir dire, or show that a correct answer to the question would have provided a basis for a challenge for cause, so, because his allegation that a juror lied during voir dire was not raised before the trial court, the trial court correctly denied his motion for new trial. *Levinger v. Mercy Med. Ctr., 139 Idaho 192, 75 P.3d 1202 (2003)*.

Following a verdict, the court is precluded from consideration of juror affidavits that allege that the special verdict form was erroneously filled out, as jurors may only testify on the questions of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, and whether or not the jury determined any issue by resort to chance. *Hoffer v. Shappard, 160 Idaho 868, 160 Idaho 870, 380 P.3d 681 (2016)*.

**Juror Interviews.**

Although the trial court erred in finding that this rule restricts the permissible scope of postconviction juror interviews to those topics on which the jurors themselves might testify, it was correct in finding that lines of inquiry related to the jurors' deliberations, mental processes, minds, or emotions were improper. *Hall v. State, 151 Idaho 42, 253 P.3d 716 (2011)*.

**Jury Instructions Misunderstood.**

In ruling on a motion for new trial, the court did not err in refusing to consider affidavits from two jurors stating that they misunderstood the jury instructions; the review of the internal deliberation process of the jury is prohibited unless affected by extraneous prejudicial information or outside influence. *Andrews v. Idaho Forest Indus., Inc., 117 Idaho 195, 786 P.2d 586 (Ct. App. 1990)*.

**New Trial Properly Denied.**

Where court did not state a time when jury would be considered "hung", and where it was unclear whether statement regarding judge leaving town for the weekend was made by bailiff or another juror, it was not erroneous to deny motion for a new trial. *State v. Vaughn, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993)*.

Court did not err in failing to grant a new trial for the defendant after the defendant presented an investigator's affidavit that jurors had considered the defendant's decision not to testify in their deliberations, where the court, in a jury instruction, had instructed the jury not to consider the defendant's decision. *State v. Turner, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2001)*.

**Purpose.**

By avoiding potentially misleading affidavits of jurors attempting to impeach their verdict, subsection (b) of this section helps focus on the true purpose of the chance verdict rule; the purpose of the rule is to assure that a jury participate in "solemn deliberation," and avoid a verdict that was irrationally skewed by a minority of "inveterate juror[s]." *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

**Quotient Verdict.**

When a jury engages in a process of averaging, coupled by a prior agreement by each of the jurors to be bound, the resulting verdict has been labeled a quotient verdict; because an average is permissible without a prior agreement, an agreement to be bound has been called "the vitiating fact" of a quotient verdict. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

**Cited in:**

*Fussell v. St. Clair, 120 Idaho 591, 818 P.2d 295 (1991)*.

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# *I.R.E. Rule 607*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 607. Who May Impeach a Witness.

Any party, including the party that called the witness, may attack the witness's credibility.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Prior Inconsistent Statements.
State's Witnesses.
Admissions.
Contradictory Statements.
Effect of Impeachment.
Foundation for Impeachment.
In General.
Medical Records.
Nature of Prior Statements.
Prejudicial Remarks.
Previous Testimony.
Prior Inconsistent Statements.
Proof of Prior Statements.
State's Witnesses.
Surprise.

**Prior Inconsistent Statements.**

District court did not abuse its discretion by allowing the state to inquire into defendant's brother's prior inconsistent statements for impeachment purposes, because it did not admit the late-disclosed jailhouse telephone conversations between defendant and his brother, the colloquy did not reference the brother's incarceration, and defendant's position was that the evidence was merely cumulative. *State v. Lankford, -- Idaho --, 535 P.3d 172 (2023)*.

**State's Witnesses.**

Court, in defendant's domestic battery case, did not err by allowing the State to impeach the victim where the State examined the victim for a purpose other than that of simply impeaching her before the jury with otherwise inadmissible substantive evidence. *State v. Hoover, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003)*.

**Cited in:**

*State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*; *Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001)*.

**Decisions Under Prior Rule or Statute**

**Admissions.**

Evidence of statements in the nature of admissions made by a party to the suit may be proved without first calling his attention to them, or laying any foundation for impeachment. This is true in spite of the fact that the tendency of such evidence or statements is to impeach such party. *Coffin v. Bradbury, 3 Idaho 770, 35 P. 715 (1894)*.

**Contradictory Statements.**

Proof of contradictory statements made out of court is sufficient to impeach witness without further finding that such statements were wilfully and intentionally false. *State v. Dong Sing, 35 Idaho 616, 208 P. 860 (1922)*.

An appraisal of a ranch did not tend to impeach the testimony of a witness concerning its value but, in the broader sense of impeachment, it did contain representations of value contradictory of the witness' testimony. *Gem-Valley Ranches, Inc. v. Small, 90 Idaho 354, 411 P.2d 943 (1966)*.

**Effect of Impeachment.**

Impeaching evidence of prior contradictory statements can be considered only as affecting the credibility of the witness sought to be impeached. *Bodenhamer v. Pacific Fruit & Produce Co., 50 Idaho 248, 295 P. 243 (1931)*.

Written statements of defendant's witnesses, offered by defendant for the purpose of impeaching the testimony of such witnesses, could only have affected their credibility and would not have been evidence of the facts recited therein; hence their exclusion was not prejudicial to defendant. *Davis v. Schmidt Bros., 92 Idaho 312, 442 P.2d 448 (1968)*.

**Foundation for Impeachment.**

Where a witness was asked if he did not write a certain letter containing certain matter, and objection was made to such question without such witness being shown such letter or given an opportunity to identify the same, it was error for the court to overrule such objection. *Keane v. Pittsburg Lead Mining Co., 17 Idaho 179, 105 P. 60 (1909)*.

Where no proper foundation is laid for introduction of alleged conversation wherein witness has made certain statements, court may properly exclude such evidence. *State v. Farmer, 34 Idaho 370, 201 P. 33 (1921)*.

Where evidence was offered solely for impeachment, foundation therefor should have been laid. *State v. Cox, 37 Idaho 397, 216 P. 724 (1923)*.

It is gross error and subversive of substantial justice to allow a party to litigation to introduce ex parte and extrajudicial statements not made in the presence or by the authority of the party to be bound, and it is equally erroneous to allow such questions to be asked by way of laying the foundation for impeaching the witness. Witnesses can only be impeached by proof of contradictory statements of a material fact. *State v. Jones, 62 Idaho 552, 113 P.2d 1106 (1941)*.

It was not error to refuse to allow wife of accused in burglary trial to testify concerning conversation she had with her brother relative to his testimony since no ground was laid for impeachment and such conversation was not shown to be either material, relevant or competent. *State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945)*.

Bookkeeper, who testified favorably for the employer in a proceeding by alleged common-law wife to recover compensation for death of employee, could not be impeached by a memorandum reportedly made by bookkeeper to claimant that she might be entitled to social security benefits as widow of the employee, where the memorandum was not shown to the bookkeeper, and she was not questioned concerning same during her testimony. *Foster v. Diehl Lumber Co., 77 Idaho 26, 287 P.2d 282 (1955)*.

In a proceeding for ejectment filed by plaintiff, as purchaser of north portion of a lot, against defendant, as purchaser of the south portion of the lot, arising out of dispute over boundary line, the defendant on rebuttal was not entitled to introduce testimony that plaintiff's witness had made contradictory statements to that testified to by him, where the defendant failed to lay a proper foundation. *Paurley v. Harris, 77 Idaho 336, 292 P.2d 765 (1956)*.

The purpose of the former rule requiring foundation, the showing of the time, place and persons present to be shown in order to lay a foundation for impeachment of testimony, was to avoid unfair surprise and to afford the witness attacked, and the party calling him, an opportunity to correct his testimony or explain the contradiction. *Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958)*.

Companion of injured minor in whose behalf suit had been brought to recover for his injuries sustained when he rode his motor scooter out from the private driveway of his parents' residence into the highway and was struck some seven feet beyond the curb line, who was a witness to such accident and from whom a statement was taken by an insurance investigator

two days after occurrence, could be contradicted in his testimony on the trial of such cause as to conditions surrounding the accident by calling his attention to the time, place and persons present when the statement was made, he being extensively examined in regard to such statement and the writing being shown to him. *Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958)*.

A deposition could not be used to impeach a witness where the deposition was not shown to the witness and he was not given opportunity to explain the statements and any changes made. *Hodge v. Borden, 91 Idaho 125, 417 P.2d 75 (1966)*.

In a prosecution for kidnapping and assault with intent to commit infamous crime against nature, the admission into evidence of a handwritten document for the purpose of impeaching defendant's testimony at trial consisting of an alibi placing him out of the area at the time the offenses occurred was not error, where before he was subjected to any questions defendant inspected the document which had been prepared in the presence of two cellmates while defendant was in the county jail awaiting trial, and where defendant offered no testimony to explain any inconsistency in the written statement with his testimony at trial. *State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976)*.

**In General.**

Witness called may be contradicted and rebutted by the party calling him. *Franklin v. Wooters, 55 Idaho 619, 45 P.2d 804 (1935)*.

**Medical Records.**

In an action for negligence by a patient against a hospital, written statements of an attending physician, made when the patient was discovered to have a fractured femur, that it probably occurred at the time of her fall from the hospital bed, were admissible to impeach his refusal as a witness to give an opinion as to when the fracture occurred. *Butler v. Caldwell Mem. Hosp., 90 Idaho 434, 412 P.2d 593 (1966)*.

**Nature of Prior Statements.**

Witness could not be impeached by testimony that he previously had stated that the shooting for which defendant was on trial "was as cold blooded a murder as could be," as such statement was merely an opinion of witness. *State v. Crea, 10 Idaho 88, 76 P. 1013 (1904)*.

For the purpose of impeaching witness by proof of contradictory statements they must have reference to some fact that has become material in case. *Hilbert v. Spokane Int'l Ry., 20 Idaho 54, 116 P. 1116 (1911)*.

If a witness' prior statement shows inconsistencies with testimony only by an inference and another inference in favor of consistency may be drawn, the statement is inadmissible for impeachment purposes. *State v. Bush, 50 Idaho 166, 295 P. 432 (1930)*.

**Prejudicial Remarks.**

While party producing witness may contradict him by other evidence and may show that he has made statements inconsistent with his testimony, yet prosecutor in a criminal case should not ask witness if he had made conflicting statements for the purpose of prejudicing him before the jury, and then fail to produce evidence of such statements, and if he does so, court should specifically instruct jury to disregard such questions. *State v. Fowler, 13 Idaho 317, 89 P. 757 (1907)*.

**Previous Testimony.**

If witness admits making contradictory statements there is no necessity of introducing transcript of testimony taken at preliminary examination. If he does not absolutely admit that he made contradictory statements, then adverse party should be allowed to prove them. *State v. Fellis, 35 Idaho 584, 207 P. 1074 (1922)*.

The trial court erred in refusing to admit in evidence for impeachment purposes a sketch made by the defense attorney at the preliminary hearing showing where a witness testified she was at the time of the collision; however, the defendant was not harmed by such ruling in view of other evidence. *State v. Wendler, 83 Idaho 213, 360 P.2d 697 (1961)*.

**Prior Inconsistent Statements.**

Where witness for state testifies contrary to his testimony at coroner's inquest, such testimony may be introduced to contradict him. *State v. Corcoran, 7 Idaho 220, 61 P. 1034 (1900)*; *State v. Gee, 48 Idaho 688, 284 P. 845 (1930)*, overruled on other grounds, *State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937)*.

Permitting the prosecuting attorney to examine a state's witness concerning previous testimony he had given at the preliminary examination did not constitute prejudicial error, where the witness simply denied having any recollection of the incident and facts about which he was interrogated. *State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940)*.

There is no requirement that the party producing a witness must show that the witness is hostile before he may impeach the witness by showing that he has made statements inconsistent with his present testimony. *Wyman v. Dunne, 83 Idaho 179, 359 P.2d 1010 (1961)*.

**Proof of Prior Statements.**

Transcript of questions asked of witness in office of prosecutor cannot be offered to impeach witness where it was not signed or adopted by him. In such case demand that transcript be shown witness or counsel is properly refused. *State v. Gee, 48 Idaho 688, 284 P. 845 (1930)*, overruled on other grounds, *State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937)*.

State was not required to call all impeaching witnesses to whom inconsistent statements were made. *State v. Allen, 54 Idaho 459, 34 P.2d 45 (1934)*.

It was an abuse of discretion to refuse to permit more than two of the four persons present to testify to a statement of a witness sought to be impeached. *State v. Calico, 55 Idaho 96, 38 P.2d 1002 (1934)*.

Assignment of error of the trial court in denying admission of plaintiff's exhibit, a written statement relating to the accident elicited about a month and a half after the accident occurred, where court afforded opportunity to cross-examine party making statements which appellant contended were inconsistent with prior testimony and which would tend to impeach the party as a witness, was without merit. *Morford v. Brown, 85 Idaho 480, 381 P.2d 45 (1963)*.

**State's Witnesses.**

The court did not err in permitting the state to impeach its own witness by showing previous contradictory statements and the defendant was not prejudiced thereby. *State v. Mundell, 66 Idaho 339, 158 P.2d 799 (1945)*.

**Surprise.**

A party who claims surprise at the changed statements of his witness has the right to show contrary statements. *Franklin v. Wooters, 55 Idaho 619, 45 P.2d 804 (1935)*.

**Cited in:**

*State v. Miller, 157 Idaho 838, 340 P.3d 1154 (Ct. App. 2014)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness. *3 A.L.R.6th 269*.

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# I.R.E. Rule 608

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 608. A Witness's Character for Truthfulness or Untruthfulness.

**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.

But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

**(1)** the witness; or

**(2)** another witness whose character the witness being cross-examined has testified about.

**(c) Effect of Giving Testimony.** By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Evidence Held Improper.
Opinion Testimony.
"Otherwise."
Particular Wrongful Acts.
Prior Alleged Perjury.
Prosecutor's Remarks.

Remote Events.
"Truthfulness" and "Honesty."
Affidavit.
Evidence of Reputation.
Materiality.
Particular Wrongful Acts.

**Evidence Held Improper.**

Admission of character evidence as to truthfulness of a defendant was improper and warranted a new trial where a direct attack on the truthfulness of defendant could not be inferred from the tone of cross-examination questions posed to the defendant nor from the fact that defendant was asked to explain some apparent inconsistencies between his testimony and previous statements. *Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989)*.

Trial judge's allowance of opinion testimony as to defendant's character for truthfulness was improper and it afforded grounds for a new trial under I.R.C.P., Rule 59 (a)(1) where cross-examination of defendant concerning inconsistent statements was neither accompanied by derogatory allegations or accusatory insinuations regarding defendant's character, nor were the questions directed to matters collateral to the litigation. *Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989)*.

Testimony by one witness that another witness was, or was not, telling the truth when they made a particular statement is not admissible evidence. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

Questions designed to rebut anticipated impeachment or attacks upon the character of a witness are improper because the credibility and character of a witness may not be supported before they have been attacked. *State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011)*.

Trial court did not err by excluding testimony of three witnesses that the infant victim's mother had been unfaithful to defendant, because it was not admissible. It was extrinsic evidence of specific instances of the mother's conduct, in violation of subsection (b) of this rule, and because the evidence was not relevant under *Rule 404 of the Rules of Evidence.State v. Carson, 151 Idaho 713, 264 P.3d 54 (2011)*.

Prior instances of defendant's conduct, elicited on cross-examination, were not probative to his character for truthfulness or untruthfulness, as none of the prior instances of conduct placed his veracity in question, and were not admissible. *State v. Hayes, 166 Idaho 646, 462 P.3d 1110 (2020)*.

**Opinion Testimony.**

The fact that officer was supposedly an expert qualified to evaluate the credibility of statements made by witnesses during police interrogations does not make this opinion testimony admissible. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

Where the Court of Appeals determined that the detectives' opinions regarding the credibility of a witness must be based upon sufficient contact with the witness in order to enable them to permissibly render opinions, and where such a showing of sufficient contact was made, the detectives' opinions were relevant and admissible under this rule. *State v. Carsner, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995)*.

**"Otherwise."**

The term "otherwise," as used in subsection (a) of this rule, embodies a recognition that a witness's character might be attacked through questions or evidence ostensibly directed at an issue in the case, but having the real effect of impugning the witness. Thus, if evidence is presented of corrupt misconduct by the witness, even if germane to an issue in the case, it is generally agreed that the witness's character for truthfulness has been attacked. *Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989)*.

**Particular Wrongful Acts.**

In prosecution for manufacturing a controlled substance, the question whether extrinsic evidence of drug-related activities should have been admitted to contradict the informant's cross-examination testimony was committed to the trial court's discretion on remand, the critical question being the foundation laid by the defendant for introducing the evidence. *State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*.

Cross-examination of defendant about a prior misdemeanor petit theft conviction was admissible under this rule because it was probative of his character for truthfulness. *State v. Johnson, -- Idaho --, 544 P.3d 766 (2024)*.

**Prior Alleged Perjury.**

The trial court did not abuse its discretion under this rule or violate defendant's constitutional right of confrontation by refusing to allow cross-examination of the state's witness concerning the witness' prior alleged perjury. Additionally, the trial court correctly excluded testimony from a defense witness concerning specific instances of untruthfulness by the state's witness. *State v. Araiza, 124 Idaho 82, 856 P.2d 872 (1993)*.

**Prosecutor's Remarks.**

It was not improper for prosecutor to say in opening remarks that the jurors would get to judge the victim for themselves to see what kind of a 13-year old girl she was, as this was a request that the jurors disregard any generalized biases or prejudices that they may hold concerning young teen-aged girls and that they judge the victim as presented. *State v. Reynolds, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991)*.

Where prosecutor's mention of a potential cocaine transaction involving defendant had nothing to do with either the alleged marijuana transaction with which defendant was charged, or defendant's credibility, the error was not harmless and required remand for a new trial. *State v. Fernandez, 124 Idaho 381, 859 P.2d 1389 (1993)*.

**Remote Events.**

In a criminal action in which defendant was charged with lewd conduct with a minor under sixteen, the trial court in the exercise of its discretion properly concluded that prior accusations made by the minor eight to nine years earlier would have added nothing of probative value to the case, thus the defense was prohibited from cross-examining the minor about such remote events. *State v. Downing, 128 Idaho 149, 911 P.2d 145 (Ct. App. 1996)*.

**"Truthfulness" and "Honesty."**

"Truthfulness" and "honesty" are, by most dictionary definitions, synonymous. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

There was no error by trial court in allowing three state rebuttal witnesses to offer opinions as to defendant's truthfulness and honesty, despite the defendant's argument that witnesses could only give their opinion of his truthfulness, not his honesty. *State v. Hedger, 115 Idaho 598, 768 P.2d 1331 (1989)*.

Testimony as to the veracity of another witness was harmless beyond a reasonable doubt, where there was no reasonable possibility that this portion of his testimony might have contributed to defendant's conviction, and because it was harmless, this error should not serve as a basis for reversal. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

Whether a witness was being truthful at the time the witness made a statement is for the jury, not another witness to determine. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

Under paragraph (b) of this rule, a court possesses discretion to permit cross-examination of a witness about an episode of his lying to the police, even though, under I.R.E. 609(a), evidence of his misdemeanor conviction for providing that false information to the police is not admissible. *State v. Bergerud, 155 Idaho 705, 316 P.3d 117 (Ct. App. 2013)*.

In a fraud case, it was not error to allow an ex-husband to testify that an alleged healer was not a truthful person; even though they were divorced, the ex-husband's testimony related to the time the healer claimed to have been diagnosed with cancer prior to her claim of curing herself. *Alexander v. Stibal, 161 Idaho 253, 385 P.3d 431 (2016)*.

**Cited in:**

*State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989)*; *State v. Siegel, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002)*; *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

## Decisions Under Prior Rule or Statute

### Affidavit.

Affidavit impeaching witness by showing that his reputation for truth and veracity was bad was proper in a civil case. *Hansen v. Standard Oil Co., 55 Idaho 483, 44 P.2d 709 (1935)*.

### Evidence of Reputation.

While a lewd woman is less likely to be truthful than a chaste woman, still there is not such an immediate connection between unchastity and untruthfulness as to permit a woman's chastity to be called in question every time she goes on witness stand. *State v. Hammock, 18 Idaho 424, 110 P. 169 (1910)*.

Whether or not evidence is too remote to have probative value on question of reputation of witness for truth and veracity, at the time of trial, is for the court. *State v. Goodrich, 33 Idaho 654, 196 P. 1043 (1921)*.

The impeachment of a defendant who testified in his own behalf, by testimony purporting to show that defendant's reputation for truth, honesty, and integrity in the community in which he resided was bad, was improper, without defendant first putting his reputation therefore in issue. *State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945)*.

Trial judge did not abuse his discretion in allowing testimony as to reputation which was three years old. *State v. May, 93 Idaho 343, 461 P.2d 126 (1969)*.

### Materiality.

Witness may not be impeached upon matter that is immaterial. *State v. Farmer, 34 Idaho 370, 201 P. 33 (1921)*; *State v. Bush, 50 Idaho 166, 295 P. 432 (1930)*.

### Particular Wrongful Acts.

Witness cannot be impeached by evidence of particular wrongful acts having no connection with matter on trial. *State v. Anthony, 6 Idaho 383, 55 P. 884 (1899)*; *Labonte v. Davidson, 31 Idaho 644, 175 P. 588 (1918)*.

In prosecution for statutory rape it is not permissible for defendant to impeach evidence of prosecutrix by introducing in evidence particular acts of her unchastity with other persons. *State v. Henderson, 19 Idaho 524, 114 P. 30 (1911)*; *State v. Farmer, 34 Idaho 370, 201 P. 33 (1921)*; *State v. Black, 36 Idaho 27, 208 P. 851 (1922)*; *State v. Cosler, 39 Idaho 519, 228 P. 277 (1924)*.

Questions asked of third person for purpose of showing that accused participated in wrongful acts having no connection with matter on trial are not allowable. *State v. Muguerza, 46 Idaho 456, 268 P. 1 (1928)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. *44 A.L.R.3d 1203*.

Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it. *76 A.L.R.3d 539*.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. *24 A.L.R.6th 747*.

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# *I.R.E. Rule 609*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 609. Impeachment by Evidence of a Criminal Conviction.

**(a) In General.** For the purpose of attacking a witness's character for truthfulness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony must be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the witness's character for truthfulness and that the probative value of this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for impeachment of a party to the action or proceeding, the party has the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction is not admissible.

**(b) Limit on Using the Evidence after 10 years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

**(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

**(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

**(c) Effect of a Withheld or Vacated Judgment; Pardon for Innocence.** Evidence of a withheld judgment or a vacated judgment must not be admitted as a conviction. A conviction that has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence is not admissible under this rule.

**(d) Effect of a Pardon, Annulment or Certificate of Rehabilitation Not Based on Innocence; Pendency of an Appeal.** If the conviction has been the subject of a pardon, annulment or certificate of rehabilitation or other equivalent procedure not based on a finding of innocence, or is the subject of a pending appeal, the evidence of a conviction is not rendered inadmissible, but such information must be considered by the court in determining admissibility. Evidence of the pardon, annulment, certificate of rehabilitation or other equivalent procedure, or pendency of an appeal is admissible if evidence of the conviction is admitted.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998; amended September 1, 2015, effective January 1, 2016; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Commentary

### STATUTORY NOTES

**Official Comment.**

Comment Subsection (a): The 2016 amendment substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness.

## Case Notes

Conviction of Informant.
Determination of Relevance.
Misdemeanor Convictions.
Nature of Felony.
Old Convictions.
Prior Conviction of Defendant.
Record of Trial Court.
Test.
Withheld Judgment.
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Improper Answers.
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In Camera Hearing.
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Manner of Proof.
Misdemeanor Convictions.
Number or Nature of Convictions.
Probative Value.
Procedure.
Prosecutor's Statement.
Rebuttal Evidence.
Use of Conviction.
Withheld or Vacated Judgment.

**Conviction of Informant.**

The court found that the confidential informant's conviction for delivery of marijuana did not go to the ability of the witness to tell the truth and provided no basis from which the court could judge that a person with that kind of conviction was not truthful. The court then concluded that any relevance of the delivery conviction was outweighed by its prejudicial effect. The court, therefore, did not allow evidence that the informant had been convicted of delivery of marijuana and concluded that no abuse of discretion occurred by excluding evidence of the prior conviction. *State v. Wheeler, 129 Idaho 735, 932 P.2d 363 (Ct. App. 1997)*.

**Determination of Relevance.**

A district court erred in permitting the state to introduce evidence of a prior felony conviction, for the purpose of impeaching the testimony of a witness, before determining the relevancy of the felony conviction. *State v. Franco, 128 Idaho 815, 919 P.2d 344 (Ct. App. 1996)*.

In determining whether evidence of a prior conviction should be admitted, a trial court must (1) determine whether the fact or nature of the conviction is relevant to the witness's credibility, and (2) if so, whether the probative value of the evidence outweighs its prejudicial impact. *State v. Thompson, 132 Idaho 628, 977 P.2d 890 (1999)*.

Where the district court considered the nature of a victim's prior conviction for aggravated assault, it correctly determined that it was not relevant to his credibility. *State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999)*.

Where defendant was charged with numerous sex offenses against a girl from the time she was 10 until she was 17, the trial court did not abuse its discretion in precluding defendant from impeaching the victim's younger brother with a theft conviction that occurred one month before defendant's retrial: given the limited testimony of the witness and given that he was not the alleged victim or a party to the action, his credibility was not central to defendant's case and the probative value of his theft conviction was very low. *State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012)*.

**Misdemeanor Convictions.**

Where plaintiff's conviction for failure to file income tax returns was a misdemeanor, not a felony, the trial court's decision to prohibit this evidence was upheld. *Fuller v. Wolters, 119 Idaho 415, 807 P.2d 633 (1991)*.

The prosecutor was not required to disclose information that the state's witnesses had misdemeanor charges against them dropped, because the defense would not have been able to use the dismissed misdemeanor charges as grounds for impeachment of confidential informants under this rule, which only allows felony convictions to be used for impeachment purposes. *Ramirez v. State, 119 Idaho 1037, 812 P.2d 751 (Ct. App. 1991)*.

Under I.R.E.608(b), a court possesses discretion to permit cross-examination of a witness about an episode of his lying to the police, even though, under paragraph (a) of this rule, evidence of his misdemeanor conviction for providing that false information to the police is not admissible. *State v. Bergerud, 155 Idaho 705, 316 P.3d 117 (Ct. App. 2013)*.

Witness' conviction for an earlier offense was not admissible under this rule to impeach the witness, and, therefore, the trial court properly excluded it, where the offense, possession of drug paraphernalia, was a misdemeanor. *State v. Kubat, 158 Idaho 661, 350 P.3d 1038 (Ct. App. 2015)*.

**Nature of Felony.**

The court properly allowed evidence concerning the fact a murder defendant had been convicted of a felony and to minimize prejudice the court did not allow the state to show the nature of the felony. *State v. Rodgers, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990)*, aff'd, *119 Idaho 1047, 812 P.2d 1208 (1991)*.

Arranging a drug transaction in and of itself is not probative of whether a person is truthful or untruthful, and a trial court should be cautious in considering whether a felony conviction for participating in the delivery of a controlled substance is sufficiently relevant, when exploring its admissibility with respect to an issue of credibility under subsection (a) of this rule. *State v. Konechny, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000)*.

**Old Convictions.**

While subsection (b) allows the use of prior convictions over ten years old upon adequate prior notice to the opposing party, where defendant provided no such notice, the trial court properly restricted the cross-examination of the witness. *State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000)*.

**Prior Conviction of Defendant.**

The fact that the defendant was convicted in another state for second degree rape, that prior felony, described as being similar to incest, involved a crime of passion which did not bear directly upon the defendant's honesty or veracity or establish a pattern of disrespect for law and lawful authority, and the potential for unfair prejudice to the defendant in admitting evidence thereof in the trial for aggravated battery was manifest and substantial, the trial judge abused his discretion in permitting of such evidence to be admitted. *State v. Allen, 113 Idaho 676, 747 P.2d 85 (Ct. App. 1987)*.

In a trial for lewd conduct with a minor under sixteen, the trial court did not err in admitting the defendant's prior felony conviction in Nevada for lewdness with a minor, as such a felony has some relevance to the defendant's credibility. *State v. Muraco, 132 Idaho 130, 968 P.2d 225 (1998)*.

The defendant's prior conviction for lewd and lascivious conduct was relevant for impeachment purposes in his trial for sexual battery of a minor, where the issue of credibility was central to the case, and where the probative value of the evidence outweighed the prejudicial effect. *State v. Thompson, 132 Idaho 628, 977 P.2d 890 (1999)*.

The district court did not err by allowing evidence of defendant's prior conviction of a felony to be introduced in cross-examination to impeach him. *State v. Page, 135 Idaho 214, 16 P.3d 890 (2000)*.

This rule will only authorize the admission of evidence when (1) a conviction is being used to impeach a witness and (2) the conviction is impeaching because it shows that a witness has a certain kind of criminal nature. The second condition, framed as a relevancy requirement in the rule, informs the meaning of the phrase "attacking the credibility of a witness"; therefore, given context, the phrase "attacking the credibility of the witness" means attacking the credibility of the witness on the basis that he has a certain kind of criminal nature that renders him untrustworthy. *State v. Kubat, 158 Idaho 661, 350 P.3d 1038 (Ct. App. 2015)*.

Admission of the witness' guilty plea to a misdemeanor was not governed by this rule, where the state was not attempting to prove the witness less credible, because she had committed a crime showing that she was dishonest, but rather the state was trying to question the witness' honesty about the presence of paraphernalia in the home, because she had previously admitted possessing paraphernalia in the home on that day. *State v. Kubat, 158 Idaho 661, 350 P.3d 1038 (Ct. App. 2015)*.

Use of 14-year-old, out-of-state, conviction for first-degree burglary to impeach defendant charged with possession of drugs and aggravated assault, even if in error, was harmless, as it is beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained. *State v. Smith, 159 Idaho 15, 355 P.3d 644 (Ct. App. 2015)*.

Trial court did not abuse its discretion in allowing the state to cross-examine defendant about his prior felony conviction for leaving the scene of an accident and about his probation for that offense, where the defendant opened the door to such questioning with his own testimony, which alluded to the earlier crime. *State v. Hoy, 159 Idaho 875, 367 P.3d 270 (2016)*.

**Record of Trial Court.**

For the purpose of assuring proper introduction of evidence pursuant to subsection (a) of this rule, a trial court must make a record of its reasons for concluding that a felony conviction for any particular crime is relevant to the credibility of the witness with respect to whom the evidence is being adduced. *State v. Franco, 128 Idaho 815, 919 P.2d 344 (Ct. App. 1996)*.

**Test.**

In examining the varied relationships between felony convictions and witness credibility, the Idaho courts have divided felonies into three categories having varying degrees of probative value on the issue of credibility. Crimes in the first category, such as perjury, are intimately

connected to a person's veracity and credibility, while crimes in the second category, like robbery and burglary, are somewhat less relevant to credibility because they do not deal directly with veracity and have only a general relationship with honesty. Offenses in the third category, which include crimes of passion and acts of violence that are the product of emotional impulse, have been said to have little or no direct bearing on honesty and veracity. *State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012)*.

To determine the impact on witness credibility the court must apply a two-prong test to determine whether evidence of a prior felony conviction should be admitted: (1) the court must determine whether the fact or nature of the conviction is relevant to the credibility of the witness; and (2) if so, the court must determine whether the probative value of the evidence outweighs its prejudicial effect. *State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012)*.

District court did not err in denying defendant's motion in limine because, while his conviction for first-degree burglary should not have been admitted, the error was harmless where it did not contribute to the verdicts obtained. *State v. Smith, 159 Idaho 15, 355 P.3d 644 (Ct. App. 2015)*.

**Withheld Judgment.**

The plain language of this rule prohibits the use of a withheld judgment to impeach a witness. *Section 19-2601(3)* sets forth the meaning of a withheld judgment - the withholding of judgment and the placing of the defendant on probation "on such terms and for such time" as the court may prescribe. *State v. Hochrein, 154 Idaho 993, 303 P.3d 1249 (2013)*.

**Cited in:**

*State v. Christopherson, 108 Idaho 502, 700 P.2d 124 (Ct. App. 1985)*; *State v. Brandt, 110 Idaho 341, 715 P.2d 1011 (1986)*; *State v. Winkler, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987)*; *State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*; *Matthews v. State, 136 Idaho 46, 28 P.3d 387 (Ct. App. 2001)*.

**Decisions Under Prior Rule or Statute**

**Application.**

Right to ask a witness for the purpose of impeachment if he has been convicted of a felony is not limited to civil cases, but also applies to criminal cases. *State v. Kleier, 69 Idaho 491, 210 P.2d 388 (1949)*.

**Conviction of Defendant.**

The legislature intended that a witness might be impeached in a criminal action as in a civil action; the defendant in a criminal action, as a party to the action, need not testify at all and if he deems it prudent to remain silent, no presumption is to be indulged against him; however, when

he voluntarily assumes the character of a witness he exposes himself to the legitimate attacks which may be made upon any witness. *State v. Storms, 84 Idaho 372, 372 P.2d 748 (1962)*.

Where defendant's own counsel asked whether he had been convicted of a felony, he was precluded from raising the constitutionality of the felony-impeachment rule by petition for postconviction relief. *Palmer v. State, 101 Idaho 379, 613 P.2d 936 (1980)*.

**Conviction Required.**

A witness cannot be impeached by evidence of particular wrongful acts except that it may be shown by examination of witness or record of a judgment that he has been convicted of felony. *State v. Reding, 52 Idaho 260, 13 P.2d 253 (1932)*.

**Improper Answers.**

Where a police officer was questioned about the character of an accused and the officer spoke of the accused in connection with a robbery and a child custody matter, no error was committed when the statements by the officer were stricken from the record and the jury told to disregard same. *State v. Griffith, 94 Idaho 76, 481 P.2d 34 (1971)*.

**Improper Questions.**

Where prosecution asked one of the defendant's witnesses whether he had ever stolen any cattle while working for defendant, such question constituted improper impeachment, since prosecution may not inquire about any wrongful conduct that witness may have participated in which did not culminate in a felony conviction; however, court's ruling that because witness did not answer the question, any prejudicial inferences resulting from the asking of the question could be cured by instructing the jury to disregard the question and avoid speculating how the witness could have answered, was proper and denial of defendant's motion for mistrial was not an abuse of discretion. *State v. Owens, 101 Idaho 632, 619 P.2d 787 (1979)*, overruled on other grounds, *State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)*.

**In Camera Hearing.**

The judge did not impermissibly deny the defendant the opportunity to impeach the state's key witness with felony convictions where the defendant's counsel failed to request an in camera hearing after the judge informed him that one was necessary. *State v. Nab, 113 Idaho 168, 742 P.2d 423 (Ct. App. 1987)*.

**In General.**

Since the Idaho Supreme Court has the inherent power to promulgate procedural rules, it follows that the court also has the inherent power to establish rules of evidence, including a rule

which allows a criminal defendant to be impeached by the use of a prior felony conviction. *State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980)*.

**Manner of Proof.**

Usual manner of making proof of prior conviction of felony is to ask witness if he has suffered such conviction and, if he denies it, to produce copy of judgment of conviction. *State v. Alvord, 46 Idaho 765, 271 P. 322 (1928)*.

**Misdemeanor Convictions.**

Conviction of misdemeanor is not admissible for purposes of impeachment. *State v. Alvord, 46 Idaho 765, 271 P. 322 (1928)*.

The fact that a witness has been convicted of a misdemeanor is not admissible to impeach him. *State v. Bassett, 86 Idaho 277, 385 P.2d 246 (1963)*.

Misdemeanor convictions cannot be used for impeachment. *State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)*.

**Number or Nature of Convictions.**

Former statute did not require disclosure on either the number or the nature of the felony or felonies of which an accused had been previously convicted, to be used for impeachment purposes when he had taken the stand in his own defense. Where defendant charged with committing a lewd and lascivious act with a minor child under the age of 16 was asked the question on cross-examination, "Have you ever been previously convicted of a felony?" and the defendant answered in affirmative, it deprived the defendant of a fair trial to allow the prosecution to continue further interrogation concerning number or nature of such previous felonies. *State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971)*.

In a prosecution for robbery, it was proper for the state to impeach the defendant by asking him whether he had ever been convicted of a felony, without asking the nature of the felony, since defendant's former robbery conviction was relevant to credibility under this rule. *State v. Ybarra, 102 Idaho 573, 634 P.2d 435 (1981)*.

**Probative Value.**

Former rule regarding use of a prior felony conviction to impeach a witness required a particularized determination, based upon the nature of the crimes, that the prior felony convictions were relevant to credibility. *State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)*.

In a prosecution for robbery where the record disclosed that the defendant had prior felony convictions of injury to a public jail, resisting or obstructing police officers incident to escape, and

for delivery of heroin, the defendant's prior felonies plainly had probative value on the question of his credibility and the district judge did not err by allowing the convictions to be used for limited impeachment. *State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)*.

In robbery prosecution, prosecutor's question to defendant's wife as to whether she knew it was illegal for defendant to possess a firearm, and question to defendant as to whether he had previously been before a judge, did not require mistrial as being impermissible references to prior felony conviction where the same result would have been reached by the jury even if the disputed evidence had been excluded. *State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984)*.

Where witness's felony convictions were not identified and the trial judge made no determination that any such convictions were relevant to credibility, the impeachment was ineffective and should be disregarded by the trial judge in weighing witness's testimony. *Golden Condor, Inc. v. Bell, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984)*.

Where the prior felony conviction is being admitted for the limited purpose of impeachment, it is not required that the trial judge make a determination that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. *State v. Christopherson, 108 Idaho 502, 700 P.2d 124 (Ct. App. 1985)*.

**Procedure.**

A defendant in a criminal action who takes the witness stand in his own behalf may be required on cross-examination to state whether or not he has ever been convicted of a felony. *State v. Dunn, 91 Idaho 870, 434 P.2d 88 (1967)*.

Where defendant's witness on cross-examination attempted to interpose privilege of *Fifth Amendment of United States Constitution* to avoid answering question as to whether he had been convicted of a felony, trial court properly required him to respond. *State v. Stevens, 93 Idaho 48, 454 P.2d 945 (1969)*.

**Prosecutor's Statement.**

In prosecution for first-degree burglary, wherein the defendant took the stand in his own defense and testified that he had been at the scene merely to observe the burglary, the prosecutor's reference to the defendant's version of the facts as "the theory of an ex-convict" was proper inasmuch as the prosecutor was using the defendant's felony record to question his credibility as a witness. *State v. Palmer, 98 Idaho 845, 574 P.2d 533 (1978)*.

**Rebuttal Evidence.**

In robbery prosecution, evidence that gun found in defendant's car was stolen was proper to rebut the testimony of defendant's wife that she was the owner of the weapon and to demonstrate the implausibility of her story that she had inadvertently left the gun in the car; the

prejudicial effect of the evidence was outweighed by its value in testing her credibility. *State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984)*.

**Use of Conviction.**

Although a felony record can be used to impeach the credibility of a witness, a careful line must be drawn between impeaching a witness's credibility and using a prior conviction to imply that a criminal would commit another crime simply because he has committed a crime in the past. *State v. Palmer, 98 Idaho 845, 574 P.2d 533 (1978)*.

The use of a prior felony conviction for impeachment purposes did not deprive defendant of his right to a fair and impartial jury trial where a jury instruction limited the prejudicial impact by stating that the conviction could be considered only on the issue of credibility and that the conviction did not necessarily impair defendant's credibility. *State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980)*.

**Withheld or Vacated Judgment.**

Admission of all evidence relating to prior felony conviction of defendant in robbery trial was error where prosecution asked defendant if he had ever been convicted of a felony, and, upon obtaining a negative answer, put into evidence a prior judgment of conviction of defendant for robbery, and order vacating such judgment, and an order of nolle prosequi relative thereto. *State v. Barwick, 94 Idaho 139, 483 P.2d 670 (1971)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial. *16 A.L.R.3d 726*.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness. *63 A.L.R.3d 1112*.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence. *83 A.L.R.5th 277*.

Comment Note: What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule? - general considerations. *82 A.L.R.5th 359*.

What constitutes crime involving "dishonesty or false statement" under rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule -- nonviolent crimes. *84 A.L.R.5th 487*.

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# *I.R.E. Rule 610*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 610. Religious Beliefs or Opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Admissibility Proper.**

Evidence regarding a victim's marijuana use and religious affiliation was admissible for the purpose of providing context to her initial dishonesty about her drug use. *State v. Sanchez, 142 Idaho 309, 127 P.3d 212 (Ct. App. 2005)*.

Evidence regarding a witness's religious affiliation was admissible to rehabilitate witness and explain how his background contributed to his initial denial of involvement in the attack. *State v. Sanchez, 142 Idaho 309, 127 P.3d 212 (Ct. App. 2005)*.

**Cited in:**

*State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*.

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# I.R.E. Rule 611

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 611. Mode and order of examining witnesses and presenting evidence.

**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

**(1)** make those procedures effective for determining the truth;

**(2)** avoid wasting time; and

**(3)** protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.

Ordinarily, the court should allow leading questions:

**(1)** on cross-examination; and

**(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Child Abuse Victim.
Cross-Examination.
--Criminal Defendant.
--Experts.
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Evidence During Deliberations.
Leading Questions.
Nonresponsive Objections.
Rebuttal of Defense Evidence.
Adverse Party.
Cross-Examination.
--Adverse Party.
--Connected Transactions.
--Criminal Defendant.
--Experts.
--Extent.
--Improper Questions.
--Party As to Whom Action Dismissed.
--Prior Convictions.
--Proper.
--Purpose.
--Scope.
Custody Proceedings.
Discretion of Court.
Divorce.
Hypothetical Questions.
Introductory Questions.
Leading Questions.
Malpractice Actions.
Mechanic's Lien Proceedings.
Mode of Examination.
Objectionable Questions.
Right of Examination.
--Tape Recordings.
--Use of Denied Facts.
Voluntary Testimony.
Waiver of Marital Privilege.

**Child Abuse Victim.**

The trial court did not abuse its discretion in requiring that counsel sit in front of the child abuse victim when questioning her and that breaks be taken more frequently than normal, where in establishing the special procedures the court gave an instruction to the jury cautioning them not to give any different weight to the testimony because of the procedures. *State v. Larsen, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993)*.

**Cross-Examination.**

The magistrate did not act improperly in cautioning the defendant against argumentative cross-examination, as the magistrate did not tell the defendant that she was prohibited from

aggressively pursuing her defense, and the magistrate exercised restrained and appropriate control over the examination of witnesses throughout the trial. *State v. Palmer, 114 Idaho 895, 761 P.2d 1247 (Ct. App. 1988)*.

Defendant's convictions for the attempted procurement of prostitution and the procurement of prostitution were proper because when defendant took the stand on her own behalf, she waived the privilege against self-incrimination in regard to questions related to the subject matter of the testimony and matters that related to the substantive issues. In its discretion, the district court found that the additional issues in question were relevant and therefore permissible matters for cross-examination. *State v. Grazian, 144 Idaho 510, 164 P.3d 790 (2007)*.

Trial court did not abuse its discretion during defendant's trial for battery on a peace officer by concluding that it would allow cross-examination into the underlying events of the fight itself where the State was permitted to attack defendant's credibility by getting into the events of the fight. *State v. Rauch, 144 Idaho 682, 168 P.3d 1029 (Ct. App. 2007)*.

**--Criminal Defendant.**

Where defendant testified as part of the self-defense argument that he was not in a position to be able to fight because of health problems, and that was part of the reason why he thought he had to defend himself with a gun, which led to the victim's death, the cross-examination by the prosecutor about defendant's history as boxer and being involved in fist fights clearly was designed to provide a basis upon which the jury ultimately could reach a conclusion whether to believe defendant's version of his reason for killing; there was no error in the admission of the evidence, and the trial court did not err in denying the motion for mistrial and motion for a new trial. *State v. Babbitt, 120 Idaho 337, 815 P.2d 1077 (Ct. App. 1991)*.

In prosecution for, inter alia, aggravated battery of a police officer, trial court properly refused to limit scope of potential cross-examination if defendant chose to testify to questions regarding an alleged admission overheard by a jailer. State should be allowed to rebut the inference that defendant did not shoot the officer, and should also be allowed to attack defendant's credibility by cross-examining him regarding the events of the fight itself. *State v. Rauch, 144 Idaho 682, 168 P.3d 1029 (Ct. App. 2007)*.

**--Experts.**

In an action for wrongful death based on medical negligence, the district court did not abuse its discretion in barring defendant doctor from questioning plaintiffs' expert witness on cross-examination about his opinion as to whether other parties, who settled out of court and had been dismissed from the case had breached the standard of care. The line of proposed questioning was outside the scope of subsection (b) of this rule, because it did nothing to impeach the expert as it was not inconsistent with his direct testimony. *Aguilar v. Coonrod, 151 Idaho 642, 262 P.3d 671 (2011)*.

**--Scope.**

No abuse of court's discretion was found with respect to controlling the scope of the State's cross-examination of a defendant charged with possession of marijuana with intent to sell, where the subject matter of defendant's testimony on direct examination was his asserted lack of intent to deliver marijuana found in his possession and on cross-examination the state challenged this alleged lack of intent by having defendant explain the nature of circumstantial evidence against him and attacked defendant's credibility by exposing his knowledge of marijuana values and marijuana delivery techniques and materials. *State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989)*.

**Discretion of Court.**

The decision whether to admonish a witness lies within the trial court's discretion and flows from his or her role as manager of the trial. *State v. Danson, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987)*.

Court abused discretion by limiting cross examination to one party's counsel where parties were no longer married, and had differing interests at trial. *Clark v. Klein, 137 Idaho 154, 45 P.3d 810 (2002)*.

Citizen failed to lay a proper foundation to impeach the manager of an aquatic center because there was nothing to attack as the citizen did not first ask the manager a direct or current question to which she gave an inconsistent answer; the citizen failed to demonstrate how the district court's requirement that she ask the manager current or direct questions before introducing the deposition to impeach her statements constituted an abuse of discretion. *Oksman v. City of Idaho Falls, -- Idaho --, 549 P.3d 1086, 2024 Ida. LEXIS 50 (June 4, 2024)*.

**Evidence During Deliberations.**

District court properly provided the jury, during deliberations, with a copy of the state's forensic scientist's PowerPoint presentation, explaining how she matched one of defendant's known fingerprints to one found on the note used in a robbery, because, while the criminal rule was silent on whether the exhibit could be used during deliberations and the statute that provided what could be provided to the jury in deliberations was unhelpful in determining what process to employ, the judge recognized the discretionary nature of his decision and provided a limiting instruction to the jury, the forensic scientist testified about the exhibit, and defense counsel had the opportunity to cross-examine her. *State v. Weigle, 165 Idaho 482, 447 P.3d 930 (2019)*.

**Leading Questions.**

Because a city was questioning the manager of its aquatic center on cross-examination, the district court did not abuse its discretion in overruling a citizen's objections and allowing the city to ask the manager leading questions. *Oksman v. City of Idaho Falls, -- Idaho --, 549 P.3d 1086, 2024 Ida. LEXIS 50 (June 4, 2024)*.

**Nonresponsive Objections.**

In a case involving lewd conduct with a minor under sixteen, a trial court did not abuse its discretion by overruling defendant's objection that an answer given during cross-examination was nonresponsive; the witness answered the question, but clarified that she took a bath, not a shower, after she first had sex with defendant. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

In a case involving lewd conduct with a minor under sixteen, a trial court did not abuse its discretion by overruling defendant's objection that an answer given was nonresponsive as it related to direct examination by the State because such an objection by the nonquestioning party was generally inappropriate. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

**Rebuttal of Defense Evidence.**

Although a potential defense must be raised through evidence presented by the defendant before the state may introduce evidence concerning that issue, it is not necessary that a defendant put on expert testimony before the state may rebut defense evidence with its own expert testimony. *State v. Johnson, 132 Idaho 726, 979 P.2d 128 (Ct. App. 1999)*.

Where the defense theory that hypoglycemia accounted for the defendant's slurred speech, confusion and lack of coordination was already well developed before the state's expert witness was called, her testimony, which was limited to her medical opinion as to whether the defendant's symptoms at the time of his arrest could be attributed to hypoglycemia, would have been permissible rebuttal to the preceding defense witnesses even if the defendant had never called an expert witness. *State v. Johnson, 132 Idaho 726, 979 P.2d 128 (Ct. App. 1999)*.

**Cited in:**

*State v. Guinn, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)*; *State v. Grinolds, 121 Idaho 673, 827 P.2d 686 (1992)*; *Easterling v. Kendall, 159 Idaho 902, 367 P.3d 1214 (2016)*.

**Decisions Under Prior Rule or Statute**

**Adverse Party.**

Opposing party may be called as to matters not readily provable in any other way, and it is not condition precedent thereto that party so calling shall have made out prima facie case. *Lessman v. Anschustigui, 37 Idaho 127, 215 P. 460 (1923)*.

**Cross-Examination.**

**--Adverse Party.**

Cross-examination of adverse party is confined to material issues. *Morton v. Morton Realty Co., 41 Idaho 729, 241 P. 1014 (1925)*.

An adverse party can be cross-examined only as to matters which are peculiarly within the knowledge of the witness and which are not otherwise readily available. *Shrives v. Talbot, 88 Idaho 209, 398 P.2d 448 (1965)*; *Cox v. Widmer, 94 Idaho 451, 490 P.2d 318 (1971)*.

Where the statutory cross-examination of defendant by plaintiff's counsel was very brief and limited to matters peculiarly within defendant's personal knowledge, and was not an attempt to present his entire case by means of defendant's testimony, there was no abuse of the court's discretionary control over the scope of statutory cross-examination. *Ross v. Olson, 95 Idaho 915, 523 P.2d 518 (1974)*.

**--Connected Transactions.**

In trial of criminal action, defendant should be permitted to cross-examine prosecuting witness as to any matters in connection with the transaction, as, for example, to the acts of prosecuting witness during the interim between meeting of prosecuting witness and defendant in the morning and the time of commission of the offense in the evening. *State v. Webb, 6 Idaho 428, 55 P. 892 (1899)*.

In action on note where plaintiff testifies in chief that he purchased note before maturity and paid therefor a consideration, and that plaintiff was well-acquainted with payee and had been for many years, and that note purchased was one of a number of the same kind, plaintiff may be fully interrogated on cross-examination as to all facts connected with transaction in order to aid jury in determining whether note was purchased in good faith before maturity and without notice. *Park v. Johnson, 20 Idaho 548, 119 P. 52 (1911)*.

**--Criminal Defendant.**

Defendant in criminal case cannot be compelled to testify in such action, but if he voluntarily takes the stand and testifies for himself, he does so subject to rule that he may be cross-examined in regard to any facts material to issue. *State v. Larkins, 5 Idaho 200, 47 P. 945 (1897)*, overruled on other grounds, *State v. White, 93 Idaho 153, 456 P.2d 797 (1969)*.

Where defendant has offered himself as a witness, cross-examination as to facts stated in his direct examination, or connected therewith, does not violate constitutional guaranty that no person may be required to be a witness against himself. *State v. Martinez, 43 Idaho 180, 250 P. 239 (1926)*.

Where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf, he is subject to the same rules applicable to other witnesses, and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. *State v. Hargraves, 62 Idaho 8, 107 P.2d 854 (1940)*.

Where accused voluntarily took stand in his own behalf, he was thereafter subject to the same rule governing the examination of other witnesses, and he may be cross-examined as to all matters he has testified to or connected thereto. *State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945)*.

**--Experts.**

The courts should be liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly designated as experts. *Trull v. Modern Woodmen of Am., 12 Idaho 318, 85 P. 1081 (1906)*.

**--Extent.**

The control of cross-examination is committed to the sound discretion of the trial judge. The court's discretion should be exercised to allow a criminal defendant considerable latitude in cross-examining adverse witnesses; but a limitation imposed by the judge will not be overturned on appeal absent a showing of prejudice. *State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984)*.

**--Improper Questions.**

Where the prosecutor asked the son of the accused on cross-examination if he had not stated to a named witness that he, the witness, suspected his father of having committed a similar offense with other girls, one a member of his family, and that such conduct on the part of the accused caused the death of the witness' mother, and if at such conversation the witness did not cry and say, "I can't go against my father, even if he is guilty," and where the prosecutor repeatedly asked substantially the same question, such conduct of the prosecutor was reversible error. These questions were improper cross-examination and should not have been allowed to go before the jury camouflaged as impeaching questions. *State v. Irwin, 9 Idaho 35, 71 P. 608 (1903)*.

**--Party As to Whom Action Dismissed.**

A party as to whom the action is dismissed is no longer an adverse party and cannot be called for cross-examination. *Lebak v. Nelson, 62 Idaho 96, 107 P.2d 1054 (1940)*.

**--Prior Convictions.**

After accused's direct testimony of imprisonment in penitentiary, cross-examination as to when he was released was proper. *State v. Smailes, 51 Idaho 321, 5 P.2d 540 (1931)*.

Where defendant waived his right not to testify and admitted on direct examination that he had been convicted of three felonies prior to 1966, and that subsequent to 1966 he had not been in trouble, it was permissible for the prosecutor, on cross-examination, to inquire as to two arrests subsequent to 1966. *State v. McClellan, 96 Idaho 569, 532 P.2d 574 (1975)*, overruled on other grounds, *State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975)*.

**--Proper.**

In an action against a city for an injury sustained by a pedestrian who stumbled and fell on a raised portion of a sidewalk, the pedestrian's knowledge that the kind of defect causing her to stumble was commonly found wherever poplar or cottonwood trees grew along the sidewalk might have a legitimate bearing on the measure of due care and thus on the question of contributory negligence, and hence cross-examination of the pedestrian concerning her knowledge of trees growing along walks throughout the city and of similar defect in other places of the city was not improper. *Stewart v. City of Idaho Falls, 61 Idaho 471, 103 P.2d 697 (1940)*.

**--Purpose.**

The purpose of cross-examination is to weaken or show the untruthfulness of the testimony of the party examined or the party's bias or prejudice, thus, where the defendant claimed on direct examination that he drove to city to gamble, the state, on cross-examination could ask him about items found in the car which indicated a different purpose -- that he went to city to commit a robbery. *State v. Baruth, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984)*.

**--Scope.**

Defendant in criminal action who has testified in his own behalf can only be cross-examined by the state as to facts stated in his direct examination, or in connection therewith. *State v. Larkins, 5 Idaho 200, 47 P. 945 (1897)*, overruled on other grounds, *State v. White, 93 Idaho 153, 456 P.2d 797 (1969)*.

Cross-examination of witness should be confined to facts stated by witness in his direct examination, or connected therewith. *State v. Anthony, 6 Idaho 383, 55 P. 884 (1899)*.

Where defendant testified to going to a specified place with another and to spending night with such person, and gave no further testimony as to his movements or when he left such place, it was not error to permit prosecuting attorney to ask defendant when he left the place to which he and the other party had gone. *State v. Gruber, 19 Idaho 692, 115 P. 1 (1911)*.

Where defendant had testified that he had received but one shipment of whisky by railroad, state may show that he had received other shipments. *State v. Silva, 21 Idaho 247, 120 P. 835 (1912)*.

It is abuse of judicial discretion and of the privilege granted to permit party calling his adversary as witness to inquire into the entire controversy and to examine him with respect to matters

about which other evidence is readily available. *Boeck v. Boeck, 29 Idaho 639, 161 P. 576 (1916)*.

On cross-examination, counsel may cover a wide field for purpose of testing knowledge and recollection of witness concerning matters to which he testified on direct examination. *Barton v. Dyer, 38 Idaho 1, 220 P. 488 (1923)*.

Where in action for accounting, plaintiff had testified on cross-examination that accounting was not correct as far as investigated, it was reversible error to refuse to allow an answer to the following question: "Now, will you designate to the court that portion of the total that is incorrect." *Morton v. Morton Realty Co., 41 Idaho 729, 241 P. 1014 (1925)*.

In prosecution for manslaughter, counsel should be permitted on cross-examination to show whether witness, who was intoxicated and was riding in back seat of defendant's automobile at time of wreck, remembered anything about what occurred at the wreck or immediately before, although subject had not been gone into on direct examination. *State v. Frank, 51 Idaho 21, 1 P.2d 181 (1931)*.

An accused in a criminal case may not open his case and present evidence to support it by cross-examination of the state's witnesses respecting matters not introduced on their direct examination. *State v. Smailes, 51 Idaho 321, 5 P.2d 540 (1931)*.

Although cross-examination is limited to facts stated in the direct examination or connected therewith, this allows cross-examination not only as to all facts stated by a witness in his original examination, but as to other facts connected with them, directly or indirectly tending to explain, modify, or qualify the inference resulting from the facts stated by the witness in his direct examination. *Towne v. Northwestern Mut. Life Ins. Co., 58 Idaho 83, 70 P.2d 364 (1937)*.

Where appellant's co-defendant was called for cross-examination by plaintiffs, and no objection was sustained to questions propounded to him by appellant's counsel in the form of direct examination, and it appeared from the record that appellant's counsel examined him fully, and at length, on matters touched on by respondents in their cross-examination of him and, furthermore, appellant did not call him for cross-examination, the rulings were not erroneous, but if they had been, the error would not have been prejudicial because it did not appear that the appellant suffered disadvantage from them. *Manion v. Waybright, 59 Idaho 643, 86 P.2d 181 (1938)*.

Any party to a proceeding may cross-examine his adversary as to any material fact or facts, and cross-examination is not restricted to matters peculiarly within knowledge of adversary. *Stearns v. Williams, 72 Idaho 276, 240 P.2d 833 (1952)*.

The trial court did not abuse its discretion so as to commit reversible error in limiting the cross-examination of defendants under the facts and circumstances of the case; the evidence sought to be brought out was substantially covered at other stages of the trial by one or more witnesses. *Grant v. Clarke, 78 Idaho 412, 305 P.2d 752 (1956)*.

There was no abuse by the trial court in limiting cross-examination where questions principally related to traffic conditions existing at the time of the accident and testimony thus attempted to be adduced was introduced at other stages of the trial. *Morford v. Brown, 85 Idaho 480, 381 P.2d 45 (1963)*.

Cross-examination addressed to the same events or events proximate in time and space to those covered on direct examination is proper. *State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972)*, modified on other grounds, *State v. Gums, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995)*.

**Custody Proceedings.**

In habeas corpus proceedings between husband and wife for custody of their child, the parties are adverse. *Mabbett v. Mabbett, 34 Idaho 611, 202 P. 1057 (1921)*.

**Discretion of Court.**

Foundation necessary to show that matters inquired of may not be otherwise readily established is matter in discretion of trial court. *Lessman v. Anschustigui, 37 Idaho 127, 215 P. 460 (1923)*.

Time when opposite party may be called, and extent of examination, are matters within discretion of trial court, which will not be overturned in absence of abuse. *Lessman v. Anschustigui, 37 Idaho 127, 215 P. 460 (1923)*.

Cross-examination is largely in the discretion of trial court, and its refusal to allow one party to action to examine person called by another party is not abuse of such discretion. *Portland Cattle Loan Co. v. Gemmell, 41 Idaho 756, 242 P. 798 (1925)*; *Evans v. Bannock County, 59 Idaho 442, 83 P.2d 427 (1938)*.

Court did not abuse its discretion in allowing defendant to call and cross-examine plaintiff as an adverse witness where plaintiff's counsel examined plaintiff on same matters covered by defendant in cross-examination. *Stearns v. Williams, 72 Idaho 276, 240 P.2d 833 (1952)*.

In an automobile collision action where attorney, who had represented defendant in a suit against garage which worked on the car, was only questioned as to the origin of the report on defendant's brakes, plaintiff's question on cross-examination to attorney as to the extent to which he aided in answering interrogatories propounded by plaintiff was outside the scope of cross-examination and the trial court did not abuse its discretion in disallowing the question. *Rosenberg v. Toetly, 94 Idaho 413, 489 P.2d 446 (1971)*.

Where defendant put details of grain transfers in issue on direct examination, trial court did not abuse discretion by allowing state on cross-examination to fix the location and identity of participants of the transfers and to trace movement of grain immediately thereafter. *State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972)*, modified on other grounds, *State v. Gums, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995)*.

**Divorce.**

Either party to a divorce action may call the other as witness. *Boeck v. Boeck, 29 Idaho 639, 161 P. 576 (1916)*.

**Hypothetical Questions.**

A hypothetical question should state all the facts relevant to the formation of an opinion, and then assuming the facts stated to be true, ask the witness whether he is able to form an opinion therefrom, and, if so, to state such opinion. *Willis v. Western Hosp. Ass'n, 67 Idaho 435, 182 P.2d 950 (1947)*.

The form of hypothetical questions and the facts to be embraced therein are matters resting largely in the sound discretion of the trial court. *Willis v. Western Hosp. Ass'n, 67 Idaho 435, 182 P.2d 950 (1947)*.

The right and duty of properly framing a hypothetical question rests primarily on the counsel by whom the question is asked, and he should not be permitted to frame an improper question and then cast the burden of supplying its deficiencies on the opposing counsel. *Willis v. Western Hosp. Ass'n, 67 Idaho 435, 182 P.2d 950 (1947)*.

**Introductory Questions.**

A question which, phrased broadly, is introductory in character, is permissible. *Viehweg v. Thompson, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982)*.

**Leading Questions.**

A leading or suggestive question is one which suggests to the witness the answer which the examining party desires. *Idaho Mercantile Co. v. Kalanquin, 8 Idaho 101, 66 P. 933 (1901)*.

The allowance of leading questions is committed to the discretion of the trial court, and as a general rule a judgment will not be reversed on this ground unless there is clear and manifest abuse in the exercise of such discretion, and resulting in prejudice to the complaining party. *McLean v. Lewiston, 8 Idaho 472, 69 P. 478 (1902)*; *Pedersen v. Moore, 32 Idaho 420, 184 P. 475 (1919)*; *State v. Larsen, 42 Idaho 517, 246 P. 313 (1926)* , reversed on other grounds, *State v. Larsen, 44 Idaho 270, 256 P. 107 (1927)*.

It may be conceded that although ordinary leading questions are objectionable, yet an exception to the rule is made where the witness is a young and unsophisticated girl and is required to testify to the details of the crime of statutory rape. *State v. Larsen, 42 Idaho 517, 246 P. 313 (1926)*, reversed on other grounds, *State v. Larsen, 44 Idaho 270, 256 P. 107 (1927)*.

A question asked of a burglary defendant by his counsel as to whether he "knowingly, wilfully, and intentionally" burglarized the store in question was properly excluded as leading. *State v. Johnson, 92 Idaho 533, 447 P.2d 10 (1968)*.

The allowance by the trial court of the state's limited use of leading questions for a witness who did not speak English did not constitute an abuse of discretion, where defendant in robbery prosecution failed to show any resulting prejudice. *State v. Gerhardt, 97 Idaho 603, 549 P.2d 262 (1976)*.

In prosecution for lewd conduct with a minor under 16 and for kidnapping in the second degree, where prosecution's witness, who was also defendant's mother, suffered an almost complete lapse of memory, the trial court did not abuse its discretion in permitting prosecution to ask leading questions. *State v. Herr, 97 Idaho 783, 554 P.2d 961 (1976)*, superseded by statute as stated in *State v. Tribe, 123 Idaho 721, 852 P.2d 87 (1993)*.

In an action to quiet title to land, the question as to whether the defendant would have signed a quitclaim deed had she known of a mistake in the description of the land sought to be conveyed did not suggest the answer sought and was therefore not a leading question. *State v. Martinez, 43 Idaho 180, 250 P. 239 (1926)*.

**Malpractice Actions.**

A plaintiff in a malpractice action has a right to cross-examine defendant as a medical expert. *Walker v. Distler, 78 Idaho 38, 296 P.2d 452 (1956)*.

**Mechanic's Lien Proceedings.**

Trial court committed error in permitting plaintiff to call defendants on cross-examination in foreclosure of mechanic's lien proceeding for matter inquired into was available to plaintiff through correspondence and plaintiff's own testimony, but error was not reversible where other evidence preponderantly supported judgment in favor of the plaintiff. *Willes v. Palmer, 78 Idaho 104, 298 P.2d 972 (1956)*.

**Mode of Examination.**

Right of examination of such witness by his own counsel means that such examination shall be according to the rules governing direct examination. *Barton v. Dyer, 38 Idaho 1, 220 P. 488 (1923)*.

**Objectionable Questions.**

In action for personal injuries, question of respondents' counsel to medical expert called by respondents as follows was objectionable: "I will ask you if it is not a fact that the medical profession recognizes the fact that in that class of cases almost all of them generally improve

after the lawsuit or litigation concerning it is over?" *Quillin v. Colquhoun, 42 Idaho 522, 247 P. 740 (1926)*.

**Right of Examination.**

Right of examination of adverse witness by his own counsel means that such examination shall be according to the rules gathered in direct examination. *Barton v. Dyer, 38 Idaho 1, 220 P. 488 (1923)*.

In an action by a passenger against an airline company for personal injuries alleged to have been caused by negligent failure to warn passengers to fasten seat belts when air turbulence causing violent motion of plane was likely, it was error to refuse to permit plaintiff to call defendant's pilot of the plane for cross-examination. *Ness v. West Coast Airlines, 90 Idaho 111, 410 P.2d 965 (1965)*.

**--Tape Recordings.**

In prosecution for murder in the first degree where defendant's wife, as a defense witness, testified as to statements made to her by defendant immediately following the shooting, it was proper for the state to introduce, during rebuttal, a tape recording which revealed that defendant made statements to his wife other than those she mentioned on direct and cross-examination. *State v. McClellan, 96 Idaho 569, 532 P.2d 574 (1975)*, overruled on other grounds, *State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975)*.

**--Use of Denied Facts.**

It was improper for the cross-examiner to assume a state of facts which had theretofore been denied by the witness; thus, asking a defendant's witness in a criminal case on cross-examination where she had put certain cartridges, after she had testified to having no cartridges, was improper. *State v. Bush, 50 Idaho 166, 295 P. 432 (1930)*.

**Voluntary Testimony.**

Where a witness voluntarily makes a statement while testifying not in response to any question, the adverse party may move to strike such voluntary statement, but he has no right of cross-examination thereon. *Kelly v. Troy Laundry Co., 46 Idaho 214, 267 P. 222 (1928)*.

**Waiver of Marital Privilege.**

In a murder in the first degree prosecution, where the marital privilege was waived and the wife was a competent witness, she was subject to normal procedures of cross-examination and the tape recording of her interview by a police officer on the day of shooting was admissible under

the rules governing cross-examination. *State v. McClellan, 96 Idaho 569, 532 P.2d 574 (1975)*, overruled on other grounds, *State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Irrelevancy as affecting cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses. *88 A.L.R.3d 74*.

Establishing on a cross-examination incompetency of witness under statute including testimony of one person because of death of another, to testify in respect of lost or destroyed instruments. *18 A.L.R.3d 606*.

Cross-examination as to religious belief or lack of it to affect credibility of witness. *76 A.L.R.3d 539*.

Right to cross-examine witness as to his place of residence. *85 A.L.R.3d 541*.

Insurance against liability, cross-examination of witness to show that defendant in personal injury or death action carries insurance. *40 A.L.R. Fed. 541*.

Waiver of incompetency of witness as to transaction with decedent by cross-examination of him. *40 A.L.R. Fed. 541*.

Scope and extent of cross-examination of defendant or witness in personal injury or death action with regard to. *40 A.L.R. Fed. 541*.

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# I.R.E. Rule 612

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 612. Writing or Object Used to Refresh a Witness's Memory.

**(a) Scope.** This rule gives an adverse party certain options when a witnesses uses a writing or object to refresh memory for the purpose of testifying:

**(1)** while testifying; or

**(2)** before testifying, if:

**(A)** the court decides that justice requires the party to have those options and it is practicable to have the writing or object produced, and

**(B)** the writing or object is not privileged under these rules and not protected from disclosure by Idaho Rule of Civil Procedure 26 or Idaho Criminal Rule 16.

**(b) Adverse Party's Options; Deleting Unrelated Matter.** An adverse party is entitled to have the writing or object produced at the hearing or deposition in which the witness is testifying, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

If production of the writing or object at the hearing or deposition is impracticable, the court may order it made available for inspection.

If the producing party claims that the writing or object includes unrelated matter, the court must examine the writing or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

**(c) Failure to Produce or Deliver the Writing or Object.** If a writing or object is not produced, made available for inspection, or delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Discretion of Court.**

When a witness refers to notes or other materials to refresh his memory, the court must ensure that the witness actually has a present recollection and is not to allow inadmissible evidence to inadvertently slip in for its truth; to aid in accomplishing this purpose the court has broad discretion in determining whether the witness is truly using the writing to refresh his memory or whether he is effectively offering the writing for its truth, and opposing counsel has the right to inspect at trial whatever is used to refresh recollection, to cross-examine the witness on it, and to introduce relevant portions into evidence. *Baker v. Boren, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997)*.

The trial court did not abuse its discretion in refusing to allow use of unemployment documents where the court stated that it was not making a blanket ruling excluding all impeachment evidence and where the defendant was allowed two means of impeaching the plaintiff. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

**Foundation.**

Two items of foundation must be laid before a witness may refer to notes or to other materials to refresh his or her memory: first, the witness must exhibit the need to refresh his or her memory and second, the witness much confirm that the notes will assist in refreshing his or her memory. The witness may not testify directly from the notes but can use them to assist in recollection. *Baker v. Boren, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997)*.

**Harmless Error.**

In action involving a contract dispute that arose from a remodeling project that plaintiff performed on a residential home for defendant, the court erred in permitting plaintiff to use notes to refresh his independent recollection where no foundation was laid to show that he had any independent recollection to be refreshed or whether the notes would be of assistance; however, such error was not grounds for reversal because the evidence elicited from plaintiff while he was testifying from his notes was generally cumulative of other properly admitted evidence. *Baker v. Boren, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997)*.

When a witness was improperly allowed to testify from a report that the witness prepared the day before testifying, despite having no independent recollection of the subject of the testimony, the error was harmless because defendant subsequently testified on the same subject. *State v. Johnson, 163 Idaho 412, 414 P.3d 234 (2018)*.

**Prepared Notes.**

In action involving contract dispute which arose from a remodeling project that plaintiffs performed on a residential house for defendants, where plaintiff witness relied almost entirely on his notes to explain the composition of each item of plaintiff's exhibit and the record showed that neither of the plaintiffs kept individual time cards, a daily diary or made entries into a ledger with this information near in time to when such work was allegedly completed it was error to allow a witness to testify at trial from prepared notes under the guise of refreshing recollection. *Baker v. Boren, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997)*.

**What May Be Used.**

A witness may use virtually anything to refresh his or her memory and the materials need not be admissible themselves. *Baker v. Boren, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997)*.

**Decisions Under Prior Rule or Statute**

**Answers Written in Advance.**

It may be stated as a general rule that answers of a witness should not be written out in advance and merely read into the record and such a procedure did not come within the purview of former rule governing refreshment of memory; yet where the defendant in a criminal case moved to strike all of the testimony of a witness who had read from a memorandum, the court properly denied the motion where a number of questions and answers were not contained in the memorandum. *State v. Jester, 46 Idaho 561, 270 P. 417 (1928)*.

**Discretion of Court.**

Much discretion is reposed in the trial judge to regulate the examination of witnesses and the manner of refreshing of recollection. *State v. Jester, 46 Idaho 561, 270 P. 417 (1928)*.

Where sheriff and state traffic officer collaborated in taking measurements at scene of accident and sheriff copied figures taken by traffic officer into his own book two days after the accident, court did not err in allowing sheriff to refer to his own notes in order to refresh his memory. *Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1949)*.

**Examination by Adverse Party.**

Where file contained several documents, one of which was used to refresh witness's memory, the entire file was not subject to scrutiny of adverse party, as the witness had not read the other documents on direct examination. *State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969)*.

**Foundation.**

In order for a witness to be permitted to use a memorandum for the purpose of refreshing his memory respecting a fact, it should be shown that the memorandum was written by the witness or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. *State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921)*.

**Harmless Error.**

It was error to refuse to allow the defense attorney to examine notes used by a state's witness to refresh his memory, but where the verdict of guilty was overwhelmingly supported by the evidence and all relevant and material facts testified to by the witness were corroborated substantially by other competent witnesses, such error was technical, harmless, and not reversible. *State v. Johnson, 92 Idaho 533, 447 P.2d 10 (1968)*.

**Mortgage Book.**

Mortgage book kept for the convenience of the mortgage company was not admissible as independent evidence in action for foreclosure of mortgage held by the company, but could only be used to refresh memory. *Prudential Ins. Co. v. Folsom, 48 Idaho 538, 283 P. 609 (1929)*.

**Police Records.**

Where during the course of the trial police officers used portions of the police record of the murder investigation to refresh their memories, it was not error to refuse to have entire record placed in evidence since much of it was irrelevant and defendant had the right to inspect items that had been used and could have read the relevant portion to the jury if he had so desired. *State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970)*, cert. denied, *401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971)*.

**Previous Testimony.**

Witness may refresh his recollection by reading evidence given by him upon former trial, and then testify, if he has an independent recollection of transaction. *State v. Marren, 17 Idaho 766, 107 P. 993 (1910)*.

**Refusal to Produce Notes.**

Where witness refused to produce his notes, when ordered to by court, on the grounds that they were not used during trial to refresh his memory, he is guilty of contempt for wilful disobedience of an order lawfully issued by the court. *Barnett v. Reed, 93 Idaho 319, 460 P.2d 744 (1969)*.

**Use of Memorandum.**

When testifying regarding the amount of hay sold, seller was permitted to refresh his memory with a memorandum written by him at the time the hay was weighed. *Clark v. Gneiting, 95 Idaho 10, 501 P.2d 278 (1972)*.

**Waiver.**

The error in permitting a witness for the state in a criminal case to use a memorandum for the purpose of refreshing his memory, which was not prepared by himself or under this direction, is not prejudicial where the defendant subsequently testifies to substantially all the facts testified to by the witness in relation to matters contained in the memorandum. *State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921)*.

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# I.R.E. Rule 613

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 613. Witness's prior statement.

**(a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Evidence Admissible.
Harmless Error.
Impeachment.
In General.
Taped Conversation.
Extrinsic Evidence.
Impeachment.

**Evidence Admissible.**

In a case involving lewd conduct with a minor under sixteen, there was no abuse of discretion in admitting a detective's testimony about a statement made by defendant's wife because it could have been reasonably inferred that her testimony denying a close relationship and

declaring defendant's innocence arose from a belief inconsistent with the belief that gave rise to her prior statement articulating suspicions as to something going on between defendant and the victim. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

**Harmless Error.**

Although the trial court erred in admitting testimony from defendant's wife, the error was harmless because it did not contribute to the jury's verdict finding defendant guilty of aggravated assault. Even if the wife's credibility concerning her testimony about a shotgun and her husband's actions were downplayed by the jury, there were multiple witnesses who testified consistent with her testimony, and the jury chose to disbelieve the other witnesses' account of the events. *State v. Miller, 157 Idaho 838, 340 P.3d 1154 (Ct. App. 2014)*.

**Impeachment.**

District court did not abuse its discretion by allowing the state to inquire into defendant's brother's prior inconsistent statements for impeachment purposes, because it did not admit the late-disclosed jailhouse telephone conversations between defendant and his brother, the colloquy did not reference the brother's incarceration, and defendant's position was that the evidence was merely cumulative. *State v. Lankford, -- Idaho --, 535 P.3d 172 (2023)*.

Excluding evidence of a specific instance of the past sexual behavior of an alleged victim of a sex offense was not error because the prosecution had not introduced an impeachable prior inconsistent statement and, without allowing an improper inquiry into the victim's past sexual history, there would be nothing to impeach and no basis to introduce a statement made by the victim during a forensic interview; moreover, defendant failed to provide timely notice of intent to use the evidence. *State v. Martin, -- Idaho --, 554 P.3d 69, 2024 Ida. LEXIS 86 (Aug. 7, 2024)*.

**In General.**

Idaho Supreme Court declines to adopt a rigid definition that an inconsistency is only found when it is apparent on the face of two statements to the extent that it is the only possible inference to be drawn; trial judges must retain a high degree of discretion in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

**Taped Conversation.**

The trial court did not err by allowing state to introduce, in rebuttal to evidence presented by the defense, a tape-recorded conversation between defendant and the victim's mother where the tape contradicted defendant's testimony on issues relevant to the case as, inter alia, even though defendant admitted to making the statements on the tape, its use was probative with regard to determining whether, as defendant claimed, his taped remarks were not meant to be taken seriously. *State v. Sorrell, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989)*.

**Cited in:**

*State v. Lamphere, 130 Idaho 630, 945 P.2d 1 (1997)*.

**Decisions Under Prior Rule or Statute**

**Extrinsic Evidence.**

Where counsel has a genuine factual basis for questioning a witness about a prior inconsistent statement, and the witness testifies to a lack of recollection, it is not error if counsel later omits to prove the statement by extrinsic evidence. *Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986)*.

**Impeachment.**

In general, when a foundation for impeachment has been laid, it should be followed by proof unless the prior statement has been admitted by the witness; nevertheless, the fact that unfinished impeachment is a disfavored practice does not mean that it is always reversible error. *Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986)*.

Testimony by a witness that he or she cannot remember is sufficient to complete the foundation for impeachment with a prior inconsistent statement, as such a declaration is equivalent to a denial. *Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986)*.

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# *I.R.E. Rule 614*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 614. Court's Calling or Examining of Witnesses.

**(a) Calling.** When the court is the trier of fact, it may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

**(b) Examining.** The court may examine a witness regardless of who calls the witness.

**(c) Objections.** A party may object to the court's examining a witness either at that time or at the next opportunity when the jury is not present.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Abuse of Discretion.
Child Abuse Victim.
Purpose.
Questioning of Defendant.
Review of Questioning.

**Abuse of Discretion.**

District court's questioning of an expert witness was an abuse of discretion, because it commented on the weight to be given to a party's evidence and expressed an opinion as to the critical issue of liability in the case. *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

**Child Abuse Victim.**

The trial court did not go beyond the scope of its authority in questioning a child abuse victim where it sought to determine what the victim meant by "touching problems," and attempted to

sort out the identity of the person who had abused the victim. *State v. Larsen, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993)*.

**Purpose.**

It is vital that trial judges be allowed to ask questions for clarification and for gathering information during hearings in which they act as fact finders. *Wolfe v. State, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990)*.

**Questioning of Defendant.**

The court's questioning of the defendant did not constitute fundamental error where the judge questioned several prosecution and defense witnesses throughout the trial and where the court's purpose in questioning the defendant was to clarify a perceived inconsistency between the defendant's testimony on direct and cross-examination. *State v. Lovelass, 133 Idaho 160, 983 P.2d 233 (Ct. App. 1999)*.

**Review of Questioning.**

Where the defense made no objection at trial to the court questioning the defendant, the appellate court reviewed the questioning only for fundamental error. *State v. Lovelass, 133 Idaho 160, 983 P.2d 233 (Ct. App. 1999)*.

Court did not improperly comment on a detective's credibility because, contrary to defendant's assertion, the statements were somewhat cryptic and did not evidence an explicit "high opinion" of the detective; the content of the conversation did not bolster the detective's testimony in any appreciable way. *State v. Gamble, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008)*.

Family preserved for appeal the issue of whether the district court abused its discretion in questioning an expert, where it was clear from the context of the family's motion to strike that they were disputing the propriety of the questioning and the testimony it elicited. The family's motion for a mistrial, coming at the next opportunity outside the presence of the jury and stating with particularity their objections to the questioning, complied with the mandate of subsection (c). *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

**Cited in:**

*Milton v. State, 126 Idaho 638, 888 P.2d 812 (Ct. App. 1995)*; *Ernst v. Hemenway & Moser Co., 126 Idaho 980, 895 P.2d 581 (1995)*; *State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003)*.


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# *I.R.E. Rule 615*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VI. WITNESSES.***

## Rule 615. Excluding witnesses.

**(a)** At a party's request, the court may order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

**(1)** a party who is a natural person;

**(2)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

**(3)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or

**(4)** a crime victim whose exclusion is prohibited under *Article 1, Section 22 of the Idaho Constitution.*

**(b) Preliminary Hearings.** Notwithstanding subsections (a)(1), (2), and (3) of this rule, in a preliminary hearing if either party requests it, the magistrate must exclude all non-party witnesses who have not been examined.

**(c) Child Witnesses.** Notwithstanding subsections (a) and (b) of this rule or any statutory provision, when a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, the court may allow parents, a counselor, friend or other person having a supportive relationship with the child to remain in the courtroom during the child's testimony.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Discretion of Court.
--Violation of Order.
Exception to Rule.
Illustrative Cases.

Methods of Enforcement.
Purpose.
Trial Transcripts.
Discretion of Court.
Interest in Suit.

**Discretion of Court.**

The question whether to grant a motion to exclude witnesses is committed to the sound discretion of the trial judge. *State v. Danson, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987)*.

Since granting or denying the request for exclusion is discretionary, permitting exceptions to or variations from an exclusion order also lies within the trial court's discretion, as does the nature of any sanction imposed for violation of the order. *State v. Danson, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987)*.

The granting or denying of a request for exclusion under this rule is a discretionary decision of the trial court. The appropriate remedy for a breach of an exclusion order is also committed to the sound discretion of the trial court. In exercising its discretion, the trial court ordinarily should not exclude witnesses without a demonstration of probable prejudice. Moreover, a failure of the trial judge to order a mistrial when witnesses who have violated sequestration orders nevertheless testify will not justify reversal on appeal absent a showing of prejudice sufficient to constitute an abuse of discretion. *State v. Huntsman, 146 Idaho 580, 199 P.3d 155 (2008)*.

**--Violation of Order.**

Where the court reasoned that a mistrial would not cure the apparent prejudice visited upon the defense by the witnesses' communication and instead held that the defense would be allowed to question both offending witnesses about their noncompliance with the non-communication order, putting their credibility in issue and also held that defense counsel would be granted leave during argument to comment on the offending witnesses' breach of the court's order, the district court rightly perceived the issue as one of discretion, acted within the outer boundaries of discretion and consistent with applicable legal standards and reached its decision by an exercise of reason. Therefore the district court's choice of sanction was not an abuse of its discretion, and the order denying the defense's motion for mistrial was properly granted. *State v. Slawson, 124 Idaho 753, 864 P.2d 199 (Ct. App. 1993)*.

Where the plaintiffs discovered within the 14 day window to file a motion for a new trial that the defendant's counsel had provided trial transcripts to witnesses subject to an exclusion order, the court properly granted the plaintiffs' motion. *Slaathaug v. Allstate Ins. Co., 132 Idaho 705, 979 P.2d 107 (1999)*.

**Exception to Rule.**

The second exception under this rule for "an officer or employee of a party that is not a natural person" is applicable to investigative agents, including local police officers; therefore, where the detective had already testified and the state had rested its case in chief before defendants moved to exclude witnesses, the foundation needed for the court to rule on the state's request that the detective be allowed to remain in the courtroom under the second exception to this rule was already in the record, and no error was committed in allowing him to remain. *State v. Ralls, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986)*.

**Illustrative Cases.**

In defendant's criminal trial for first degree murder and two counts of second degree kidnapping, two witness violated an exclusion order under this rule by having a discussion in the witness room; defendant was not entitled to exclusion of their testimony even though the victim's mother changed her testimony after the discussion with the other witness. The victim's mother testified that her decision to tell the truth was motivated by personal reasons and there was no showing of prejudice to the defendant. *State v. Huntsman, 146 Idaho 580, 199 P.3d 155 (2008)*.

**Methods of Enforcement.**

There are four recognized methods of enforcing an exclusion order: (1) citing the witness for contempt, (2) permitting comment on the witness's noncompliance in order to reflect on his credibility, (3) refusing to let the witness testify, and (4) striking the witness's testimony. *State v. Slawson, 124 Idaho 753, 864 P.2d 199 (Ct. App. 1993)*.

**Purpose.**

This rule recognizes that exclusion is one means to reduce the possibility of a witness shaping his or her testimony to conform with or to rebut prior testimony of others. *State v. Ralls, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986)*.

**Trial Transcripts.**

While an exclusion order did not specifically instruct defense counsel not to provide trial transcripts to witnesses subject to the order, since the purpose of this rule is to prevent witnesses from molding their own testimony to conform with or rebut testimony of other witnesses, the trial court did not err in finding that the defendant violated the order, even though no witness subject to the order "heard" the testimony of another witness. *Slaathaug v. Allstate Ins. Co., 132 Idaho 705, 979 P.2d 107 (1999)*.

**Cited in:**

*State v. Mercado, 159 Idaho 656, 365 P.3d 412 (Ct. App. 2015)*.

**Decisions Under Prior Rule or Statute**

**Discretion of Court.**

The exclusion of witnesses who are not parties to the suit although interested therein, is wholly in the court's discretion. *Paine v. Strom, 51 Idaho 532, 6 P.2d 849 (1931)*.

Permitting a witness to testify after earlier being present in the courtroom was not an abuse of discretion or reversible error in the absence of a showing how the adverse parties were prejudiced by the fact that the witness had been in the courtroom previous to his testimony. *State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968)*.

The exclusion of witnesses from the courtroom during trial rests in the sound discretion of the trial court and, where an examination of the record revealed that the defendant had originally requested that the state's witnesses be excluded, it was not error for the trial court to make the order applicable to both sides. *State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970)*, cert. denied, *401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971)*.

In the absence of specific authority, the trial judge's duty to cause witnesses to be kept separate and prevented from conversing with each other is at most discretionary. *State v. Lopez, 100 Idaho 99, 593 P.2d 1003 (1979)*.

Since the granting or denial of the request for exclusion is discretionary in the first instance, it follows that permitting exceptions to or variation of the sequestration order must also lie within the court's discretion, as does the nature of the sanction imposed, if any, for violation of the order. *State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979)*.

**Interest in Suit.**

Where an action was brought by the assignee of claims of others, and one of the plaintiff's assignors was excluded with other witnesses from the courtroom, under these circumstances, error cannot be predicated upon such exclusion on the theory that such assignor had an interest in the suit, because whatever interest he may have had, he was not a party. *Paine v. Strom, 51 Idaho 532, 6 P.2d 849 (1931)*.

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# *I.R.E. Rule 701*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is:

**(a)** rationally based on the witness's perception;

**(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

**(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Applicability.
Cause of Death.
Conditions for Opinion.
Evidence Held Admissible.
Evidence Properly Excluded.
Factual Basis for Opinion.
Fundamental Error.
Harmless Error.
Intent of Defendant.
Interested Witness.
Medical Condition.
Perception of Witness.
Restrictions.
Speed.

**Applicability.**

Nurse's comparison opinion of bruising on a girlfriend's neck based on her rational perception and specialized knowledge was within the scope of Idaho R. Evid. 702, and, thus, it was error to implicitly admit her opinion under Idaho R. Evid. 701. The nurse offered her interpretation of photos after applying her specialized knowledge, and that type of opinion, which went beyond every day reasoning from common knowledge, was only admissible through a qualified expert. *State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022)*.

**Cause of Death.**

The trial court did not err in concluding that the lay opinion of husband, that his wife's death by cardiac arrest was caused by certain events in question, was not admissible under this rule and the prior decisions of the Supreme Court and the Court of Appeals; accordingly, if there was a wrongful death claim pled, the trial court did not err in dismissing it. *Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990)*, cert. denied, *498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991)*.

**Conditions for Opinion.**

Generally, a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long as two conditions are met. First, the witness's opinion must be based on his or her perception; and second, the opinion must be helpful to a clear understanding of the witness' testimony or a determination of a fact in issue. *State v. Enyeart, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993)*.

**Evidence Held Admissible.**

Investigating officer's statement at trial that defendant appeared not to have been truthful in his interview with the officer was admissible since defendant's own counsel had opened the door to such an explanation when he asked the officer if defendant had appeared shocked or shaken upon hearing his daughter's allegation of sexual misconduct. *State v. Drennon, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994)*.

Loss prevention officer's testimony was a permissible statement of opinion based on her own observations of the signatures from the separate transactions. She testified as a lay witness, describing the steps she took in her investigation of the transactions, which included comparing the signatures, and such comparison did not require scientific, technical or specialized knowledge. *State v. Waller, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004)*.

Testimony by a toddler's family members that the toddler's behaviors changed for the worse immediately following a car accident was admissible because the ability to observe a young family member's progress from infant to child was not outside of the usual and ordinary experience of the average person. *Carrillo v. Boise Tire Co., 152 Idaho 741, 274 P.3d 1256 (2012)*.

During defendant's trial for aggravated battery, the court did not err in allowing a detective to testify that the detective believed the person in a photograph to be defendant; although the foundational testimony was limited, it referred to a 20-minute period in which the detective observed defendant at a time when his appearance differed from his appearance at trial. *State v. Salazar, 153 Idaho 24, 278 P.3d 426 (2012)*.

Admission of a witness's testimony was not reversible error because the circumstances under which the witness performed her experiment were the subject of her own personal knowledge; the only opinion that the witness expressed related to the results of her experiment. *United States Bank N.A. v. CitiMortgage, Inc., 157 Idaho 446, 337 P.3d 605 (2014)*.

Police officer's testimony as to the investigative process was properly allowed, where it provided background information crucial to understanding the investigative process, and he did not offer an opinion that concerned inferences that could be drawn by the jurors utilizing their own common sense and normal experience. *State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018)*.

In an action for negligent infliction of emotional distress, the trial court did not err in allowing the plaintiff to testify that he felt sick, lost weight, experienced headaches and skin issues, had trouble sleeping, could not eat, and felt stressed because those symptoms were common physical ailments that a lay person could recognize. *Eller v. Idaho State Police, 165 Idaho 147, 443 P.3d 161 (2019)*.

Declarants, based on their considerable personal knowledge and experience with the initiative and referendum processes in Idaho, provided both facts and opinion that complied with the requirements of the rules, and their opinions were not unduly speculative. *United States v. Bartley, 9 F.4th 1128 (9th Cir. 2021)*.

**Evidence Properly Excluded.**

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992)*.

The district court properly ruled that plaintiff could not testify about when her injury actually occurred and who was at fault for that injury, particularly since she was not qualified as a medical expert, and therefore could not give her opinion about whether the standard of care was breached by the defendants. *Kolln v. Saint Luke's Reg'l Med. Ctr., 130 Idaho 323, 940 P.2d 1142 (1997)*.

As a lay person, plaintiff was not competent to testify about the cause of her injury, including her statements that the injury occurred during surgery and that her rotator cuff was not torn before surgery. *Kolln v. Saint Luke's Reg'l Med. Ctr., 130 Idaho 323, 940 P.2d 1142 (1997)*.

Where a witness's opinion that the defendant's shooting of the victim was an accident amounted to inadmissible speculation as to the defendant's state of mind, court properly excluded it. *State v. Turner, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2001)*.

Plaintiffs' declarations as to whose property a tree was on were not supported by personal knowledge as required by this rule, because there was no evidence in the record that plaintiffs' neighbor, from whom plaintiffs had acquired their knowledge of the location of the tree and property lines, had personal knowledge of the location of the property line. *Sankey v. Ivey, -- Idaho --, 535 P.3d 198 (2023)*.

The defendant's lay opinion concerning the trajectory of one of the bullets that hit him was properly excluded where the court permitted him to testify that he was shot in the arm when his arm was in front of his body; the court only prevented him from opining that the bullet that entered his left arm was the same one that went into his chest because that testimony required the application of specialized medical and forensic knowledge. *State v. Rambo, -- Idaho --, 540 P.3d 974 (2023)*.

**Factual Basis for Opinion.**

Where the record showed that a witness 1) had personal knowledge of LSD's effects and knew that it was present at the concert; 2) observed defendant throughout the afternoon from a very close range; and 3) testified as to defendant's condition and actions, there was sufficient factual basis for the opinion that defendant was under the influence of LSD the trial court did not abuse its discretion in admitting the opinion. *State v. Enyeart, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993)*.

**Fundamental Error.**

Defendant's claim that a prosecutor committed misconduct at trial by asking defendant on cross-examination whether other witnesses had lied under oath did not implicate a constitutional right and, therefore, did not present an issue of fundamental error. *State v. Herrera, 152 Idaho 24, 266 P.3d 499 (Ct. App. 2011)*.

**Harmless Error.**

Although the trial court should not have allowed police officer's opinion concerning the bloody clothing, this was harmless error because there was not a reasonable possibility that this opinion might have contributed to the defendant's convictions. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

An abuse of discretion in admitting evidence is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense, and since admission of lay testimony pursuant to this rule is within the discretion of the trial court, if the trial court erred in admitting lay witness opinion, it was not fundamental. *State v. Babb, 125 Idaho 934, 877 P.2d 905 (1994)*.

Error in admitting a nurse's opinion testimony was harmless, because the probative force of the remaining record in establishing defendant's guilt of attempted strangulation significantly outweighed the probative force of the error in admitting the opinion testimony: the nurse and other treatment providers testified that defendant's girlfriend had many signs, symptoms, and complaints apart from the issue of bruising, and the girlfriend also testified to the symptoms and complaints. *State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022)*.

**Intent of Defendant.**

The trial court abused its discretion by admitting a property owner's testimony that a trespasser was on her property to harass, as such testimony under the circumstances of this case was an improper statement of a lay witness's opinion under this rule; it was clearly prejudicial, which justified reversal of defendant's conviction. *State v. Missamore, 119 Idaho 27, 803 P.2d 528 (1990)*.

**Interested Witness.**

Since it was unlikely that the testimony of a lay witness influenced the jury where it was clear that he was an interested witness, any error in allowing the expression of his opinion was harmless. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc., 133 Idaho 180, 983 P.2d 834 (1999)*.

**Medical Condition.**

While under this rule and I.R.E. 702, a court has the discretion to determine whether to allow a lay witness to express an opinion relating to causation, a court should disregard lay opinion testimony relating to the cause of a medical condition as a lay witness is not competent to testify to such matters, and, therefore, such testimony is inadmissible for purposes of summary judgment. *Bloching v. Albertson's, Inc., 129 Idaho 844, 934 P.2d 17 (1997)*.

Expert opinion testimony was necessary to establish causation of a slip and fall victim's permanent ankle deformity, but the trial court erred by not considering her lay opinion in an affidavit as to her symptoms immediately after the fall; the causal relationship between the victim's fall and her immediate symptoms in the ankle, knee and back (the pain, swelling, and the inability to sit, stand or walk without assistance) was within the usual and ordinary experience of the average person. *Dodge-Farrar v. Am. Cleaning Servs. Co., 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002)*.

Because a customer was not testifying as an expert, this rule governed the admissibility of his testimony as to the cause of the fracture of a screw in his leg and his resulting medical complications. *Holdaway v. Broulim's Supermarket, 158 Idaho 606, 349 P.3d 1197 (2015)*.

Excluding the entirety of the claimant's declaration in a medical malpractice case was error, because the expert witness requirement did not bar the claimant from testifying as a lay witness about experiences based on personal observation, which included a narrative describing the

claimant's symptoms. Although the declaration also included inadmissible testimony as to causation that was properly stricken, the admissible portions provided a foundational basis for an expert's causation opinions. *Mortensen v. Baker, 170 Idaho 744, 516 P.3d 1015 (2022)*.

**Perception of Witness.**

Where a physician not qualified as expert in a child sexual abuse prosecution offered an opinion based on the histories provided by the children and the mother, the opinion was not based upon his own perception but instead was based on what others had related to him, violating the first requirement of this rule. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Detective's remarks, prior to defendant's objection, regarding a witness's desire "to say something" or "to come forward" were not admissible lay opinion testimony because no "perception of the witness" giving some basis for the opinion had yet been presented. The detective had not yet described anything relating to the witness's behavior or demeanor, but instead expressed conclusory opinions. *State v. Hauser, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006)*.

Defendant's convictions for burglary and petit theft were appropriate and there was no error in admitting into evidence the opinions of lay witnesses who identified the defendant as the man appearing in security videotape or in photographs derived from the videotape. The opinion of each lay witness, identifying defendant, was rationally based on the perception of the witness and the testimony was helpful to the jury in the determination of a fact in issue. *State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009)*.

Police detective properly testified that, based on his training and experience, he identified the pills found in defendant's purse during booking by using an internet database, comparing observable characteristics, including shape, color, and numeric identifiers, and discussing the identification method with an experienced narcotics officer. *State v. Youmans, 161 Idaho 4, 383 P.3d 142 (Idaho Ct. App. 2016)*.

Nurse's comparison opinion of bruising on a girlfriend's neck based on her rational perception and specialized knowledge was within the scope of Idaho R. Evid. 702, and, thus, it was error to implicitly admit her opinion under Idaho R. Evid. 701. The nurse offered her interpretation of photos after applying her specialized knowledge, and that type of opinion, which went beyond every day reasoning from common knowledge, was only admissible through a qualified expert. *State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022)*.

**Restrictions.**

Both expert and lay opinions are subject to the restriction that when the question is one which can be decided by persons of ordinary experience and knowledge, it is for the trier of fact to decide. The court or jury must weigh the truth of the facts presented by the witnesses and draw

its conclusions by the exercise of independent judgment and reasoning powers, without hearing the opinions of witnesses. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Where officer testified that his assessments of a person's sobriety based upon field tests were 95 percent accurate after the officer conducted tests (presumably breathalyzer, blood, or urine tests) to confirm or disprove the opinion that he formed about intoxication, his testimony was admissible under this rule, because the opinion was rationally based on the perception of the witness, and was helpful to the determination of a fact in issue, namely, whether defendant was intoxicated when stopped. *State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991)*.

**Speed.**

A lay witness' opinion or inference as to speed is admissible. *Smith v. Praegitzer, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988)*.

**Cited in:**

*State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*; *State v. Leavitt, 116 Idaho 285, 775 P.2d 599 (1989)*; *State v. Gray, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997)*; *State v. Vandenacre, 131 Idaho 507, 960 P.2d 190 (Ct. App. 1998)*; *West v. Sonke, 132 Idaho 133, 968 P.2d 228 (1998)*; *Cook v. Skyline Corp., 135 Idaho 26, 13 P.3d 857 (2000)*; *Nelsen v. Nelsen, 170 Idaho 102, 508 P.3d 301 (2022)*.

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# *I.R.E. Rule 702*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Admissibility of Testimony.
Applicability.
Aura of Reliability.
Child Abuse Cases.
Credibility of Another Witness.
Discretion of Court.
Driving Under the Influence.
Evidence Held Admissible.
Evidence Held Inadmissible.
--Rape.
Evidence Properly Excluded.
Future Liability on Claim.
Harmless Error.
Indicia of Reliability.
Limitation of Testimony.
Malpractice Action.
Murder Cases.
Plaintiff's Self-Diagnosis.
Qualifications of Expert.
Relevance.
Restrictions.

State of Mind.
Summary Judgment.
Witness Not Qualified.
Witness Qualified.
Malpractice Action.

**Admissibility of Testimony.**

Once a witness is qualified as an expert, the trial court must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence. If the testimony is thus competent and relevant, it may be admissible; the weight given to the testimony is left to the trier of fact. *State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987)*.

Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and to determine a fact in question, however, an expert's opinion is not inadmissible merely because it embraces an ultimate issue to be decided by the trier of fact. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

Although both professionals appeared to be well-qualified for the service they provided as counselors, the art or science of divining whether a child who has made allegations of sexual touching has in fact been abused calls for additional expertise that was not shown to be possessed by these witnesses; therefore, on the foundation presented, the district court erred in finding these counselors qualified to testify as to their diagnoses of sexual abuse. *State v. Konechny, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000)*.

Court erred in finding there was sufficient foundation to admit an expert's opinion that an alleged victim was sexually abused, and error was not harmless, as the case turned upon the credibility of the witnesses, and the jury may have been swayed toward its finding of guilt by the expert's opinion, which bolstered the victim's credibility. *State v. Eytchison, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001)*.

Where the issues related to the ambiguity in an insurance policy before the trial judge were matters of law, the offered expert opinion was irrelevant, and there was no abuse of discretion in excluding the testimony. *Howard v. Or. Mut. Ins. Co., 137 Idaho 214, 46 P.3d 510 (2002)*.

A detective's testimony on domestic violence was properly allowed. The only objection was whether the detective could offer expert testimony and there were no objections to the opinions that he ultimately gave; that he ultimately gave some testimony that would be objectionable did not establish that the district court abused its discretion in permitting him to testify in the first place. *State v. Parton, 154 Idaho 558, 300 P.3d 1046 (2013)*.

There was no genuine issue of material fact as to whether trial counsel's failure to present appellant's accident reconstruction expert's testimony prejudiced appellant. Because the expert's proffered testimony was speculative and conclusory, the testimony would have been inadmissible at trial. *Adams v. State, 158 Idaho 530, 348 P.3d 145 (2015)*.

In an action arising out of an accident which occurred during a school employee's instruction of a student driver, a human factors expert could testify on behalf of the student's parents to rebut the testimony of the school's accident reconstructionist, to explain from a scientific perspective that the other driver involved in the car accident was reasonable in how he interpreted what he saw, and to explain why the student may have been reasonable in performing a three-point turn under circumstances he may have known were unsafe. *Hennefer v. Blaine County Sch. Dist. #61, 158 Idaho 242 , 346 P.3d 259 (2015)*.

Trial court did not abuse its discretion in admitting expert's testimony and report; where the expert testified to decades of experience in engineering, geology, and providing remediation plans, which assisted the trier of fact with the specific remediation needed on the land. Expert's report and testimony assisted with a matter outside the common experience and knowledge of a lay trier of fact. *Radford v. Orden, 168 Idaho 287, 483 P.3d 344 (2021)*.

**Applicability.**

The appropriate test for measuring the scientific reliability of evidence is this rule. *State v. Gleason, 123 Idaho 62, 844 P.2d 691 (1992)*.

Under this rule, there are a number of different reasons an attorney may object to evidence: howwever, an objection that expert testimony invades the province of the jury, without more, is not sufficiently specific to preserve an objection to any of them. *Hansen v. Roberts, 154 Idaho 469, 299 P.3d 781 (2013)*.

Trial court erred when it found that trial counsel was not deficient for failing to object to the state expert witness' testimony prior to trial or for failing to retain an expert witness to rebut the witness's testimony at trial, where the defendant objections were not to the witness' conclusions but to the underlying assumptions leading to those conclusions. *Marsalis v. State, 166 Idaho 334, 458 P.3d 203 (2020)*.

**Aura of Reliability.**

Testimony concerning blood spatter interpretation, used to show that murder victim was moving away from defendant when shot, was not of a nature which would cause the jurors to be over-impressed by its aura of reliability; the testimony did not involve overly complex scientific or technological concepts with the potential for juror confusion. *State v. Rodgers, 119 Idaho 1047, 812 P.2d 1208 (1991)*.

**Child Abuse Cases.**

Although the field of child abuse may be "beyond common experience," having an expert render an opinion as to the identity of the abuser is more of an invasion of the jury's function rather than an "assist" to the trier of fact. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

Whether a child has been sexually abused is beyond common experience and allowing an expert to testify on this issue will assist the trier of fact. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

There does not exist a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

Physician should not have been allowed to offer his opinion that children had been sexually molested where (1) he had little if any experience with child sexual abuse; (2) the only information available to support his opinion was gleaned from one visit with the children in which he found no physical evidence of molestation; and (3) he relied solely on the histories provided by the children and the mother that the children had been molested. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Physician who had no expertise in the area of child sexual abuse was not properly qualified as an expert to speak in that capacity regarding whether certain children had been molested. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Although some behavioral patterns of child sexual abuse victims may not need expert explanation, the manner in which abuse victims attempt to disassociate themselves from the abuse do need explanation because this is beyond common experience. *State v. Ransom, 124 Idaho 703, 864 P.2d 149 (1993)*, cert. denied, *510 U.S. 1181, 114 S. Ct. 1227, 127 L. Ed. 2d 571 (1994)*.

The issue of whether a child's conduct in relating the details of his or her sexual abuse is consistent with the behavior of other sexually abused children is a matter beyond the common experience of the jury, and was thus a proper subject of testimony by a qualified expert. *State v. Matthews, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993)*.

In a criminal action for sexual abuse, where the trial record was conspicuously lacking any explication of disciplined inquiry and methodology that would support a psychologist's testimony about the frequency with which children's accusations of sexual abuse are found to be false, the trial court correctly excluded this evidence for lack of adequate foundation. *State v. Parkinson, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996)*.

In prosecution for lewd conduct and child abuse, counsel was not ineffective in failing to object to testimony of expert witness in field of child abuse which was limited to explaining the behavioral patterns of and characteristics, in general, of children sexually abused, since the witness acknowledged that she was there only to provide background information and such testimony was properly the kind of testimony suitable for expert opinion. The issues were beyond common experience and were necessary for jury education and clarification of certain child sexual abuse behavioral patterns, and thus summary dismissal of application for post-conviction relief was proper. *Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997)*.

In prosecution for lewd conduct with a minor child under sixteen, doctor's medical training and experience as a emergency room physician who had come into contact with 10 to 12 children

alleging sexual abuse qualified him to report his visual observations of child's physical condition and the possible causes of observed injuries. Thus, an objection to his qualification as a expert would have been properly overruled, therefore, the absence of objection by defendant's counsel to doctor's testimony was not a deficiency in performance nor a cause of prejudice to defendant. *State v. Aspeytia, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997)*.

In prosecution for lewd conduct with a minor child under 16 where doctors reported physical findings, some of which were, in their opinions, consistent only with sexual abuse, and there was adequate factual basis on which they could reach the conclusion that child's injuries, were, in all likelihood, a result of molestation, and the interpretation of their physical findings were beyond the experience or knowledge of the average juror, if defendant's counsel had objected to such testimony he would have been overruled, consequently his failure to object did not amount to ineffective assistance of counsel. *State v. Aspeytia, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997)*.

A foundational showing of expertise to render an opinion about whether sexual abuse has occurred requires more than general education and experience in mental health counseling. *State v. Konechny, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000)*.

In a prosecution of defendant on three counts of lewd conduct with a minor, the trial court did not abuse its discretion by admitting an expert's testimony regarding the general behavioral and emotional characteristics of victim and offender in child sexual abuse cases, including the issue of delayed disclosure; the expert did not testify concerning matters outside her demonstrated expertise. *State v. Dutt, 139 Idaho 99, 73 P.3d 112 (Ct. App. 2003)*.

**Credibility of Another Witness.**

**I.** R.E., Rule 704 must be read in the light of this rule. Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue. Opinions which directly pass on the credibility of witnesses are generally not allowed. *State v. Walters, 120 Idaho 46, 813 P.2d 857 (1990)*.

In a criminal trial where the expert opinion involves the weighing of the credibility of witnesses based upon their out-of-court statements, special caution must be exercised by the trial court to make certain that the expert's opinion is based upon his or her expertise and that it will assist the trier of fact in determining a fact in issue. Historically, the evaluation of the credibility of witnesses has been committed solely to the jury and they alone have the responsibility to determine the guilt or innocence of the accused. *State v. Walters, 120 Idaho 46, 813 P.2d 857 (1990)*.

In a case involving the alleged sexual abuse of children, nonexpert physician should not have been permitted to offer an opinion on the children's credibility, that is, that he believed they were telling the truth; in a jury trial, it is for the jury to determine the credibility of a witness, not another witness, and statements by a witness as to whether another witness is telling the truth are prohibited. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

In a second degree murder case, the trial court's order, granting defendant's motion in limine to allow admission of a doctor's opinion that defendant was truthful when he made denial

statements during a polygraph examination, was reversed, because the results of the polygraph were useful to bolster defendant's credibility but did not provide the trier of fact with any additional information that pertained to defendant's case, and to admit the results was an attempt to substitute the credibility determination appropriate for the jury with the doctor's interpretation of the alleged involuntary physiological results from the polygraph examination. *State v. Perry, 139 Idaho 520, 81 P.3d 1230 (2003)*.

An expert cannot opine to the accuracy of an eyewitness identification or the credibility of any witness, as those matters are reserved for the jury. However, an expert witness may testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony. *State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013)*.

**Discretion of Court.**

Whether a witness is sufficiently qualified as an expert is a matter largely within the discretion of the trial court. *State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987)*.

Defendant/manufacturer moved for a mistrial when a safety engineering expert testified about other accidents and injuries caused by combines; in this case, it was clear that the trial court considered the motion and determined that it did not prejudice International Harvester sufficiently to warrant a mistrial. *Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*.

Since the admissibility of expert opinion testimony is discretionary and will not be disturbed on appeal absent a showing of an abuse of discretion, it is not error for a trial court to exclude from evidence testimony dealing with a scientific theory for which an adequate foundation has not been laid. *State v. Parkinson, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996)*.

Where court refused to allow the witness to testify as an expert on the memory or perceptions of the officers relative to the presence of a firearm, on the ground that such testimony would not assist the trier of fact, the district court did not abuse its discretion in ruling that the reliability of the officers' observation of a firearm in defendant's hand was well within the ability of the jury to determine, so that no expert testimony was needed to aid the trier of fact in understanding the evidence or determining a fact in issue. *State v. Pacheco, 134 Idaho 367, 2 P.3d 752 (Ct. App. 2000)*.

Court did not err by striking plaintiff's expert's affidavit in a wrongful death suit where there was no explanation of the methodology the expert used to determine the cause of the fire or to exclude possible causes, and where the expert's testimony lacked factual foundation. *Carnell v. Barker Mgmt., Inc., 137 Idaho 322, 48 P.3d 651 (2002)*.

Defendant's conviction for second-degree murder was appropriate because there was other substantial, corroborative evidence that defendant was the shooter. Exclusion of expert-witness testimony regarding eyewitness identification was not an abuse of discretion on the part of the trial court. *State v. Wright, 147 Idaho 150, 206 P.3d 856 (2009)*.

**Driving Under the Influence.**

In criminal case where defendant was charged with driving under the influence in violation of §§ 18-8004 and 18-8005(3), expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses, and their opinions were properly admitted into evidence. State v. Crea, 119 Idaho 352, 806 P.2d 445 (1991).

The horizontal gaze nystagmus test (HGN) satisfies the test of Frye v. United States, 293 F. 1013 (1923) for novel scientific evidence because the test is based on a generally accepted theory that persons who are intoxicated exhibit nystagmus. State v. Garrett, 119 Idaho 878, 811 P.2d 488 (1991).

Defendant did not provide any evidence demonstrating the unreliability of the Alco-Sensor III and failed to show that the proper foundation under Idaho R. Evid. 702 for admission of his blood-alcohol test results was not established; the Alco-Sensor III was approved by the Idaho state police, additionally, the arresting officer testified that the device had been certified, that he followed the procedures required for accurate use of the device, including conducting a calibration check within twenty-four hours of its use, and that he was certified by the state as a specialist and an instructor in its operation. State v. Alford, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004).

**Evidence Held Admissible.**

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. State v. Gong, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. Pacheco v. Safeco Ins. Co. of Am., 116 Idaho 794, 780 P.2d 116 (1989), rehearing denied, 117 Idaho 491, 788 P.2d 1314 (1989).

In DUI prosecution where deputy's testimony relating to HGN test results was offered not as independent scientifically sound evidence of defendant's intoxication but rather for the same purpose as other field sobriety test evidence -- a physical act on the part of defendant observed by the officer, contributing to the cumulative portrait of defendant's intimating intoxication in the officer's opinion, such evidence was properly admitted. State v. Gleason, 123 Idaho 62, 844 P.2d 691 (1992).

The district court did not abuse its discretion by allowing a psychologist, who had treated the victim after the crime, to testify regarding whether the victim had been sexually abused, where a proper foundation had been laid. State v. Lewis, 123 Idaho 336, 848 P.2d 394 (1993).

The fire investigation expert was sufficiently qualified to interpret the lightning strike data where the plaintiffs did not argue that the expert was not qualified as an expert in fire investigation, and prior to testifying in detail as to what the data indicated to him, the expert explained that his training and experience in fire investigation encompassed the interpretation of such data, and in addition, the expert testified that fire investigators routinely relied upon such lightning detection data when attempting to determine a fire's cause, and the trial court did not abuse its discretion in allowing the expert to testify to his interpretation of such data, as the expert was trained to interpret it and qualified to base an opinion on those interpretations. *Lanham v. Idaho Power Co., 130 Idaho 486, 943 P.2d 912 (1997)*.

Defendant's grand theft conviction was proper pursuant to Idaho R. Evid. 702 and Idaho Crim. R. 16(b)(6) where the trial court did not err by allowing expert testimony from an attorney. While defense counsel complained generally about the lack of knowledge of the specific content of the witness's testimony, no discovery sanction was ever requested. State v. Vondenkamp, *141 Idaho 878, 119 P.3d 653 (Ct. App. 2005)*.

In a medical malpractice suit, defense expert witnesses were properly allowed to testify that the complication experienced by the patient was a known complication even though medical literature on the subject did not specify the particular injury as a known complication. The expert witnesses, who had individual knowledge, skill, experience, training, and education in thoracic surgery, testified that damage to the phrenic nerve was a complication based upon the proximity of the cyst to be removed to the nerve. *Thomson v. Olsen, 147 Idaho 99, 205 P.3d 1235 (2009)*.

Where mother of a child who died after extended sedation with Propofol presented evidence through an expert witness regarding the effects of that extended use, and this evidence was clearly influential in producing a jury verdict in favor of the mother, the trial court erredrejecting that evidence and in entering a j.n.o.v. in favor of the child's doctors, who were not entitled to attorney fees on appeal because they did not prevail. *Coombs v. Curnow, 148 Idaho 129, 219 P.3d 453 (2009)*.

Trial court did not abuse its discretion by admitting the testimony of the lessor's appraiser regarding the value of the land subject to the lease because the lessee failed to show that the appraiser's testimony was unsubstantiated, but rather argued that its suggested method of valuing the property was more appropriate. *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC, 156 Idaho 709, 330 P.3d 1067 (2014)*.

Allowing an expert in playground safety to testify was not an abuse of discretion, where his testimony would have clearly assisted the jury by informing the members of the jury about the general standards regarding the construction and/or maintenance of playgrounds and how the city's construction and/or maintenance of its playground deviated from those standards, even if the expert would have had to admit that the standards to which he testified had never been adopted in *Idaho. Noel v. City of Rigby, 166 Idaho 575, 462 P.3d 103 (2020)*.

Declarants, based on their considerable personal knowledge and experience with the initiative and referendum processes in Idaho, provided both facts and opinions that complied with the requirements of the rules, and their opinions were not unduly speculative. *United States v. Bartley, 9 F.4th 1128 (9th Cir. 2021)*.

**Evidence Held Inadmissible.**

In prosecution for rape and lewd and lascivious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988)*.

Where expert had no contact with the victim or her parents during the time period in question and defendant laid an insufficient foundation regarding expert's qualifications in child sexual abuse matters, the trial court properly excluded the testimony. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992)*.

In suit against pharmacy alleging that substitute type of insulin for plaintiff's regular insulin caused his hypoglyemic seizures, statement of plaintiff's treating physician that is was possible the insulin blend could have caused a reaction was inadmissible because expert medical testimony must be based on a reasonable degree of medical probability in order to be admissible; a mere possibility of a causal connection does not satisfy this standard; thus such testimony could not be considered for the purposes of summary judgment. *Blocking v. Albertson's, Inc., 129 Idaho 844, 934 P.2d 17 (1997)*.

In a suit for wrongful death, admission of the expert's opinion on whether the widow's husband could have avoided the accident was error because the jury could have answered that question for itself based on the previous expert testimony. *Warren v. Sharp, 139 Idaho 599, 83 P.3d 773 (2003)*, overruled on other grounds, *Blizzard v. Lundeby, 156 Idaho 204, 322 P.3d 286 (2014)*.

Opinions of a corporate chairman of the board that the failure of the attorneys retained to represent the corporation in an underlying negligence action to pursue attorney fees rendered the corporation a target for increased litigation and damaged the corporation's reputation as an aggressive litigator were properly stricken because there was no identified factual basis for the opinions. *J-U-B Eng'rs, Inc. v. Sec. Ins. Co., 146 Idaho 311, 193 P.3d 858 (2008)*.

In a premises liability action stemming from injury sustained by a party guest who slipped on a bathroom rug while trying to extricate her heel from the hem of her pants, the trial court did not err in excluding expert witness opinion testimony because the determination of whether the bathroom presented a hazard or danger was within the competence of the average layman or juror and, therefore, the proffered opinion would not assist the trier of fact. *Chapman v. Chapman, 147 Idaho 756, 215 P.3d 476 (2009)*.

**--Rape.**

Where defendant was on trial for lewd conduct and rape and defense counsel failed to object to a pediatrician's testimony that in his opinion the child had been sexually abused despite his failure to find any physical evidence of sexual abuse during his examination of the child, the defense counsel was deficient in failing to object, and the testimony was inadmissible as presented since the physician's conclusion was based on the logical consistencies and details of the child's story and was not based on any tests or interview techniques which were beyond the common experience of average jurors. *State v. Pugsley, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995)*.

Trial court did not err by excluding defendant's medical expert's testimony, because his opinion that the victim was not subjected to vaginal intercourse was impermissibly speculative, as it was based on an unsubstantiated premise that another physician's earlier external examination of the victim included visual observation of the hymen. The record of the examination did not say that the hymen was viewed, but rather suggested the contrary. *State v. Marks, 156 Idaho 559, 328 P.3d 539 (2014)*.

**Evidence Properly Excluded.**

District court did not abuse its discretion in a negligence action by refusing to admit the expert testimony of the claimants' out-of-area doctor as to the local community standard of care in the administration of anesthesia services because: (1) the doctor's conversation with the associate director of the Idaho state board of nursing was not sufficient to show that the doctor had acquired actual knowledge of the local standard of care; and (2) the statewide and national standards cited by the doctor had not replaced the local standard of care. *Navo v. Bingham Mem'l Hosp., 160 Idaho 363, 373 P.3d 681 (2016)*.

District court did not abuse its discretion when it struck the affidavit of a doctor, given that the affidavit failed to identify specific facts upon which the doctor relied in forming his opinion. *Green v. Green, 161 Idaho 675, 389 P.3d 961 (Idaho 2017)*.

District court properly granted the state's motions in limine, excluding defendant's expert-witness testimony, because the central question was whether the DNA samples at issue were contaminated, and yet defendant's expert witness testified only about a possibility of increased risk of contamination that could have been reduced and he admitted that he could not say there was contamination or quantify the risk of contamination. *State v. Caliz-Bautista, 162 Idaho 833, 405 P.3d 618 (2017)*.

District court did not abuse its discretion when it ruled an expert's causation opinion inadmissible, where the expert did not clearly assert that his causation opinion was reached within a reasonable degree of fire science certainty and the expert did not supplement or amend his report after an evaluation by an electrical engineer was completed. *Tech Landing, LLC v. JLH Ventures, LLC, 168 Idaho 482, 483 P.3d 1025 (2021)*.

The defendant's lay opinion concerning the trajectory of one of the bullets that hit him was properly excluded where the court permitted him to testify that he was shot in the arm when his arm was in front of his body; the court only prevented him from opining that the bullet that entered his left arm was the same one that went into his chest because that testimony required the application of specialized medical and forensic knowledge. *State v. Rambo, -- Idaho --, 540 P.3d 974 (2023)*.

**Future Liability on Claim.**

The trial court did not abuse its discretion by refusing to allow a State Insurance Fund's (SIF) claims supervisor to estimate SIF's future liability for medical and disability benefits to passenger injured in an auto accident. *Lumbermens Mut. Cas. Co. v. Egbert, 125 Idaho 678, 873 P.2d 1332 (1994)*.

**Harmless Error.**

Although it is now settled that admission of DNA evidence in a rape case is governed by this rule and not by the Frye test, and although the district court may have erred in applying the Frye test instead of this rule in rejecting defendant's claim to prevent introduction of DNA evidence, such error was harmless because other overwhelming evidence, including several fingerprints, proved the defendant's guilt. *State v. Amerson, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996)*, cert. denied, *521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997)*.

Error in admitting a nurse's opinion testimony was harmless, because the probative force of the remaining record in establishing defendant's guilt of attempted strangulation significantly outweighed the probative force of the error in admitting the opinion testimony: the nurse and other treatment providers testified that defendant's girlfriend had many signs, symptoms, and complaints apart from the issue of bruising, and the girlfriend also testified to the symptoms and complaints. *State v. Smith, 170 Idaho 800, 516 P.3d 1071 (2022)*.

**Indicia of Reliability.**

The studies used by the experts possessed sufficient indicia of reliability to meet the requirements under this rule and court properly admitted expert testimony based on the studies. *State v. Merwin, 131 Idaho 642, 962 P.2d 1026 (1998)*.

**Limitation of Testimony.**

The trial court did not abuse its discretion in limiting expert testimony where it found the witness' methodology deficient, since this was an exercise of reason supported by the record. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

Expert testimony consisting solely of legal conclusions does not assist the trier of fact in understanding the evidence or determining a fact at issue and, therefore, is inadmissible under this rule. *Ballard v. Kerr, 160 Idaho 674, 378 P.3d 464 (2016)*.

**Malpractice Action.**

Expert's declaration was admissible in a medical malpractice case, because the claimant's declaration provided a foundational basis for opinions on causation, which the expert was qualified to offer based on education, experience, and review of records. *Mortensen v. Baker, 170 Idaho 744, 516 P.3d 1015 (2022)*.

In a legal malpractice case against emergency care providers, the district court did not err in striking expert testimony as inadmissible and dismissing the case for failure to provide adequate expert medical testimony, because a lawyer, an out-of-state expert, and a nurse practitioner were not qualified to opine on the standard of care for doctors in a local emergency room. *Rich v. Hepworth Holzer, LLP, 172 Idaho 696, 535 P.3d 1069 (2023)*.

**Murder Cases.**

Given physician's qualifications, experience, and the foundation laid for his testimony, the Supreme Court could not say that the district court abused its discretion in allowing testimony as to the location of murder victims' bodies when they were shot. *State v. Thomasson, 122 Idaho 172, 832 P.2d 743 (1992)*.

In prosecution for second degree murder, ordinarily testimony about mere possibilities rather than probabilities is inadmissible because it is speculative or irrelevant and does not aid in the fact-finding process. However, medical expert's inability to completely rule out any one of three possible causes of death did not render his testimony inadmissible where he testified to a reasonable degree of medical certainty that victim's death was caused by one or both bludgeonings, but acknowledged that suffocation could also have been a factor, for such testimony was relevant and could assist the trier of fact in addressing the factual issues of the case even though he could not specify which among the series of attacks on the victim resulted in death. *State v. Schneider, 129 Idaho 59, 921 P.2d 759 (Ct. App. 1996)*.

Where the ultimate purpose of expert witness testimony regarding the defendant's state of mind was to evaluate the facts and circumstances of the murder as related to the expert by the defendant, which is the same evaluation that the jury would have to make in reaching its verdict on the issues in the case, and the testimony did not appear to involve either scientific or technological concepts outside the knowledge and understanding of the average juror, the testimony was properly excluded. *State v. Arrasmith, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998)*.

**Plaintiff's Self-Diagnosis.**

In suit against pharmacy alleging that type of insulin substituted for plaintiff's regular type caused plaintiff's hypoglycemic seizures, district court correctly disregarded plaintiff's testimony concerning his seizures since a lay person is not qualified to give an opinion about a medical diagnosis and thus plaintiff's testimony could not be considered for purposes of summary judgment; moreover, his testimony was not opinion testimony relating to causation because he simply testified to the nature and extent of the seizures from which he suffered after taking the substitute insulin, not to the cause of the seizures. *Bloching v. Albertson's, Inc., 129 Idaho 844, 934 P.2d 17 (1997)*.

**Qualifications of Expert.**

This rule provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. The five qualification areas are disjunctive, so that academic training is not always necessary, and practical experience or special knowledge or training in a related field each might suffice. *State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987)*.

To give expert opinion testimony, a witness must first be qualified as an expert on the matter at hand. *State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987)*.

This rule allows expert testimony where specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue and it does not require licensing in any particular discipline. *Jones v. Jones, 117 Idaho 621, 790 P.2d 914 (1990)*.

The foundation for establishing a witness's qualifications as an expert must be offered before his testimony will be received in evidence. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

Court did not err by qualifying a forensic scientist and a county coroner as experts in blood splatter pattern analysis and allowing them to testify in a murder prosecution; both witnesses had experience and training in blood splatter analysis. *State v. Rodgers, 119 Idaho 1047, 812 P.2d 1208 (1991)*.

The trial court expressly found that no foundation had been established which permitted the court to consider witness's opinion that the frequency of flooding in mud basin in the future could be expected to occur once every seven years. Such opinion related to the science of hydrology and witness's affidavit demonstrated no qualifications which he might have had relating to hydrology. *Marty v. State, 122 Idaho 766, 838 P.2d 1384 (1992)*.

In order for expert opinion testimony to be admissible, the party offering the evidence must show that the expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect. *Ryan v. Beisner, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992)*.

The qualification of an expert to render an opinion under this rule does not turn upon his capacity for memorization, and an inability to recite from memory the composition of a chemical compound has no bearing upon an expert's capacity to identify the compound through proper application of reliable testing methods. *State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998)*.

A real estate agent, if properly qualified under the rule, may testify as to the value of property. *Boel v. Stewart Title Guar. Co., 137 Idaho 9, 43 P.3d 768 (2002)*.

In suit by patient brought against anesthesiologists, alleging that his decreased vision was the result of medical malpractice, district court erred in holding that the patient's expert, an anesthesiologist, was not competent to testify as to ophthalmologic issues. Based on his experience as an anesthesiologist, expert was qualified on the issues of causation and injury. *Foster v. Traul, 145 Idaho 24, 175 P.3d 186 (2007)*.

District court did not abuse its discretion in allowing the detective to testify regarding the Internet screen names where his testimony showed he had extensive training and experience in investigating Internet sexual abuse crimes where the use of a screen name was integral to the process; it was within the province of the jury to take the extent and type of training and experience that he had and decide how much weight to give his testimony. *State v. Glass, 146 Idaho 77, 190 P.3d 896 (2008)*.

Where an expert witness did not possess the necessary skill, experience, or specialized knowledge specific to lineup procedures, a trial judge acted within her discretion in determining that the expert was not qualified to testify; it was irrelevant whether such testimony would assist the trier of fact. *State v. Pearce, 146 Idaho 241, 192 P.3d 1065 (2008)*.

Trial court did not abuse its discretion by allowing a police officer to testify as to a bullet's direction of travel where the mushrooming of bullets and the relative size of entrance and exit holes were not particularly technical or arcane subjects, and his regular use of a firearm, frequent observations of the aftermath of shootings, and participation in investigations that included determining a bullet's path made him qualified to testify. *State v. Larson, 158 Idaho 130, 344 P.3d 910 (2014)*.

Defendant could not qualify the arresting officer as an expert because the officer lacked scientific, technical, or specialized knowledge about the correlation of specific alcohol concentrations and the physical manifestations thereof or absorption rates of alcohol in the body. *State v. Tomlinson, 159 Idaho 112, 357 P.3d 238 (Ct. App. 2015)*.

District court did not err by concluding that a certified life planner had the requisite foundation for her testimony regarding plaintiff's life care plan, where she had extensive qualifications as a life care planner, she explained her methodology, and the resources she used were reasonably relied upon by life-care planning experts. *Brauner v. AHC of Boise, LLC, 166 Idaho 398, 459 P.3d 1246 (2020)*.

**Relevance.**

Motion for an expert witness was denied in a case where a potential parolee was challenging the licensing requirements of I.C.A. *§ 20-223* because an expert's opinion regarding the merit of allowing psychological evaluations to be conducted by only licensed evaluators was not relevant to the legal determination of whether licensing was required. *Dopp v. Idaho Comm'n of Pardons Parole, 144 Idaho 402, 162 P.3d 781 (Ct. App. 2007)*.

**Restrictions.**

Both expert and lay opinions are subject to the restriction that when the question is one which can be decided by persons of ordinary experience and knowledge, it is for the trier of fact to decide. The court or jury must weigh the truth of the facts presented by the witnesses and draw its conclusions by the exercise of independent judgment and reasoning powers, without hearing the opinions of witnesses. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

**State of Mind.**

While a defendant's mental condition has been expressly eliminated as a defense under *§ 18-207(1)*, the defendant may still use expert evidence on the issue of the defendant's state of mind -- subject to the Rules of Evidence -- where it is an element of the offense. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

Trial court erred in allowing a state trooper, who was an accident reconstruction expert, to testify that an incident was not an accident, and that defendant acted intentionally because there was a lack of any evasive action. The testimony was improper opinion testimony in which the trooper gratuitously and unnecessarily injected his clearly inadmissible opinion that defendant acted intentionally. *State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011)*.

**Summary Judgment.**

In action alleging breach in agreement concerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, upon motion for summary judgment, action of district court in refusing to consider affidavit of plaintiff's expert witness in challenging the manner in which corporation was showing its profits and losses was improper because the court, instead of determining the admissibility of evidence prepared by an expert witness by examining foundational issues before ruling on summary judgment, used the term "foundation" to criticize the facts considered and opinions held by the expert. This was nothing more than a weighing of evidence and a determination of a witness's credibility, which is improper in a motion for summary judgment. *Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997)*.

Summary judgment dismissing a medical malpractice action was properly granted where the patient failed to show a causal connection between an error in a prescription for antibiotics (which resulted in the patient taking enormous doses) and a subsequent heart attack; neither the patient's proffered experts nor the written materials they claimed to rely on established any

causal connection between the antibiotic and heart attacks. *Swallow v. Emergency Med. of Idaho, P.A., 138 Idaho 589, 67 P.3d 68 (2003)*.

**Witness Not Qualified.**

The qualifications of a professor of metallurgy as to whether dressmaking pins were defective or unreasonably dangerous were insubstantial and borderline at best, and the trial court did not abuse it's discretion in refusing to permit such opinion testimony. *Sidwell v. William Prym, Inc., 112 Idaho 76, 730 P.2d 996 (1986)*.

District court properly held that a customer's own statements that a supermarket door caused the screw in his leg to fracture were inadmissible, because the customer was not not competent to testify as to the cause of the fractured screw and the medical complications. *Holdaway v. Broulim's Supermarket, 158 Idaho 606, 349 P.3d 1197 (2015)*.

Trial court did not abuse its discretion when it held that plaintiffs' expert was not qualified to opine about the decedent's level of intoxication, because the expert's experience with addiction treatment was not the same field of expertise, given the technical nature of alcohol dissipation rates and the relevant variables therein. *Phillips v. E. Idaho Health Servs., 166 Idaho 731, 463 P.3d 365 (2020)*.

**Witness Qualified.**

The magistrate abused his discretion in refusing to accept a witness as a qualified expert on the Intoximeter 3000, a device used to analyze blood alcohol concentration by sampling a person's breath. *State v. Hopkins, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987)*.

In prosecution for DUI, state satisfactorily established police officer's qualifications regarding the administration of the HGN test where such officer had extensive training in traffic accident investigations, including DUI detection and arrest and had attended seminars conducted by doctor who had worked with highway traffic and safety organization to develop reliable field sobriety tests; therefore, officer was competent to testify as an expert on the administration of the test. *State v. Garrett, 119 Idaho 878, 811 P.2d 488 (1991)*.

Where witness testified that he had taken a one-week course in blood spatter patterns taught by a professional instructor, that he received training in crime scene evaluation in his training as a forensic pathologist, that he had interpreted blood spatter patterns and investigated crime scenes on a number of occasions, and that he had given testimony on blood spatter patterns in other cases, the trial court did not abuse its discretion in allowing witness to testify as an expert concerning blood spatter. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993)*.

Defendants' expert qualified as an expert under the Rules of Evidence because of his experience as being a certified registered nurse anesthetist; he was licensed in three states and had practiced for nearly 20 years. *Grover v. Isom, 137 Idaho 770, 53 P.3d 821 (2002)*.

Paramedic qualified as an expert witness based on evidence that she had worked as a paramedic in Idaho for three years and had previously worked in emergency medical services in Utah for six years, had graduated from a specialized school qualifying her to be a paramedic, and had observed and treated several stab wounds in the past in her role as a paramedic. *Adams v. State, 161 Idaho 485, 387 P.3d 153 (2016)*.

**Cited in:**

*State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*; *Earl v. Cryovac, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989)*; *Idaho Dep't of Law Enforcement v. $34,000 United States Currency, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991)*; *Levin v. Levin, 122 Idaho 583, 836 P.2d 529 (1992)*; *State v. Faught, 127 Idaho 873, 908 P.2d 566 (1995)*; *Boundary Backpackers v. Boundary County, 128 Idaho 371, 913 P.2d 1141 (1996)*; *Kessler v. Barowsky, 129 Idaho 647, 931 P.2d 641 (1997)*; *Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997)*; *Dachlet v. State, 136 Idaho 752, 40 P.3d 110 (2002)*; *State v. Ransom, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002)*; *Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 245 P.3d 992 (2010)*; *State v. Herrera, 152 Idaho 24, 266 P.3d 499 (2011)*; *State v. Critchfield, 153 Idaho 680, 290 P.3d 1272 (2012)State v. Diaz, 163 Idaho 165, 408 P.3d 920 (2017)*; *State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018)*; *Ybarra v. Legis. of Idaho, 166 Idaho 902, 466 P.3d 421 (2020)*; *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*; *Nelsen v. Nelsen, 170 Idaho 102, 508 P.3d 301 (2022)*.

**Decisions Under Prior Rule or Statute**

**Malpractice Action.**

A plaintiff in a malpractice action has the right to cross-examine the defendant as a medical expert. *Walker v. Distler, 78 Idaho 38, 296 P.2d 452 (1956)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Admissibility of results of presumptive tests indicating presence of blood on object. *82 A.L.R.5th 67*.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession. *82 A.L.R.5th 591*.

Admissibility of expert and opinion evidence as to cause or origin of fire -- modern civil cases. *84 A.L.R.5th 69*.

Admissibility of expert and opinion evidence as to cause or origin of fire in criminal prosecution for arson or related offense -- modern cases. *85 A.L.R.5th 187*.

Admissibility of expert testimony on child sexual abuse accommodation syndrome (CSAAS) in criminal case. *85 A.L.R.5th 595*.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case. *87 A.L.R.5th 693*.

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. *90 A.L.R.5th 453*.

Admissibility and weight of voice spectrographic analysis evidence. *95 A.L.R.5th 471*.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. *104 A.L.R.5th 503*.

Admissibility of ion scan evidence. *124 A.L.R.5th 691*.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused. *1 A.L.R.6th 657*.

Admissibility in state criminal case of results of polygraph (lie detector) test-Post-Daubert cases. 10 A.L.R.6th 463.

Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. *18 A.L.R.6th 325*.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. *18 A.L.R.6th 613*.

Admissibility of Actuarial Risk Assessment Testimony in Proceeding to Commit Sex Offender. *20 A.L.R.6th 607*.

Admissibility of Expert Testimony by Nurses. *24 A.L.R.6th 549*.

Qualification as Expert To Testify as to Findings or Results of Scientific Test Concerning DNA Matching. *38 A.L.R.6th 439*.

Admissibility of Computer Forensic Testimony. *40 A.L.R.6th 355*.

Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes". *40 A.L.R.6th 595*.

Admissibility of Biomedical Engineer Testimony. *43 A.L.R.6th 327*.

Necessity and Admissibility of Expert Testimony to Establish Malpractice or Breach of Professional Standard of Care by Architect. *47 A.L.R.6th 303*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- General principles and conduct related to interaction with client. *58 A.L.R.6th 1*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- Conduct related to procedural issues. *59 A.L.R.6th 1*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- Conduct related to substantive representation and transactional matters. *60 A.L.R.6th 1*.

Qualification as expert to testify in legal malpractice action. *82 A.L.R.6th 281*.

Admissibility and propriety of use of *Abel* assessment for sexual interest test. *84 A.L.R.6th 263*.

Admissibility of expert or opinion evidence -- Supreme court cases. *177 A.L.R. Fed. 77*.

Admissibility of handwriting expert's testimony in federal criminal case. *183 A.L.R. Fed. 333*.

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# *I.R.E. Rule 703*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Admissibility of Testimony.
Discovery Documents.
Evidence Described by Expert.
Foundation.
Harmless Error.
Independent Judgment of Expert.
Opinion Based on Inadmissible Evidence.
Records of Another Expert.
Summary Judgment.
Testimony Properly Excluded.
Testimony Properly Included.

**Admissibility of Testimony.**

Where mother of a child who died after extended sedation with Propofol presented evidence through an expert witness regarding the effects of that extended use, and this evidence was clearly influential in producing a jury verdict in favor of the mother, the trial court erred in

rejecting that evidence and in entering a j.n.o.v. in favor of the child's doctors. *Coombs v. Curnow, 148 Idaho 129, 219 P.3d 453 (2009)*.

District court erred in reversing the magistrate court's decision to allow the forensic pathologist to testify concerning the cause of death because the record established that the magistrate court admitted the testimony after recognizing the discretionary nature of the decision. *State v. Ochoa, 169 Idaho 903, 505 P.3d 689 (2022)*.

**Discovery Documents.**

A scheduling order requiring the disclosure of opinions and conclusions does not, by its terms, refer to the facts and data upon which those opinions and conclusions were based. *Lepper v. E. Idaho Health Servs., 160 Idaho 104, 369 P.3d 882 (2016)*.

**Evidence Described by Expert.**

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. *Pacheco v. Safeco Ins. Co. of Am., 116 Idaho 794, 780 P.2d 116 (1989)*, rehearing denied, *117 Idaho 491, 788 P.2d 1314 (1989)*.

Assuming a deputy testified as an expert in the administration of the horizontal gaze nystagmus test, the testimony was not admissible where, although this rule permitted the deputy to rely on the instruction that he had received at the police academy when forming his opinion that defendant was under the influence, it did not permit that information to be disclosed to the jury in the absence of a ruling that its probative value substantially outweighed its prejudicial effect. *State v. Hill, 161 Idaho 444, 387 P.3d 112 (2016)*.

**Foundation.**

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992)*.

Where expert's testimony indicated that he relied in part on the notes of non-disclosed expert witness, as well as his own investigation, in forming and rendering his own independent expert opinion concerning any defects in tires, and where expert further testified that such foundation evidence was typically relied on by experts in his field in forming their expert opinions, the trial court did not err in admitting this evidence. *Doty v. Bishara, 123 Idaho 329, 848 P.2d 387 (1992)*.

Testimony of the victim's examining physician as to what the victim and her mother reported to him was admissible for foundational purposes only, where the medical history solicited by the

physician constituted part of the facts and data relied upon by him in forming his expert opinion, and the trier of fact was a judge, not a jury. *State v. Doe (In re Doe), 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004)*.

District court did not err by concluding that a certified life planner had the requisite foundation for her testimony regarding plaintiff's life care plan, where she had extensive qualifications as a life care planner, she explained her methodology, and the resources she used were reasonably relied upon by life-care planning experts. *Brauner v. AHC of Boise, LLC, 166 Idaho 398, 459 P.3d 1246 (2020)*.

District court abused its discretion when it permitted an expert to testify as to breach and causation, because the expert's testimony lacked the required foundation; the record did not reflect that the expert relied on any evidence, let alone evidence that other experts would reasonably rely on, to form his opinion that the treatment a decedent received at a medical center had no causal relationship with his death. *Secol v. Fall River Med., P.L.L.C., 168 Idaho 339, 483 P.3d 396 (2021)*.

Expert's declaration was admissible in a medical malpractice case, because the claimant's declaration provided a foundational basis for opinions on causation, which the expert was qualified to offer based on education, experience, and review of records. *Mortensen v. Baker, 170 Idaho 744, 516 P.3d 1015 (2022)*.

**Harmless Error.**

In a fraud case, a district court might have erred by admitting medical records, because it made no finding that the records were necessary for the jury's evaluation of a doctor's testimony. However, the error was harmless, because the defendant's attorney stated that he had no objection to the records coming in as they related to the defendant's cancer diagnosis. *Alexander v. Stibal, 161 Idaho 253, 385 P.3d 431 (2016)*.

**Independent Judgment of Expert.**

In personal injury action on theory that city was negligent in design of intersection where accident occurred, reports of other accidents that had occurred in the intersection area both before and after the occurrence of the collision between plaintiff's car and another car, referred to by plaintiff's expert witness as a basis of his opinion that the design of the accident site was dangerous and did not meet existing standards, was proper since an expert may rely on hearsay to form an opinion so long as such opinion is reached through independent judgment. *Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994)*.

**Opinion Based on Inadmissible Evidence.**

The trial court, in its discretion, may allow an expert to render an opinion based in part upon hearsay or other inadmissible evidence, as long as the expert testifies as to the specific basis of

his opinion and reaches an opinion through his own independent judgment. *Doty v. Bishara, 123 Idaho 329, 848 P.2d 387 (1992)*.

This rule authorizes the admission of expert opinions that are based upon hearsay or other inadmissible information, if the information is of a type reasonably relied upon by experts in the field, but the rule does not provide that the hearsay information itself is automatically, independently admissible in evidence. *State v. Scovell, 136 Idaho 587, 38 P.3d 625 (Ct. App. 2001)*.

District court did not err in allowing the injured customer's expert to testify about and rely upon a summary of the store's accident history that contained irrelevant information about accidents that were not the result of improperly stacked merchandise because the accident summary was not admitted into evidence, rather, the accident summary was referred to by the expert as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise, and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 95 P.3d 34 (2004)*.

Where defendant was convicted of lewd contact with a six-year-old girl, the testimony from a DNA expert who indicated that defendant's DNA was in the semen found on the girl's underwear and inside a condom was inadmissible; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. She relied on oral communications with her colleague and his notes in forming her conclusions about the DNA evidence, which was inadmissible hearsay. *State v. Watkins, 148 Idaho 418, 224 P.3d 485 (2009)*.

In workers' compensation proceedings, it was not error for a referee to consider a vocational report, referring to an excluded medical report, because (1) the author of the medical report did not have to be qualified as an expert, (2) vocational experts reasonably used such reports, and (3) a vocational expert only opined on employability. *Smith v. State, 165 Idaho 164, 443 P.3d 178 (2019)*.

**Records of Another Expert.**

A medical expert witness can give his opinion and state the facts upon which that opinion was based, even though he relies in part upon the records of another medical expert. *Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985)*, aff'd, *Long v. Hendricks, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988)*.

**Summary Judgment.**

In action alleging breach in agreement concerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, upon motion for summary judgment, action of district court in refusing to consider affidavit of plaintiff's expert witness in challenging

the manner in which corporation was showing its profits and losses was improper because the court, instead of determining the admissibility of evidence prepared by an expert witness by examining foundational issues before ruling on summary judgment, used the term "foundation" to criticize the facts considered and opinions held by the expert. This was nothing more than a weighing of evidence and a determination of a witness's credibility, which is improper in a motion for summary judgment. *Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997)*.

**Testimony Properly Excluded.**

Where expert had no contact with the victim or her parents during the time period in question and defendant laid an insufficient foundation regarding expert's qualifications in child sexual abuse matters, the trial court properly excluded the testimony. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

The trial court did not abuse its discretion by refusing to allow a State Insurance Fund's (SIF) claims supervisor to estimate SIF's future liability for medical and disability benefits to passenger injured in an auto accident. *Lumbermens Mut. Cas. Co. v. Egbert, 125 Idaho 678, 873 P.2d 1332 (1994)*.

Where defendant's expert witness did not finish his metallurgic analysis on composition or integrity of shotgun pellets prior to trial, the expert could not testify as to information he received through a telephone call to the manufacturer of the pellets. *State v. Grube, 126 Idaho 377, 883 P.2d 1069 (1994)*, cert. denied, *514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995)*.

In a legal malpractice case against emergency care providers, the district court did not err in striking expert testimony as inadmissible and dismissing the case for failure to provide adequate expert medical testimony, because a lawyer, an out-of-state expert, and a nurse practitioner were not qualified to opine on the standard of care for doctors in a local emergency room. *Rich v. Hepworth Holzer, LLP, 172 Idaho 696, 535 P.3d 1069 (2023)*.

**Testimony Properly Included.**

The fire investigation expert was sufficiently qualified to interpret the lightning strike data where the plaintiffs did not argue that the expert was not qualified as an expert in fire investigation, and prior to testifying in detail as to what the data indicated to him, the expert explained that his training and experience in fire investigation encompassed the interpretation of such data, and in addition the expert testified that fire investigators routinely relied upon such lightning detection data when attempting to determine a fire's cause. The trial court did not abuse its discretion in allowing the expert to testify to his interpretation of such data, as the expert was trained to interpret it and qualified to base an opinion on those interpretations. *Lanham v. Idaho Power Co., 130 Idaho 486, 943 P.2d 912 (1997)*.

Where injured parties brought suit against a cow owner, pasture owners and the state when their vehicle struck a cow carcass on an interstate highway, the trial court did not abuse its discretion in allowing the pasture owners' expert to testify as to why the cows might have broken

down a pasture gate and gone out onto the highway. *Karlson v. Harris, 140 Idaho 561, 97 P.3d 428 (2004)*.

**Cited in:**

*Earl v. Cryovac, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989)*; *Idaho Dep't of Law Enforcement v. $34,000 United States Currency, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991)*; *Ryan v. Beisner, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992)*; *Reed v. Foster, 130 Idaho 74, 936 P.2d 1316 (1997)*; *Hoffer v. Shappard, 160 Idaho 868, 160 Idaho 870, 380 P.3d 681 (2016)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case. *87 A.L.R.5th 693*.

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. *90 A.L.R.5th 453*.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. *104 A.L.R.5th 503*.

Admissibility of ion scan evidence. *124 A.L.R.5th 691*.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused. *1 A.L.R.6th 657*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- General principles and conduct related to interaction with client. *58 A.L.R.6th 1*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- Conduct related to procedural issues. *59 A.L.R.6th 1*.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney -- Conduct related to substantive representation and transactional matters. *60 A.L.R.6th 1*.

Admissibility and propriety of use of *Abel* assessment for sexual interest test. *84 A.L.R.6th 263*.

Admissibility of handwriting expert's testimony in federal criminal case. *183 A.L.R. Fed. 333*.

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# I.R.E. Rule 704

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 704. Opinion on an Ultimate Issue.

An opinion or inference is not objectionable just because it embraces an ultimate issue.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Child Abuse Cases.
Credibility of Witness.
Evidence Held Admissible.
Eyewitness Identification.
In General.
State of Mind.

### Child Abuse Cases.

Physician's opinion that children had been molested embraced an ultimate issue, and although this rule allows such testimony if it will assist the trier of fact, the testimony in this case would not assist the jury because the physician was not qualified as an expert in the area of child sexual abuse and it should not have been admitted. *State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991)*.

### Credibility of Witness.

This rule must be read in the light of Rule 702. Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue. Opinions which directly pass on the credibility of witnesses are generally not allowed. *State v. Walters, 120 Idaho 46, 813 P.2d 857 (1990)*.

In a criminal trial where the expert opinion involves the weighing of the credibility of witnesses based upon their out-of-court statements, special caution must be exercised by the trial court to make certain that the expert's opinion is based upon his or her expertise and that it will assist the trier of fact in determining a fact in issue. Historically, the evaluation of the credibility of witnesses has been committed solely to the jury, and they alone have the responsibility to determine the guilt or innocence of the accused. *State v. Walters, 120 Idaho 46, 813 P.2d 857 (1990)*.

An expert cannot opine to the accuracy of the eyewitness identification or the credibility of any witness, as those matters are reserved for the jury. However, an expert witness may testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony. *State v. Almaraz, 154 Idaho 584, 301 P.3d 242 (2013)*.

**Evidence Held Admissible.**

Even though the doctor was allowed to give his opinion as to whether "great bodily injury," one of the elements of the aggravated assault charge against the defendant, could have resulted from the victim's injuries, there was no abuse of discretion that would warrant a reversal of the conviction, where testimony by the doctor, in addition to his opinion, overwhelmingly established that great bodily injury occurred, and the jury was instructed by the judge that it should consider the nature and extent of any injuries in deciding whether those injuries were likely to produce great bodily harm. *State v. Crawford, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986)*.

In a criminal prosecution for forgery, a loan agreement signed by defendant, which stated that the purpose was to pay for a forged check, was not rendered inadmissible by I.R.E. 704 since the loan agreement was not an improper lay opinion testimony, nor did it speak to an ultimate issue in the case. *State v. Hill, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004)*.

Officers' observations that defendant was under the influence of alcohol and too impaired to drive went to an ultimate issue of fact, but did not invade the province of the jury as to its determination of whether defendant was or was not guilty of having driven an automobile while under the influence of alcohol and, thus, were admissible under this rule. *State v. Corwin, 147 Idaho 893, 216 P.3d 651 (2009)*.

**Eyewitness Identification.**

Where a scientist's research casts doubt upon the ability of eyewitnesses to perceive accurately, or to memorize and recall fully, certain observed events, such research meets the criterion of I.R.E., Rule 401, and any concern for invasion of the jury's factfinding mission is obviated by this rule, which permits experts to render opinions on ultimate issues; accordingly, expert testimony concerning eyewitness identification is admissible under appropriate circumstances. *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*.

**In General.**

Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and to determine a fact in question; an expert's opinion is not inadmissible merely because it embraces an ultimate issue to be decided by the trier of fact. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

Expert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible. *State v. Diaz, 163 Idaho 165, 408 P.3d 920 (2017)*.

**State of Mind.**

While a defendant's mental condition has been expressly eliminated as a defense under *§ 18-207(1)*, the defendant may still use expert evidence on the issue of the defendant's state of mind -- subject to the Rules of Evidence -- where it is an element of the offense. *State v. Dragoman, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997)*.

State trooper, who was an accident reconstruction expert, gratuitously and unnecessarily injected his clearly inadmissible opinion that defendant acted intentionally; not only was his answer an inadmissible intrusion into the jury's domain of determining the defendant's state of mind, it also was completely unsolicited and wholly unnecessary. *State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011)*.

**Cited in:**

*Sidwell v. William Prym, Inc., 112 Idaho 76, 730 P.2d 996 (1986)*; *Sliman v. Aluminum Co. of Am., 112 Idaho 277, 731 P.2d 1267 (1986)*; *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*; *Idaho Dep't of Law Enforcement v. $34,000 United States Currency, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991)*; *State v. Pearce, 146 Idaho 241, 192 P.3d 1065 (2008)*.

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# I.R.E. Rule 705

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without prior disclosure of the underlying facts or data, provided that, if requested pursuant to the rules of discovery, the underlying facts or data were disclosed. But the expert may be required to disclose those facts or data on cross-examination.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Applicability.
Cross-Examination.
Testimony Held Admissible.

**Applicability.**

Finding against the State and in favor of defendant was improper where the magistrate erred in imposing a discovery sanction for a defense request not allowed by the Idaho Criminal Rules; there was no motion pursuant to Idaho Crim. R. 16(b)(8) and therefore, the magistrate's order to disclose the facts and data underlying the expert's opinion was not within the scope of the applicable criminal discovery rules, thus, the ordered sanction of preventing the expert from testifying was in error. *State v. Maynard, 139 Idaho 876, 88 P.3d 695 (2004)*.

In a real estate dispute, a district court did not err by striking portions of a summary analysis that were inadmissible as lacking foundation or containing hearsay; under this rule, the vendors failed to disclose during discovery the underlying facts and data upon which the opinions in the affidavit were based. *Hilliard v. Murphy Land Co., LLC, 158 Idaho 737, 351 P.3d 1195 (2015)*.

**Cross-Examination.**

Trial court should have permitted cross-examination of the defense's accident reconstruction expert concerning defendant's statement to an insurance adjuster, where expert did not read defendant's statement prior to testifying about causation of the accident. *Dabestani ex rel. Dabestani v. Bellus, 131 Idaho 542, 961 P.2d 633 (1998)*.

**Testimony Held Admissible.**

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. *Pacheco v. Safeco Ins. Co. of Am., 116 Idaho 794, 780 P.2d 116 (1989)*, rehearing denied, *117 Idaho 491, 788 P.2d 1314 (1989)*.

The trial court correctly admitted the deposition of the injured party that was taken in a lawsuit involving a prior accident in which the injured party was involved, and the trial court did not abuse its discretion in allowing the deposition to be read to the jury as facts underlying an expert opinion. *Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991)*.

**Cited in:**

*Priest v. Landon, 135 Idaho 898, 26 P.3d 1235 (Ct. App. 2001)*.

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# I.R.E. Rule 706

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.***

## Rule 706. Court-Appointed Expert Witnesses.

**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

**(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

**(1)** must advise the parties of any findings the expert makes;

**(2)** may be deposed by any party;

**(3)** may be called to testify by the court, pursuant to Rule 614(a);

**(4)** may be called to testify by any party; and

**(5)** may be cross-examined by any party, including the party that called the expert.

**(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

**(1)** in a criminal case or in a civil case involving just compensation for the taking of property, from any funds that are provided by law; and

**(2)** in any other civil case, by the parties in the proportion and at the time that the court directs - the compensation is then charged like other costs.

**(d) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Proper Denial of Expert or Investigative Assistance.**

In prosecution for rape, the decision to deny the defendant expert or investigative assistance was not an abuse of the district court's discretion, where the state laboratory was available for any additional scientific testing which the defendant desired. *Estes v. State, 111 Idaho 430, 725 P.2d 135 (1986)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness. *83 A.L.R.5th 541*.

Idaho Court Rules Annotated
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# *I.R.E. Rule 801*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 801. Definitions that apply to this article; Exclusions from hearsay.

**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

**(b) Declarant.** "Declarant" means the person who made the statement.

**(c) Hearsay.** "Hearsay" means a statement that:

**(1)** the declarant does not make while testifying at the current trial or hearing; and

**(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

**(B)** is consistent with the declarant's testimony and is offered:

**(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

**(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

**(C)** identifies a person as someone the declarant perceived earlier.

**(2) Statement by Party-Opponent.** The statement is offered against an opposing party and:

**(A)** was made by the party in an individual or representative capacity;

**(B)** is one the party manifested that it adopted or believed to be true;

**(C)** was made by a person whom the party authorized to make a statement on the subject;

**(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

**(E)** was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

## History

(Adopted January 8, 1985, effective July 1, 1985; amended September 1, 2015, effective January 1, 2016; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

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**Admission by Party Opponent.**

Subdivision (d)(2)(E) of this rule essentially equates testimony concerning an extrajudicial statement by a co-conspirator with testimony by the co-conspirator himself concerning an extrajudicial statement by the defendant; both types of testimony are treated as an admission by a party-opponent and are deemed to be nonhearsay, rather than exceptions to the hearsay rule. *State v. Caldero, 109 Idaho 80, 705 P.2d 85 (Ct. App. 1985)*.

The testimony of an alleged co-conspirator, concerning incriminatory statements made by the defendant, may be viewed as containing an admission by a party-opponent; the statements are

deemed to be nonhearsay rather than an exception to the hearsay rule, as prior case law characterized them. *State v. Walker, 109 Idaho 356, 707 P.2d 467 (Ct. App. 1985)*.

Testimony about an offer to sell may be viewed as a non-hearsay admission of a party-opponent. *Brazier v. Brazier, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986)*.

In prosecution for violation of state sales tax laws, the checks written by the taxpayer to his suppliers were party admissions. *State v. Barlow, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987)*.

Victim's testimony, concerning letters defendant allegedly wrote to victim after an aggravated battery, was not hearsay and was admissible because letters were written by defendant who was a party to the action and therefore were an admission by a party-opponent. *State v. Hernandez, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991)*.

Evidence of a party's plea of guilty to a traffic infraction is admissible against that party in a subsequent civil proceeding arising from the same occurrence as an admission by a party-opponent; however, evidence of such a plea is not conclusive on the issue of negligence; the party against whom the evidence is offered is free to explain the circumstances under which the guilty plea was entered, and the jury, as the trier of fact, shall determine the weight to which that explanation is entitled. *Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995)*.

Defendant's statement that he had just been released from prison was an oral assertion, which was offered against him at trial, thus it falls within the definition of an admission by a party-opponent under this rule. *State v. Martinez, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995)*.

When employees sued a school district over the employees' termination, a school board member's statement was admissible as an admission by a party opponent, because the school board member was an agent of the school district. *Berrett v. Clark Cty. Sch. Dist. No. 161, 165 Idaho 913, 454 P.3d 555 (2019)*.

**Adoptive Admissions.**

Tape recording of an interview of several alleged accomplices of robbery defendant in which they made inculpatory statements, with defendant allegedly present and nodding his head occasionally in apparent agreement with those statements, was erroneously admitted as adoptive admissions; statements were in the form of two or three co-defendants speaking at once where one's narration overlaid the statements of the other and any attempt to identify which statements defendant purportedly agreed to would have been impossible. *State v. Nguyen, 122 Idaho 151, 832 P.2d 324 (Ct. App. 1992)*.

**Agent of Party-Opponent.**

Statements by a bouncer employed at defendant's bar whereby the bouncer explained to assault victim that he was sorry the assault happened in the bar, that codefendant, the alleged perpetrator of the attack, had no business being there, and that she did the same thing to

someone else a week earlier, could be admitted as an admission by an agent of a party-opponent under this rule. *McGill v. Frasure, 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990)*.

Record contained independent evidence of an agency relationship between the business owner and his daughter where, during his previously published deposition, the owner testified that his daughter helped him manage the company, thereby acting as his agent in the day-to-day function of the company, and the owner also stated that he asked the daughter to pay off the Bank of Idaho loan with the money he gave her; based on this evidence, the district court did not abuse its discretion in determining that the daughter was acting as an agent at the time of the transfer, and that her comments to the family concerning the transfer were admissible as a statement by a party's agent. *Vreeken v. Lockwood Eng'g, B.V., 148 Idaho 89, 218 P.3d 1150 (2009)*.

**Applicability.**

The Idaho Rules of Evidence apply at parental termination hearings. To the extent *§ 16-2009* allows impermissible hearsay evidence, it is not valid and should not be relied on for that purpose over a valid objection. *State v. Doe (In re Doe), 165 Idaho 675, 450 P.3d 323 (Ct. App. 2019)*.

**Complaint As Judicial Admission.**

A complaint against a railroad in a wrongful death action was correctly excluded from use as evidence of prior admissions and for impeachment purposes; the complaint did not rise to the level of judicial admission. *Curtis v. Canyon Highway Dist. No. 4, 122 Idaho 73, 831 P.2d 541 (1992)*.

**Corporate Designees.**

Depositions by nurses were ruled admissible as statements from party agents who are not corporate designees, not as depositions by persons who were testifying on behalf of a corporation. *Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000)*.

**Harmless Error.**

Although the physician's testimony about the victim's statements identifying her husband as the assailant was hearsay, it was harmless error where, prior to the doctor's testimony, two other witnesses had already testified as to the victim's statements incriminating her husband. *State v. Crawford, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986)*.

Where the defendant admitting having rented the ministorage unit and the investigator testified, without objection, that he had a conversation with the ministorage caretaker that showed the defendant was renting it, the defendant's rental of the unit was a fact firmly established and

never denied at trial, and any error in admitting the rental agreement over the hearsay objection was harmless. *State v. Burke, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986)*.

In a criminal case where trial court overruled defendant's hearsay objection under subsection (c) of this rule, but the Court of Appeals noted that the trial court should have sustained the objection until the proponent made an offer of proof that the statement was not hearsay, under I.R.E. 103 the testimony was harmless error because other non-hearsay evidence amply proved fact related by the objectionable testimony. *State v. Gomez, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995)*.

In view of the considerable amount of independent evidence, essentially unrebutted by the defense, that identified defendant as the second man who fled from officer, and in view of the district court's directive to the jury to disregard officer's testimony that was designed to convey hearsay, court held that the misconduct of the prosecutor was harmless beyond a reasonable doubt. *State v. Agundis, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995)*.

Although the trial court erred by admitting the battery victim's hearsay statement acknowledging that she told a 911 operator that defendant pointed a shotgun at her, the error was harmless. The evidence was simply cumulative to evidence already introduced without objection. *State v. Miller, 157 Idaho 838, 340 P.3d 1154 (Ct. App. 2014)*.

In convictions of sexual abuse of a child and lewd conduct with a minor, although the district court erred in admitting testimony from a detective of an instruction from defendant's wife because it was hearsay and contained an implied assertion of fact, reversal was not required. The error was harmless beyond a reasonable doubt; the record evidence established defendant's guilt beyond a reasonable doubt. *State v. Roman-Lopez, 171 Idaho 585, 524 P.3d 864 (2023)*.

**Inconsistent Statements.**

It was more appropriate to analyze the admissibility of the videotape under I.R.E. 106 because the essence of the prosecutor's reason for seeking admission of the tape was to demonstrate, by providing context, that the allegedly inconsistent statements introduced on cross-examination of victim were actually not inconsistent, rather than introduce prior consistent statements to mitigate inconsistent statements. *State v. Bingham, 124 Idaho 698, 864 P.2d 144 (1993)*.

District court did not abuse its discretion by admitting the testimony of two witnesses to contradict defendant's mother's statements concerning defendant's crimes because out-of-court statements offered to impeach a witness's credibility were not hearsay. *State v. Smith, 168 Idaho 463, 483 P.3d 1006 (2021)*.

**Intoximeter Printout.**

A printout from the Intoximeter is not a "statement" for hearsay purposes. The printout, although a writing offered to prove the truth of the matter asserted therein, is not extrajudicial testimony prohibited by the hearsay rule; the printout is a test result produced by a machine.

The Intoximeter machine is not a "declarant" capable of being hailed into the courtroom, placed under oath, made to testify and then cross-examined. *State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)*.

**Objections.**

As there was no obligation by a highway district's counsel to object to any potential hearsay during a deposition, any objections that the district had about the admissibility of hearsay statements would have been automatically preserved for trial. *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

**Preservation for Review.**

The district court did not abuse its discretion by denying the admissibility of defendant's statements made during the police interrogation on hearsay grounds when trial counsel argued their admissibility as admissions of a party-opponent. Defendant's contention that admission of the statements was justified under other Rules of Evidence was not properly preserved for appeal and did not rise to the level of fundamental error. *State v. Parmer, 147 Idaho 210, 207 P.3d 186 (2009)*.

**Purpose of Testimony.**

Officer's testimony about what he had learned from third parties concerning defendant's activities relating to a prior bank robbery was not offered for the truth of any of the facts relayed in the testimony; rather, it was presented only to show what defendant was told by the officer, which precipitated defendant's confession. *State v. Nichols, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)*.

Where the testimony of a witness was not offered to prove that the defendant had recently been released from prison, but rather to rehabilitate the victim's testimony regarding the defendant's statement to him, the testimony was not hearsay and was properly admitted. *State v. Martinez, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995)*.

Where the prosecutor's purpose for the testimony, as admitted during his argument on defendant's objection, was to convey an identification to the jury by implication, such testimony, which conveys the substance of an out-of-court statement for the truth of the matter asserted, was properly characterized as hearsay even though the statement was not directly repeated. *State v. Agundis, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995)*.

Where an attorney's testimony disclosed that his client had expressed guilt when he told the witness he was having trouble sleeping and that he wanted to get the matter off his conscience, the statement sought to prove the matter asserted, and was inadmissible hearsay. *State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)*.

Will contestant's testimony of the testator's statements, which focused entirely on the testator's negative feelings toward her children, were properly excluded because the statements were inadmissible hearsay and irrelevant. They did not necessarily speak to her mental condition or particular susceptibility to influence, but rather were aimed at proving their truth: that she was angry with her children, that they were not worthy to inherit, and that she did not mean for them to inherit. *Wooden v. Martin (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012)*.

Deputy's testimony as to what he had been taught regarding the presence of vertical nystagmus was hearsay under subsection (c), where it was used to show defendant's blood alcohol concentration. *State v. Hill, 161 Idaho 444, 387 P.3d 112 (2016)*.

In convictions of sexual abuse of a child and lewd conduct with a minor, district court did not abuse its discretion in admitting a prior drawing of the layout of the living room and bedroom in defendant's home that was made by a victim to illustrate her in-court testimony. The drawing was not hearsay under the rule as it was clearly admitted for illustrative purposes and not to establish a particular fact. *State v. Roman-Lopez, 171 Idaho 585, 524 P.3d 864 (2023)*.

**Recent Fabrication.**

Because, on cross-examination, defendant attempted to elicit testimony which would support his claim that child's mother spent the three years before the trial programming the child to say defendant had abused her, the video tape of child's interview with CARES (Child at Risk Evaluation Services) nurse was admissible for the purpose of refuting defendant's charge of recent fabrication. *State v. McAway, 127 Idaho 54, 896 P.2d 962 (1995)*.

**Statement by Co-Conspirator.**

Statements by a co-conspirator made during the course of and in furtherance of a conspiracy, which are not considered hearsay under this rule, were properly admitted before the conspiracy was established during the trial, where evidence such as the informant's testimony and the circumstances of the drug transactions, sufficiently established a conspiracy between the *co-defendants. State v. Hernandez, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991)*.

In order to be admissible under this section, it is not necessary that the statements were made in the presence of, or with the knowledge of, the other conspirators; nor is it necessary that the defendant be a part of the conspiracy at the time the statements were made. *State v. Hoffman, 123 Idaho 638, 851 P.2d 934 (1993)*, cert. denied, *511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994)*.

The statute of limitation for the crime of conspiracy does not automatically bar the use of statements by a person who cannot be charged with the crime of conspiracy due to the operation of the statute of limitation. Once there is some evidence of a conspiracy or promise of its production, any statement made by a co-conspirator during the course of and in furtherance of the conspiracy are admissible; it makes no difference whether the declarant or any other

partner in crime could actually be tried, convicted and punished for the crime of conspiracy. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

Witness physician's testimony, based on witness physician's review of procedures recorded in surgical logs rather than his personal observation, which was offered to prove the truth of his conclusions, was speculative and excludable as hearsay. *Woodfield v. Board of Professional Discipline, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995)*.

The descriptive statement, made 45 minutes after the incident as repeated by the officer in his testimony, was admissible as a prior identification by a witness and was not hearsay, and the district court did not err in admitting the descriptive testimony. *State v. Woodbury, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995)*.

Where the use of a common address was circumstantial evidence of a link between the two men, both involved in a flight from a police officer, and this link was probative in determining whether defendant was the second man observed by officer, when used in this way, as circumstantial evidence of defendant's association with arrested man and not to prove that defendant or arrested man had ever been at a specific address, the evidence was not hearsay. *State v. Agundis, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995)*.

Where the statement of a friend of the defendant was not made during, or in furtherance of, a conspiracy, but after the completion of the crime and after arrest, and where it was not made to conceal or perpetuate the conspiracy, the statement was not properly admissible under this rule, either as a statement against interest or as a statement of a *co-conspirator. State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998)*.

Statements made by defendant's girlfriend to an undercover officer during a drug exchange were admissible as nonhearsay because the evidence showed that the conspiracy between defendant and his girlfriend was ongoing at the time, and it demonstrated that defendant was involved in the conspiracy because defendant was present at the drug exchanges; moreover, the admission of the statements under I.R.E. 801(d)(2)(e) did not violate the *Confrontation Clause. State v. Ingram, 138 Idaho 768, 69 P.3d 188 (Ct. App. 2003)*.

Note written by defendant's co-conspirator to the co-conspirator's girlfriend, showing that the co-conspirator was attempting to cover up the crime by dissuading his girlfriend from divulging information to police, was not hearsay; although the note was offered in error under subsection (d)(2)(E) of this rule, such error was harmless because the note was admissible on other grounds. *State v. Harris, 141 Idaho 721, 117 P.3d 135 (Ct. App. 2005)*.

District court did not err in admitting a co-conspirator's testimony about another co-conspirator's statements under subdivision (d)(2)(E), because the statements were made in furtherance of the conspiracy. The statements were made after the co-conspirator had agreed to join the drug ring and were part of his "orientation" as they explained the operation and roles of the conspiracy. *State v. Rolon, 146 Idaho 684, 201 P.3d 657 (2008)*.

Trial court did not abuse its discretion by denying defendant's motion for relief from prejudicial joinder because her co-conspirator's statements were admissible under this rule, as they were

made in furtherance of the conspiracy, where the detective informed the trial court that the co-conspirator was attempting to determine whether the detective was still investigating the other people that were not in custody. *State v. Blake, 161 Idaho 33, 383 P.3d 712 (2016)*.

Where the evidence presented during the trial was sufficient to show that there was a conspiracy between defendant and a co-conspirator to deliver psilocybin mushrooms to an undercover detective, the detective's statement, recounting what the co-conspirator said about the defendant, was not hearsay. *State v. Smith, 161 Idaho 782, 391 P.3d 1252 (2017)*.

**Statement by Party Opponent.**

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor, 141 Idaho 459, 111 P.3d 144 (2005)*.

Where defendant and his accomplice were apprehended separately and charged with burglary and attempted robbery and where both gave the same residential address at the time of booking, the trial court erred in ruling that the accomplice's statement of his residence address was an admission of a party opponent when proffered against defendant, because a nonjudicial statement is admissible under subsection (d)(2) only as against the party who made the statement or on whose behalf it was made. While the state was entitled to introduce the accomplice's statement to prove its case against the accomplice himself, the statement was hearsay as to defendant. *State v. Gerardo, 147 Idaho 22, 205 P.3d 671 (2009)*.

Where defendant and his accomplice were apprehended separately and charged with burglary and attempted robbery, the trial court erred in admitting the accomplice's statements to police regarding the location of the guns used in the commission of the offenses at defendant's trial; the accomplice's statements were not the admissions of a party opponent when proffered against defendant, because a nonjudicial statement is admissible under subsection (d)(2) only as against the party who made the statement or on whose behalf it was made. While the state was entitled to introduce the accomplice's statement to prove its case against the accomplice himself, the statement was hearsay as to defendant. *State v. Gerardo, 147 Idaho 22, 205 P.3d 671 (2009)*.

Trial court properly allowed recordings of statements by defense witnesses and defendant, because the statements were offered to demonstrate the witnesses' bias and to impeach their testimony and they were made by a party-opponent. *State v. Osterhoudt, 155 Idaho 867, 318 P.3d 636 (Ct. App. 2013)*.

**Statement Inadmissible.**

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible

hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*.

Where a witness never stated that the reason he was willing to testify against the defendant was because of feelings of guilt that were weighing on him, that comment, made to his attorney, could not be construed as a prior consistent statement which preceded any motive on his part to lie, and the admission of this testimony was error. *State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)*.

During defendant's trial for lewd conduct with a minor, the district court abused its discretion by admitting testimony from a DNA expert who testified that defendant's DNA was in semen found on the girl's underwear and inside a condom; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. *State v. Watkins, 148 Idaho 418, 224 P.3d 485 (2009)*.

District court correctly held that a customer's testimony concerning the content of conversations he allegedly had with a doctor was inadmissible hearsay, because the customer used statements he attributed to the doctor to argue that an alleged incident at a supermarket was the likely cause of the fractured screw in his leg and did not suggest any other function that could be served by admission of his testimony regarding his conversations with the doctor. *Holdaway v. Broulim's Supermarket, 158 Idaho 606, 349 P.3d 1197 (2015)*.

Defendant's statement in a verified petition for post-conviction relief that defendant reported that, prior to entry of a guilty plea, he began hearing voices and was suffering greatly from mental illness, deeming him incompetent to stand trial, was inadmissible hearsay, due to foundational deficiencies relating to the circumstances under which the report was made. *Takhsilov v. State, 161 Idaho 669, 389 P.3d 955 (Idaho 2016)*.

A sheriff's statement in a letter was inadmissible hearsay, because the statement was not made while the sheriff was testifying at a trial or hearing and it was offered to prove the truth of the matter asserted in the statement. *Charboneau v. State, 162 Idaho 160, 395 P.3d 379 (2017)*.

A private investigator's sworn affidavit, which was comprised of unsworn, out-of-court statements that were inadmissible at trial as hearsay, could not be considered by the court in ruling on a summary judgment motion. *Losee v. Deutsche Bank Nat'l Trust Co., 165 Idaho 883, 454 P.3d 525 (2019)*.

Where a question sought a hearsay response, because its context was intended to elicit an answer regarding what a witness's father told him; the trial court abused its discretion in allowing it, as it failed to analyze whether the remainder of the witness's statement constituted inadmissible hearsay. *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

**Statement Not Hearsay.**

Where the testimony of the neighbor was not offered for the purpose of proving the truth of the overheard statement, no hearsay was involved and no error was committed in allowing the neighbor to testify about what he had heard. *State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986)*.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the testimony of the preliminary hearing witness regarding the defendant's alleged statement in her presence was not hearsay but a party's statement under subdivision (d)(2) of this rule; however, on remand the trial court should make a ruling on the application of I.R.E. 403 to this testimony. *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*.

Police officer's testimony that he had not been contacted by the hospital staff was not hearsay since there was no basis in the record to support a conclusion that the hospital staff intended that their failure to contact the officer was an assertion regarding the victim's involvement in the shooting with which defendant was charged. *State v. Morrison, 130 Idaho 85, 936 P.2d 1327 (1997)*.

A witness' out-of-court comment to a police officer did not constitute hearsay where it was not a statement of fact but a request, and where, since it contained no assertion of any fact, it could not have been offered for the truth of the matter "asserted." *State v. Salinas, 134 Idaho 362, 2 P.3d 747 (Ct. App. 2000)*.

District court did not abuse its discretion by admitting evidence concerning a beneficiary's intent when signing a promissory note on behalf of a relative because the action did not concern a demand against an estate or a claim against an executor or administrator under *§ 9-202(3)*; moreover, the evidence did not constitute hearsay because it was offered for the purpose of showing the beneficiary's state of mind. *Rowan v. Riley, 139 Idaho 49, 72 P.3d 889 (2003)*.

Officer's testimony regarding another officer's administration of field sobriety tests was not inadmissible as hearsay because the administering officer's verbal directions to defendant were not assertions of fact and could not be offered to prove the truth of the matter asserted. *State v. McDonald, 141 Idaho 287, 108 P.3d 434 (Ct. App. 2005)*.

District court did not abuse its discretion by admitting unredacted St. Luke's Children at Risk Evaluation Services interviews; questions included what the declarants liked to do for fun and whether they understood the importance of telling the truth. The victims' answers were not admitted for the truth of the matter asserted, but instead so the jury had the full context of their statements and to provide background. *State v. Christensen, 166 Idaho 373, 458 P.3d 951 (2020)*.

Second count of trafficking in heroin was sufficient because the confidential informant's (CI's) statements were not offered to prove the truth of the matter asserted and were not hearsay and thus, did not violate the Confrontation Clause. None of the relevant circumstances established that the primary purpose of the statements was to establish facts of a past crime; the CI's statements were made while engaging defendant in the process of buying drugs and, thus, the statements were not made to perpetuate testimonial evidence. *State v. Spencer, 169 Idaho 505, 497 P.3d 1125 (2021)*.

**Statements in Furtherance of Conspiracy.**

Idaho law does not require contemporaneous independent proof of a conspiracy. Idaho law simply requires that there be some evidence of conspiracy or promise of its production, before the court can admit evidence of statements made in furtherance of the conspiracy under this rule. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

Where there was sufficient evidence to support the trial court's ruling that conspiracy was for the paid murder of victim, the conspiracy was not complete until final payment was made, and all statements made in furtherance of the conspiracy until final payment were admissible. *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*.

**Testimony Erroneously Prohibited.**

Where plaintiff called one of defendant's employees as a witness in an assault case, the employee should have been permitted to testify concerning an admission made to him by another of defendant's employees, as it was not necessary to show that the employee making the admission had personal knowledge regarding the matters in question. *McGill v. Frasure, 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990)*.

District court abused its discretion in granting a city's hearsay objection over a citizen's testimony that the manager of an aquatic center stated "people fall down there all the time" because it prejudiced the citizen's substantial right to present her case in an effective manner; by precluding the citizen from testifying the manager made the statement, but allowing the manager to later testify she did not, the district court impermissibly took a credibility determination away from the jury. *Oksman v. City of Idaho Falls, -- Idaho --, 549 P.3d 1086, 2024 Ida. LEXIS 50 (June 4, 2024)*.

**Cited in:**

*State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*; *Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986)*; *State v. Burton, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989)*; *Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991)*; *State v. Larsen, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993)*; *State v. Vivian, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996)*; *State v. Welker, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997)*; *State v. Cox, 136 Idaho 858, 41 P.3d 744 (Ct. App. 2002)*; *State v. Siegel, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002)*; *State v. Howell, 137 Idaho 817, 54 P.3d 460 (Ct. App. 2002)*; *Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 48 P.3d 1241 (2002)*; *State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003)*; *State v. Timmons, 145 Idaho 279, 178 P.3d 644 (Ct. App. 2007)*; *State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009)*; *State v. Thorngren, 149 Idaho 729, 240 P.3d 575 (2010)*; *Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 314 P.3d 593 (2013)*; *Cook v. State, 157 Idaho 775, 339 P.3d 1179 (Ct. App. 2014)*; *State v. Folk, 157 Idaho 869, 341 P.3d 586 (Ct. App. 2014)*; *State v. Cunningham, 164 Idaho 759, 435 P.3d 539 (2019)*; *Ybarra v. Legis. of Idaho, 166 Idaho 902, 466 P.3d 421 (2020)*.

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# *I.R.E. Rule 802*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Effect of *§ 19-3024*.
Evidence Held Inadmissible.
No Objection.
Statement Hearsay.

**Effect of *§ 19-3024*.**

The trial court should not have considered the admission of the five-year-old victim's out-of-court statements or the testimony with regard to victim's out-of-court statements by the psychologist who counseled the victim, or the statements made by victim in her sleep overheard by family members under *§ 19-3024*; to the extent that *§ 19-3024* attempts to prescribe the admissibility of hearsay evidence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

**Evidence Held Inadmissible.**

Where the State should not have been permitted to elicit testimony by victim's mother about defendant's alleged attempt to choke mother in the first instance, the State could not predicate the admissibility of otherwise inadmissible testimony by mother's coworker upon its value to impeach other evidence that was itself inadmissible and should have been excluded. *State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)*.

Although the hearsay rule presented no obstacle to the admission of the transcript for impeachment purposes, due to the plaintiffs' untimely motion for admission of the partial transcript, the appellate court found no error in the trial court's exclusion of the transcript. *Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995)*.

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010)*.

Will contestant's testimony of the testator's statements, which focused entirely on the testator's negative feelings toward her children, were properly excluded because the statements were inadmissible hearsay and irrelevant. They did not necessarily speak to her mental condition or particular susceptibility to influence, but rather were aimed at proving their truth: that she was angry with her children, that they were not worthy to inherit, and that she did not mean for them to inherit. *Wooden v. Martin (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012)*.

District court correctly held that a customer's testimony concerning the content of conversations he allegedly had with a doctor was inadmissible hearsay, because the customer used statements he attributed to the doctor to argue that an alleged incident at a supermarket was the likely cause of the fractured screw in his leg and did not suggest any other function that could be served by admission of his testimony regarding his conversations with the doctor. *Holdaway v. Broulim's Supermarket, 158 Idaho 606, 349 P.3d 1197 (2015)*.

Defendant's statement in a verified petition for post-conviction relief that defendant reported that, prior to entry of a guilty plea, he began hearing voices and was suffering greatly from mental illness, deeming him incompetent to stand trial, was inadmissible hearsay, due to foundational deficiencies relating to the circumstances under which the report was made. *Takhsilov v. State, 161 Idaho 669, 389 P.3d 955 (Idaho 2016)*.

A private investigator's sworn affidavit, which was comprised of unsworn, out-of-court statements that were inadmissible at trial as hearsay, could not be considered by the court in ruling on a summary judgment motion. *Losee v. Deutsche Bank Nat'l Trust Co., 165 Idaho 883, 454 P.3d 525 (2019)*.

Magistrate court abused its discretion when it allowed the officer to testify about the motor vehicle warning on the pill bottles in violation of the evidence rules because the testimony was hearsay and the State did not proffer an exception to the rule against hearsay or demonstrate how the warning was relevant to admit for a non-hearsay purpose. *State v. Guerra, 169 Idaho 486, 497 P.3d 1106 (2021)*.

**No Objection.**

Where hearsay evidence is admitted without objection, it may properly be considered in determining the facts; the important question being the weight to be given such evidence. *Phillips v. Erhart, 151 Idaho 100, 254 P.3d 1 (2011)*.

**Statement Hearsay.**

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*.

Witness physician's testimony, based on witness physician's review of procedures recorded in surgical logs rather than his personal observation, which was offered to prove the truth of his conclusions, was speculative and excludable as hearsay. *Woodfield v. Board of Professional Discipline, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995)*.

Where the excluded portion of the minutes of the highway district board of directors meeting contained hearsay statements allegedly made by persons not in attendance at the meeting, they were properly excluded. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

**Cited in:**

*State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986)*; *State v. Carpenter, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988)*; *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*; *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1990)*; *State v. Vivian, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996)*; *Quinto v. Millwood Forest Prods., Inc., 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997)*; *Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 48 P.3d 1241 (2002)*; *Rowan v. Riley, 139 Idaho 49, 72 P.3d 889 (2003)*; *Hurtado v. Land O'Lakes, Inc., 147 Idaho 813, 215 P.3d 533 (2009)*; *State v. Thorngren, 149 Idaho 729, 240 P.3d 575 (2010)*; *Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 314 P.3d 593 (2013)*; *Shea v. Kevic Corp., 156 Idaho 540, 328 P.3d 520 (2014)*; *State v. Miller, 157 Idaho 838, 340 P.3d 1154 (Ct. App. 2014)*; *State v. Folk, 157 Idaho 869, 341 P.3d 586 (Ct. App. 2014)*; *State v. Ogden, 171 Idaho 843, 526 P.3d 1013 (2023)*.

## Research References & Practice Aids

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**A.L.R.**

Sufficiency of Hearsay Evidence in Probation Revocation Hearings. *21 A.L.R.6th 771*.

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# *I.R.E. Rule 803*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 803. Exceptions to the rule against hearsay -- Regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

**(1) Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

**(2) Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

**(3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

**(4) Statement Made for Medical Diagnosis or Treatment.** A statement that:

**(A)** is made for - and is reasonably pertinent to - medical diagnosis or treatment; and

**(B)** describes medical history; past or present symptoms or sensations; or their source.

**(5) Recorded Recollection.** A record that:

**(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

**(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and

**(C)** accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

**(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

**(A)** the record was made at or near the time by - or from information transmitted by - someone with knowledge;

**(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

**(C)** making the record was a regular practice of that activity;

**(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12); and

**(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

**(7) Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

**(A)** the evidence is admitted to prove that the matter did not occur or exist;

**(B)** a record was regularly kept for a matter of that kind; and

**(C)** the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

**(8) Public Records.** A record or statement of a public office if:

**(A)** it sets out:

**(i)** the office's regularly recorded and regularly conducted activities; or

**(ii)** a matter observed while under a legal duty to report, or factual findings resulting from an investigation conducted under legal authority, but not including:

**(a)** a statement or factual finding offered by the public office in a case in which it is a party; or

**(b)** an investigative report by law enforcement personnel or a public office's factual finding resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case; and

**(B)** the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

**(9) Public Records of Vital Statistics.** A record of a birth, death, fetal death, or marriage, if reported to a public office in accordance with a legal duty.

**(10) Absence of a Public Record.** Testimony - or certification under Rule 902 - that a diligent search failed to disclose a public record or statement if:

**(A)** the testimony or certification is admitted to prove that

**(i)** the record or statement does not exist; or

**(ii)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

**(B)** in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does

not object in writing within 7 days of receiving the notice - unless the court sets a different time for the notice or the objection.

**(11) Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

**(12) Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

**(A)** made by a person who is authorized by a religious organization or by law to perform the act certified;

**(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

**(C)** purporting to have been issued at the time of the act or within a reasonable time after it.

**(13) Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

**(14) Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

**(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

**(B)** the record is kept in a public office; and

**(C)** a statute authorizes recording documents of that kind in that office.

**(15) Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

**(16) Statements in Ancient Documents.** A statement in a document that is at least 30 years old and whose authenticity is established.

**(17) Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

**(18) Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

**(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

**(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit, except upon motion and for good cause shown.

**(19) Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

**(20) Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

**(21) Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

**(22) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

**(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

**(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year;

**(C)** the evidence is admitted to prove any fact essential to the judgment; and

**(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

**(23) Medical or Dental Tests and Test Results for Diagnostic or Treatment Purposes.** A written, graphic, numerical, symbolic or pictorial representation of the results of a medical or dental test performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the opponent shows that the sources of information or other circumstances indicate a lack of trustworthiness. This exception shall not apply to:

**(A)** psychological tests

**(B)** reports generated pursuant to I.R.C.P. 35(a)

**(C)** medical or dental tests performed in anticipation of or for purposes of litigation; or

**(D)** public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

**(24) Other Exceptions.**

**(A) In General.** A statement not specifically covered by any of the foregoing exceptions if:

**(i)** the statement has equivalent circumstantial guarantees of trustworthiness.

**(ii)** it is offered as evidence of a material fact;

**(iii)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

**(iv)** admitting it will best serve the purposes of these rules and the interests of justice.

**(B) Notice.**

The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 24, 2005, effective July 1, 2005; amended October 23, 2008, effective January 1, 2009; amended September 1, 2015, effective January 1, 2016; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Application to Standing.
Authentication of Records.
Business Records.
Confrontation Clause Analysis.
Declarations by Children.
Documentary Evidence.
Evidence Inadmissible.
Excited Utterance.
Existing Mental, Emotional, or Physical Condition.
Governmental Records and Reports.
Hearsay As Basis for Affidavit.
Hearsay Within Hearsay.
Learned Treatises.
Medical Diagnosis.
Other Exceptions.
--Guarantees of Trustworthiness.
--Medical Report.

--Personal or Family History.
--Requirements.
--Spontaneity and Trustworthiness.
--Totality of Circumstances.
--Trustworthiness and Necessity.
Present Sense Impression.
Preservation of Objections.
Prior Consistent Statements.
Probation Files.
Public Records and Reports.
Recorded Recollection.
Sales Charts.
State of Mind.
Statements of Victim.
Statement to Prove Matter Asserted.
Testimony of Spouse.
Videotape of Testimony.

**Application to Standing.**

Idaho R. Evid. 803 governs the admissibility of evidence; it has no application to the issue of standing. Thus, a lease of a state land lessee did not constitute an admission conveying third party beneficiary status on adjoining landowners, and they had no standing to enforce a provision that required compliance with local laws and ordinances. *Fenwick v. Idaho Dep't of Lands, 144 Idaho 318, 160 P.3d 757 (2007)*.

**Authentication of Records.**

Records need not be authenticated by the person who actually made them; all that is necessary is that the record be authenticated by a person who has custody of the record as a regular part of his or her work, or has supervision of its creation. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman, 122 Idaho 1004, 842 P.2d 683 (1992)*.

**Business Records.**

A trial court's decision to admit business record evidence will not be overturned absent a clear showing of abuse. *Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d 1120 (1988)*, overruled on other grounds, *Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990)*.

Where the summation was produced from daily time cards of individuals and from daily job activity sheets produced by the employee in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial, the record was properly admitted pursuant to subdivision (6) of this rule. *Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d*

1120 (1988), overruled on other grounds, Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990).

Certain types of hearsay evidence are admissible because the circumstances behind their creation implies a high degree of veracity; business records are one such legitimate and important classification, and the trial court is vested with the authority to admit such evidence. Christensen v. Rice, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988).

The trial court did not abuse its discretion in not admitting the curriculum vitae of the doctor, who made the human leukocyte antigen (HLA) report but did not testify, under either § 7-1116 or under the business records exception to the hearsay rule contained in subdivision (6) of this rule. State, Dep't of Health & Welfare ex rel. Osborn v. Altman, 122 Idaho 1004, 842 P.2d 683 (1992).

Where the department of health and welfare's witness was not a "qualified witness" as she did not supervise the creation of the human leukocyte antigen (HLA) report, the trial court did not abuse its discretion in refusing to admit the HLA report under subdivision (6) of this rule. State, Dep't of Health & Welfare ex rel. Osborn v. Altman, 122 Idaho 1004, 842 P.2d 683 (1992).

Computer printout of city's labor and equipment costs incurred during the time for which it assessed liquidated damages against contractor was a "business record" and not a "summary" and was admissible upon laying a proper foundation. Beco Constr. Co. v. City of Idaho Falls, 124 Idaho 859, 865 P.2d 950 (1993).

Subdivision (6) of this rule does not require a foundation of testimony by the person who prepared the document in order to admit the document as a business record. Large v. Cafferty Realty, Inc., 123 Idaho 676, 851 P.2d 972 (1993).

The business records exception was inapplicable, although Court Appointed Special Advocate program (CASA) might have been a business entity within the scope of the rule, CASA was not the business that prepared the letter, and putting the letter in CASA's files did not transform it into CASA's business record. Wood v. State, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

Where deceased's sister testified that deceased regularly made entries in the cattle notebook and these entries were in her handwriting and where a certified accountant testified that the notebook reliably reflected the income from and the expenses of the cattle, a sufficient foundation was established to admit the notebook into evidence under the business record exception to the hearsay rule. Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Magistrate did not err in admitting blood test report and doctor's testimony under the business records exception to the hearsay rule as doctor was accepted as expert witness, doctor was custodian of the business records and thus able to testify to the record keeping process, and proper foundation was established regarding his testimony. Henderson v. Smith, 128 Idaho 444, 915 P.2d 6 (1996).

The exhibit satisfied the requirements of subdivision (6). The employer was the custodian of the exhibit. The exhibit was prepared by the employer's record keeping employees in the regular course of business, at or near the time at issue, and was based upon the employer's record keeping employees' personal knowledge. The exhibit was not produced in anticipation of trial, and the court properly admitted it as an exception to the hearsay rule. *State v. Evans, 129 Idaho 758, 932 P.2d 881 (1997)*.

Under Idaho R. Evid. 803(8) and 803(6), the state police crime lab report should not have been admitted into evidence as either a business records exception or public records exception because it was an investigative report offered by the prosecution; however, all the information obtained in the report was testified to by the forensic lab technician and was a duplicate of testimony under oath; therefore, the error was harmless. *State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003)*.

In a criminal prosecution for forgery, the trial court erred by admitting a reclamation document advising the bank that the payee's social security check had been forged where there was no testimony presented by any witness familiar with the system used to create the document; however, the error was harmless because the reclamation document did not present the jury with any information that had not already been introduced through the testimony of other witnesses. *State v. Hill, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004)*.

Mere receipt and retention by a business entity of a document that was created elsewhere did not transform the document into a business record of the receiving entity for purposes of this rule. *Posey v. Ford Motor Credit Co., 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005)*.

Although a doctor testified that he requested lab reports and relied upon such records in the regular course of his medical practice, a lab report regarding defendant's human immunodeficiency virus status was improperly admitted into evidence under the business records exception to the hearsay rule because the doctor's business did not make the record. *State v. Kanay Aongola Mubita, 145 Idaho 925, 188 P.3d 867 (2008)*, overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011)*.

Because there was conflicting testimony on whether the alarm went off when defendant left the store, and whether logging occurred in this instance, the log was material to the defense and the district court abused its discretion in excluding it entirely. *State v. Karpach, 146 Idaho 736, 202 P.3d 1282 (2009)*.

The general requirements for the admission of business records are that the documents be produced in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial. These foundational requirements supply the degree of trustworthiness necessary to justify an exception to the rule against hearsay. *Hurtado v. Land O'Lakes, Inc., 147 Idaho 813, 215 P.3d 533 (2009)*.

Ranch's exhibits, created for use at trial from an informal method of tracking arrival and death rate of new calves, were not regularly kept business records within the meaning of this rule and were not admissible. *Hurtado v. Land O'Lakes, Inc., 147 Idaho 813, 215 P.3d 533 (2009)*.

During defendant's trial for lewd conduct with a minor, the district court abused its discretion by admitting testimony from a DNA expert who testified that defendant's DNA was in semen found on the girl's underwear and inside a condom; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. *State v. Watkins, 148 Idaho 418, 224 P.3d 485 (2009)*.

District court properly exercised its discretion by striking a letter from a claims adjuster at an insurance company to a claimant's attorney, when the letter was submitted as an exhibit to the attorney's affidavit, because the letter was not properly authenticated by any person and there was no testimony that the letter was produced in the ordinary course of business and not in anticipation of trial. *Shea v. Kevic Corp., 156 Idaho 540, 328 P.3d 520 (2014)*.

District court erred in denying a victim's request to strike an affidavit, and its accompanying exhibits, because, although it averred that the documents were kept in the normal course of business and that the affiant was familiar with them, nothing in the affidavit stated that the affiant had custody of the records as a regular part of her work or that she had supervision of their creation. *Mitchell v. State, 160 Idaho 81, 369 P.3d 299 (2016)*.

Affidavit of a document control officer for the bank did not contain adequate foundation and was not admissible under the business records exception to the hearsay rule, as the statements contained therein were based on information contained on a computer screen, and, thus, there were concerns about accuracy and authenticity. *Portfolio Recovery Assocs., LLC v. MacDonald, 162 Idaho 228, 395 P.3d 1261 (2017)*.

Certificate of records affidavit was improperly admitted into a restitution hearing, where the affidavit was not kept in the course of a regularly conducted activity, but was instead created a few months prior to a second restitution hearing to prove costs incurred. *State v. Cunningham, 164 Idaho 759, 435 P.3d 539 (2019)*.

It was not an abuse of discretion to admit an electronic payroll screenshot in defendant's criminal trial, because (1) the prosecutor showed when the screenshot was taken, (2) the payroll records were kept in the regular course of a victim's business, and (3) defendant did not show the screenshot lacked trustworthiness. *State v. Munson, 167 Idaho 98, 467 P.3d 462 (2020)*, review denied, -- *Idaho --, 2020 Ida. LEXIS 145 (Idaho July 14, 2020)*.

Magistrate court abused its discretion by admitting, in a parental rights termination case, an entire Narrative Report based on the limited foundation the prosecutor offered to establish the document as a business record under subsection (6) of this rule. Although a review of the Narrative Report shows that some entries may arguably qualify as business records, many entries do not meet the rule's foundational requirements, including: (1) entries describing negative information about mother provided to the department of health and welfare by unidentified individuals who may not have a duty to the department to provide accurate information; (2) entries containing double hearsay, namely information an unidentified person conveyed to another who in turn conveyed that information to the department; and (3) entries failing to identify the department employee entering the information in the *Narrative Report. State v. Doe (In the Interest of Doe), 166 Idaho 788, 464 P.3d 1 (2020)*.

Exhibit did not satisfy the requirements of this rule, because plaintiffs failed to provide a certification from a record custodian or a qualified witness, as the surveyor's stamp on the exhibit did not attest to the elements of this rule and did not satisfy the requirements of *Idaho R. Evid. 902(11). Sankey v. Ivey, -- Idaho --, 535 P.3d 198 (2023)*.

**Confrontation Clause Analysis.**

The residual hearsay exception, contained in subdivision (24) of this rule, is not a firmly rooted hearsay exception for Confrontation Clause purposes; admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements; however, hearsay statements admitted under the residual exception, almost by definition, do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

Where hearsay statements do not fall within a firmly rooted hearsay exception, they are presumptively unreliable and inadmissible for purposes of the Confrontation Clause of the U.S. Constitution, and must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

It was not appropriate for the trial court to address the application of the Confrontation Clause to the testimony of social worker, who interviewed child in lewd conduct case, until the court determined that the social worker's testimony was admissible under an exception to the hearsay rule. *State v. Poole, 124 Idaho 346, 859 P.2d 944 (1993)*.

**Declarations by Children.**

Hearsay declarations of child witnesses have generally been considered reliable only because they were excited utterances or part of the res gestae; the theory being that there was no time for fabrication, coaching or confabulation and, therefore, the guarantees of reliability shared by those traditional exceptions to the rule against admission of hearsay statements were present. *State v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989)*, aff'd, *497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

There does not exist a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

With regard to out-of-court statements made by children regarding sexual abuse, a mechanical test shall not be imposed for determining particularized guarantees of trustworthiness under the Confrontation Clause of the United States Constitution; rather, the unifying principle is that the factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

Where the trial court found that the statements were reliable because the five-year-old victim of lewd and lascivious conduct made the statements the next morning after returning from visiting her father, and concluded that the short length of time between the victim's visit to her father and her bath the next morning indicated that there was not enough time for the victim to fabricate the story, the totality of the circumstances supported the finding of the trial court and the trial court did not abuse its discretion in admitting this evidence pursuant to this rule. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

Where the victim's great-grandmother testified that the victim screamed, "Don't daddy, don't," in her sleep the night after she returned from visiting her father, the trial court should not have admitted these out-of-court statements. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

The trial court did not abuse its discretion by admitting testimony of psychologist of out-of-court statements by five-year-old victim pursuant to subdivision (24) of this rule where (1) the statements had sufficient circumstantial guarantees of trustworthiness equivalent to those set out in the other exceptions of I.R.E. 803, (2) the statements were offered as evidence of a material fact, i.e., whether the victim was in fact sexually abused, and (3) the interests of justice would be served because the statements were made in a situation less threatening than open court might be for a very young child. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

Admission of letter written by minor child to judge which contained the thoughts and fears of a child who was the subject of an action under the Child Protective Act was not error, as evidence was clearly relevant. *Wood v. State, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995)*.

Where a young girl related the details of three events of sexual abuse to her brother only a few minutes after the last incident had occurred and where the brother testified that his sister was in tears and appeared to be distraught when she recounted the incidents, there was an adequate showing that the victim was under the stress of a startling event and that her statement was a spontaneous reaction made without reflective thought; consequently, the trial court's decision to allow the brother's testimony was not an abuse of discretion. *State v. Parkinson, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996)*.

**Documentary Evidence.**

Where the report at issue did not purport to relate to the investigation, diagnosis, treatment, correction or prescription for any disease, ailment, injury, infirmity, deformity or other condition, physical or mental, but rather, it compared the genetic identity of the blood of rape suspect and the victim with that of the victim's vaginal secretions containing sperm from the perpetrator of the rape, where the director of the laboratory who signed the affidavit to which the report was attached did not purport to be a medical doctor, and where the report concerned the results of scientific examinations and not medical facts or reports, the report was not admissible under I.C.R., Rule 5.1 or under subdivision (24) of this rule. *State v. Horsley, 117 Idaho 920, 792 P.2d 945 (1990)*.

**Evidence Inadmissible.**

Where minor submitted a letter purporting to be from the U.S. Department of Justice to show that the federal government intended his mother to hold and spend death benefits, as a fiduciary, for his benefit, the district court properly determined that the letter was inadmissible hearsay because there was no evidence of authentication to demonstrate that the letter was qualified as a public record under subdivision (8). *Herman v. Herman, 136 Idaho 781, 41 P.3d 209 (2002)*.

Trial court did not err in granting defendants' motion to strike, as inadmissible hearsay, an email correspondence between plaintiff's employee and a former employee of the defendant, because the statements in the email were not made near the time an alleged verbal agreement at issue was made, and, for purposes of paragraph (24), the email was less probative than other evidence that could have reasonably been procured - the actual testimony of the two parties to the email. *Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 314 P.3d 593 (2013)*.

**Excited Utterance.**

Judge's ruling, that a remark by a defendant charged with aggravated battery and using a firearm during the commission of a crime was not an "excited utterance" under this rule, was upheld where the remark was uttered some five minutes after the event of the crime; the remark was made after defendant had driven away from the scene of the crime and was therefore removed by time and distance from the events, and the remark was self-serving. *State v. Burton, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989)*.

The admissibility of excited utterances, pursuant to subdivision (2) of this rule, is not dependent on whether the person making those statements is called as a witness, or is, in fact, competent to be a witness. *State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)*.

The admission of excited utterances pursuant to subdivision (2) of this rule, as an exception to the hearsay rule, is left to the sound discretion of the trial court. *State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)*.

At the time the court ruled to admit the evidence as an excited utterance, the court had before it testimony that victim had been beaten, raped and threatened with death. Victim testified that after escaping from defendant's car, she made her way to the interstate where witness picked her up 15 or 20 minutes later. Witness testified that at the time he picked her up, victim appeared excited, scared and frightened. Upon this foundation, the court reasonably could conclude that victim was still under the stress of the events in defendant's car when witness stopped for her. *State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)*.

Child sex abuse victim's statements to family friend within a few hours of the alleged molestation could still be considered an excited utterance even though child had already told his

eight-year-old brother about defendant's actions. *State v. Stover, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994)*.

There was a sufficient evidentiary foundation upon which the trial court could reasonably determine that child sex abuse victim's out-of-court statement was an excited utterance where child's description of the abuse was given to a family friend within a few hours of the alleged molestation when the child was still likely to be emotionally distressed by the troubling event. *State v. Stover, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994)*.

The taped conversation between a minor and the police and paramedics in which the minor, who was crying and hysterical, informed them of the acts of lewd conduct performed on her by the defendant just 30 minutes prior to the call was properly admitted into evidence as an excited utterance. *State v. Valverde, 128 Idaho 237, 912 P.2d 124 (Ct. App. 1996)*.

Where police officer testified that the minor victim was very obviously upset and still in an excited state, that it took some time to calm her down and that she had been crying, there was sufficient evidence to support the district court's finding that statements made to her mother and the officer within an hour of the event were the product of her distress, not reflective thought, and were therefore admissible as excited utterances. *State v. Monroe, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996)*.

There was no abuse of discretion in the court's determination that child was under the stress of her abduction and molestation when she made the statements to her mother and to the police officer and that her statements were therefore admissible under subsection (2) of this rule. *State v. Kay, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996)*.

The excited utterance exception did not apply where the declarant was an adult woman who had suffered no physical trauma in the course of a fight with her boyfriend, even though she was crying and upset when she spoke with the police officer ten minutes later. *State v. Hansen, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999)*.

Court, in defendant's domestic battery case, did not err by admitting statements made by the victim to a security guard where the victim was badly beaten and the victim made the statements only a few minutes after being found. *State v. Hoover, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003)*.

A boy's statement made during a telephone call to his aunt was an excited utterance and was therefore admissible under Idaho R. Evid. 803(2) as an exception to the hearsay rule where the defendant called the boy a profane name, the boy ran to his mother's car, and the mother arrived at the car, where the aunt testified that when the boy called her, he was extremely hysterical, crying, and was besides himself at what had happened. *State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004)*.

Statements by a four-year-old victim to her mother and grandmother to the effect that defendant put his finger in her vagina were admissible as excited utterances, where the victim made the statements within minutes of the incident, the injury suffered by her was of an intimate

and shocking nature, the victim was only four years old, and the statements were made in response to her mother asking what was wrong upon finding the victim crying hysterically. *State v. Doe (In re Doe), 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004)*.

Admission of a victim's prior statement, made to police on the night before her death, that petitioner had tried to break into her home, was not a violation of petitioner's rights under the Confrontation Clause because, although the state court relied on its residual exception, which was not firmly rooted, the court had no doubt that the evidence could properly have come in under the excited utterance exception of Idaho R. Evid. 803(2). The victim was speaking while under the baleful influence of an exceedingly stressful event--the attempt by an intruder to break into her home--and she lacked the time or the incentive to reflect upon and make up a story. *Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004)*, cert. denied, *545 U.S. 1105, 125 S. Ct. 2540, 162 L. Ed. 2d 277 (2005)*.

In defendant's lewd conduct and sexual battery case, the court erred by admitting two hearsay statements regarding what the child said because two days had passed between the incident and the statements, the statements were not volunteered, and the child's initial refusal to speak about the incident to her sister tended to show that when she finally did, the statements were a result of reflective thought. *State v. Field, 144 Idaho 559, 165 P.3d 273 (2007)*.

In a felony injury to a child case, the court properly admitted the child's hearsay statements to a neighbor, even though they were not spontaneous. Given the child's young age, proximity to the physical altercation, and ongoing emotional upset, the statements were the product of the startling events and not the child's normal reflective thought process. *State v. Timmons, 145 Idaho 279, 178 P.3d 644 (Ct. App. 2007)*.

Defendant's son's statement to a friend was admissible as an excited utterance because news of his father's murder was sufficiently startling to render inoperative the son's reflective thought process and, although in response to a general question, the statement was a spontaneous reaction to his mother's apparent involvement in the murder. *State v. Thorngren, 149 Idaho 729, 240 P.3d 575 (2010)*.

Testimony by defendant's girlfriend was admissible as an excited utterance; she was not asleep when police officers found her, she had knocked on the door of the police station shortly before being discovered, indicating that she had not been asleep or had time to reflect after the stress of being beaten and strangled. *State v. Parton, 154 Idaho 558, 300 P.3d 1046 (2013)*.

In a case in which defendant was convicted of lewd conduct with a minor child under sixteen, a mother's hearsay testimony about her child's statements that he had a nightmare about what a bad guy had done to him the night before and identifying defendant as the bad guy was relevant and the child's statements were an excited utterance. Accordingly, the district court did not abuse its discretion by admitting the child's statements. *State v. Folk, 157 Idaho 869, 341 P.3d 586 (Ct. App. 2014)*.

There are two requirements of an excited utterance: (1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the

statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *Thumm v. State, 165 Idaho 405, 447 P.3d 853 (2019)*.

Trial court did not abuse its discretion by preventing defendant from presenting a police officer on-body video of defendant's response to a police officer's statement about the officer finding bus tickets in a search of defendant's vehicle. Defendant's response was not an excited utterance as the officer's statement was not a startling event and little about the statement was sufficient to provoke a spontaneous response without reflection. *State v. Ogden, 171 Idaho 843, 526 P.3d 1013 (2023)*.

**Existing Mental, Emotional, or Physical Condition.**

Subdivision (3) of this rule treats testimony regarding a victim's expression of fear as hearsay but grants it limited admissibility under the exception for "existing mental, emotional, or physical condition" so long as it is not offered to prove the fact remembered or believed by the declarant. *State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*.

In wrongful death action in which father sought damages for loss of son's affection, love and companionship, the trial court was correct in permitting witnesses to testify as to statements made by deceased son regarding the relationship between him and his father. These statements fell within the exceptions to hearsay provided in subdivision (3) of this rule. *Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987)*.

In a first degree murder case, where the State offered the testimony of victim's boyfriend as to statements made to him by the victim the night before her death about her relationship with defendant, and where the boyfriend's testimony indicated that the victim had told him she was worried because she did not know where defendant was, testimony was admissible under this section as evidence of the victim's existing state of mind. *State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989)*, cert. denied, *493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989)*, cert. denied, *493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989)*, overruled on other grounds, *State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)*, cert. denied, *506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)*.

Where the alleged sexual abuse occurred during the period of November 15-27 and the officer heard victim's statement which the trial court admitted as an "excited utterance" on December 2, this delay from the time of the "event or condition" to the time of the declarant's statement was too long. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

There are four well-defined categories under which a homicide-victim-declarant's state of mind is relevant due to the legal theories presented in the case, such as where the defendant argues: (1) he or she acted in self-defense; (2) the victim committed suicide; (3) the killing was accidental; or (4) there is a specific mens rea in issue. However, even where the evidence falls into one of these categories, the court must balance the relevance of such evidence against its possible prejudicial effect. *State v. Herrera, 159 Idaho 615, 364 P.3d 1180 (Idaho 2015)*.

**Governmental Records and Reports.**

Some governmental departments will be able to generate and retain records or reports that could be admissible in evidence to show compliance with the requirements in § 49-623(3). *State v. Monaghan, 116 Idaho 972, 783 P.2d 311 (Ct. App. 1989)*.

Where city council clerk testified that a motion authorizing the lease of former hospital to state for use as correctional facility was presented at the December 20, 1989 meeting of the city council and that the city council took a final vote at that time but that she did not record this vote and mayor later signed the resolution, trial court concluded that the oral motion made and passed by the city council amounted, in substance, to a "resolution" within the meaning of *§ 50-902* prior to execution of the lease and the trial court did not abuse its discretion in admitting the copy of the resolution. *Foster v. City of St. Anthony, 122 Idaho 883, 841 P.2d 413 (1992)*.

**Hearsay As Basis for Affidavit.**

Hearsay may be the basis for issuance of the warrant "so long as there [is] a substantial basis for crediting the hearsay". The delivery of the cocaine to the informant, who was searched before and after going into the trailer, was uncontroverted, and the communications between defendant and the informant were recorded and monitored by the officer; on this information which was supplied by the officer to the magistrate in support of the search warrant, the reliability of the informant was established and the magistrate had a substantial basis to accept hearsay in the affidavit that drugs were present in the trailer. *State v. Fairchild, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992)*.

**Hearsay Within Hearsay.**

Statement of defendant in police report, that he denied having dropped drugs while running from officer, was inadmissible on the grounds that it was hearsay within hearsay not within any exception to the hearsay rule and district court did not err in excluding such statement. *State v. Vivian, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996)*.

**Learned Treatises.**

Admission of an article in a scientific magazine on the subject of eyewitness testimony was not barred in a prosecution for robbery by this state's version of the hearsay rule, despite a lack of live testimony by the author. *State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*.

In a medical malpractice case, it was not error not to allow an article from a medical treatise, admitted under subsection (18), to go to the jury room, as only a portion of the article had been discussed at trial and the purpose of the rule is to prevent jurors from overvaluing the written word and from roaming at large through the treatise, thereby forming conclusions not subjected to expert explanation and assistance. *Hoffer v. Shappard, 160 Idaho 868, 160 Idaho 870, 380 P.3d 681 (2016)*.

**Medical Diagnosis.**

The trial court should not have admitted psychologist's testimony pursuant to subdivision (4) of this rule; only out-of-court statements necessary for medical diagnosis and treatment are admissible under subdivision (4) of this rule and the victim did not make her statements to psychologist for the purposes of medical treatment. *State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992)*.

Several factors supported the court's determination that the child's statements were made for purposes of diagnosis or treatment. The child's abduction and the consequent medical examinations were not associated with any domestic dispute, and there was no apparent motivation for any of the adults involved to try to influence the child's story. Although the child's age was an important factor, the court was unwilling to hold as a matter of law that a child of four years and two months cannot be motivated to give information for the purposes of medical diagnosis or treatment. *State v. Kay, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996)*.

Testimony from a nurse about a statement of a child sexual abuse victim was exempt from the hearsay rule under Idaho R. Evid. 803(4) and therefore was not admitted for a limited purpose. *State v. Rothwell, 154 Idaho 125, 294 P.3d 1137 (2013)*.

District court did not abuse its discretion by admitting the St. Luke's Children at Risk Evaluation Services interviews under subsection (4), because the victims" statements were made for the purpose of medical diagnosis or treatment; the interviewer explained the medical purpose of the interviews to the victims, who were 13 but functioning at the level of a third grader, the victims freely communicated about pain they experienced from the abuse, and their statements were not inappropriately influenced by others. *State v. Christensen, 166 Idaho 373, 458 P.3d 951 (2020)*.

District court did not err in admitting the recording of the children at risk evaluation services' interview because the child's statements were found to be sufficiently reliable and made for medical purposes, making them admissible under this rule. Additionally, the child expressed distress and had thoughts of self-harm during the interview, providing substantial evidence for the court's finding that the child was in physical pain or "acting out". *State v. Roberts, -- Idaho --, 545 P.3d 591 (2023)*.

District court did not err by admitting hearsay evidence under subsection (4), because, when the victim spoke to the doctor, the victim was 14 years old and the statements were made for medical treatment. The doctor testified that she made her medical decisions based on the history provided by the victim and on her physical examination. *State v. Towell, -- Idaho --, 535 P.3d 624 (2023)*.

Victim was capable of making statements for the purpose of medical diagnosis; despite the fact that she functioned as a 13-year-old, children as young as four were capable of making statements for purposes of medical diagnosis or treatment. State v. Muthafar, -- Idaho --, -- P.3d --, *2024 Ida. LEXIS 57 (June 13, 2024)*.

State failed to establish at the preliminary hearing that the victim's statements were made for medical diagnosis purposes; aside from briefly noting the victim's pain, the nurse only described the physical exam she typically conducted and she did not testify about the actual physical assessment she performed on the victim, the diagnosis of the victim's injuries, or any treatment rendered or prescribed. Thus, there was no evidence that showed how the statements the victim made pertained to a medical purpose. State v. Muthafar, -- Idaho --, -- P.3d --, *2024 Ida. LEXIS 57 (June 13, 2024)*.

Notwithstanding the magistrate's error in admitting the nurse's testimony at the preliminary hearing since it was not shown that the victim made the statements to the nurse for medical diagnosis purposes, the error was cured by the fair trial defendant was afforded, at which the victim testified and was subject to cross-examination, and the jury found defendant guilty beyond a reasonable doubt. State v. Muthafar, -- Idaho --, -- P.3d --, *2024 Ida. LEXIS 57 (June 13, 2024)*.

**Other Exceptions.**

Trial judge properly considered the factors of subdivision (24) of this rule, and his ruling admitting into evidence the alleged child molestation victim's out-of-court statements to his mother under that exception was correct; moreover, since the judge found the victim to be "unavailable," I.R.E., Rule 804(b)(5) would also be applicable and would allow the admission of his statements to his mother regarding incidents of sexual molestation. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

In child abuse case where trial court allowed doctor to testify to out-of-court statements of defendant's younger daughter, and where defendant claimed statements were unreliable because of alleged suggestiveness of doctor's questions (by referring to "daddy") and the younger daughter's alleged inability to recollect and communicate because of her age, trial court did not err when it allowed doctor to testify concerning the younger daughter's statements to him since there was physical evidence to corroborate that sexual abuse occurred, since there was no motive to make up a story of this nature in a child of these years, and since the older daughter testified as to the identification of the perpetrators. *State v. Giles, 115 Idaho 984, 772 P.2d 191 (1989)*, cert. denied, *State v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989)*.

The admission of a hearsay statement under subsection (24) of this rule by a trial court is a proper exercise of discretion only when the court finds that (A) the hearsay statement has circumstantial guarantees of trustworthiness equivalent to those in subsections (1) through (23) of this rule, (B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, (D) the general purposes of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence, and (E) the proponent gives the adverse party adequate notice and information regarding use of the statement. *State v. Ransom, 124 Idaho 703, 864 P.2d 149 (1993)*, cert. denied, *510 U.S. 1181, 114 S. Ct. 1227, 127 L. Ed. 2d 571 (1994)*.

Under this rule, the admissibility of plaintiffs' predecessor's statements turns upon whether the statements were probative as to her state of mind about ownership of the cattle; where it is apparent that her statements indicated her belief that she owned the cattle, the statements are relevant for determining whether she had an ownership interest. *Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995)*.

Subdivision (24) is not a well-rooted exception to the hearsay rule and hearsay admitted pursuant to this subsection must be proven to have particularized guarantees of trustworthiness. The spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate are indicators of trustworthiness, but these factors are not exclusive. The existence of corroborating evidence may indicate that any error in the admission of the statement was harmless, but is not an appropriate consideration in finding a statement was trustworthy. *State v. Gray, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997)*.

In a murder prosecution, the trial court did not err in excluding testimony of a witness as to a statement by the victim regarding bruises she suffered at the hands of a man other than defendant. *State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998)*.

**--Guarantees of Trustworthiness.**

The use of corroborating evidence to support a hearsay statement's particularized guarantees of trustworthiness would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, and this is a result at odds with the requirement that hearsay evidence admitted under the Confrontation Clause of the United States Constitution be so trustworthy that cross-examination of the declarant would be of marginal utility. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

Because the surgical logs from the hospital were records kept in the regular course of business, court concluded that the surgical logs were admissible under subsection (6) of this rule. *Woodfield v. Board of Professional Discipline, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995)*.

A magistrate erred, in defendant's battery trial, by admitting a videotaped interview of the victim under the residual hearsay exception because the statements lacked particularized guarantees of trustworthiness, however, the error was harmless. *State v. Doe, 137 Idaho 519, 50 P.3d 1014 (2002)*.

**--Medical Report.**

Where except for the department's claim in its complaint that putative father had a duty to repay the department $207 for costs incurred in the drawing, shipping and analysis of the blood samples and the allegation that a true and correct copy of the analysis result was attached to the complaint, there was no basis to support a finding that the department gave putative father adequate information and notice regarding the use of the human leukocyte antigen (HLA) report; therefore, the trial court did not abuse its discretion in not admitting the HLA report under

subdivision (24) of this rule. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman, 122 Idaho 1004, 842 P.2d 683 (1992)*.

**--Personal or Family History.**

A proponent of paragraph (19) evidence must establish that the reputation testimony arises from sufficient inquiry and discussion among persons with personal knowledge of the matter to constitute a trustworthy "reputation." Rumors and speculation are clearly insufficient in this regard. *State v. Nichols, 156 Idaho 365, 326 P.3d 1015 (Ct. App. 2014)*.

**--Requirements.**

Hearsay evidence may not be admitted under subdivision (24) of this rule when there are not specific findings that each of the five requirements of the rule have been fulfilled. *State v. Horsley, 117 Idaho 920, 792 P.2d 945 (1990)*.

**--Spontaneity and Trustworthiness.**

If there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness with regard to statements by a young child. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

**--Totality of Circumstances.**

With regard to the admissibility of hearsay statements, particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

If the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

**--Trustworthiness and Necessity.**

The admissibility of hearsay pursuant to subdivision (24) of this rule depends upon the trustworthiness of the evidence and the necessity for its use. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

A physician's testimony regarding the declarations of a two and one-half year old alleged victim of sexual abuse lacked the constitutionally required guarantees of trustworthiness, where the interview was not recorded on videotape for preservation and perusal by the defense at or

before trial, where the physician had a preconceived idea of what the child should be disclosing, and where the physician used blatantly leading questions throughout his interview. *State v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989)*, aff'd, *497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*.

**Present Sense Impression.**

Trial court abused its discretion in overruling a highway district's objection to testimony regarding a property owner's statement, because there was substantial opportunity to fabricate a response. The owner's statement that the ramp was his property, and he was only letting the county use it, was not the type of statement contemplated by subsection (1). *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

**Preservation of Objections.**

A litigant who has made a motion in limine requesting advance rulings on the admissibility of hearsay testimony must continue to assert his objections as the evidence is offered or his objections are not preserved. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

**Prior Consistent Statements.**

In a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, prior consistent statements made by the victim to a number of different individuals were admissible because the prior statements were more reliable than the victim's trial testimony (due to the lapse in time between the abuse and the trial), were probative of whether the abuse actually occurred, and contained the necessary circumstantial guarantees of trustworthiness. *State v. Rossignol, 147 Idaho 818, 215 P.3d 538 (2009)*.

**Probation Files.**

Probation files can fall under both the business records exception and the public records exception to the hearsay rule. *State v. Nez, 130 Idaho 950, 950 P.2d 1289 (Ct. App. 1997)*.

**Public Records and Reports.**

The magistrate properly concluded that the teletype documents which an officer used to determine that defendant's driving privileges were suspended were hearsay but admissible as evidence under the public records exception to the hearsay rule in subdivision (8) of this rule. *State v. Carr, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992)*.

Where the excluded portion of the minutes of the highway district board of directors meeting contained hearsay statements allegedly made by persons not in attendance at the meeting, they

were properly excluded. *Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995)*.

The coroner's report with the lab report attached should have been admitted under subsection (8) because it was an investigative report prepared by law enforcement personnel, presented factual findings resulting from special investigation of a case, and was offered by defendant in the criminal case against him. *State v. Santana, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000)*.

Under Idaho R. Evid. 803(8) and 803(6), the state police crime lab report should not have been admitted into evidence as either a business records exception or public records exception because it was an investigative report offered by the prosecution; however, all the information obtained in the report was testified to by the forensic lab technician and was a duplicate of testimony under oath; therefore, the error was harmless. *State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003)*.

Grant of summary judgment in favor of the employer in the employee's wrongful termination action was proper where his actions were not protected under the Idaho Protection of Public Employees Act, *§ 6-2101* et seq.; further, the district court did not abuse its discretion in striking a letter regarding the Attorney General's investigation into Correctional Industries' operation because it was excluded from the hearsay exception of *Idaho R. Evid. 803(8). Mallonee v. State, Dep't of Corr., 139 Idaho 615, 84 P.3d 551 (2004)*.

In a child custody proceeding, a certified copy of a Nevada proceeding was admissible because it fell within the public record exception to the hearsay rule. *Navarro v. Yonkers, 144 Idaho 882, 173 P.3d 1141 (2007)*.

**Recorded Recollection.**

Pursuant to subsection (5) of this section, the reading of witness's notes from the first trial into evidence would have been proper only after the trial court had admitted them. Defendant's counsel did not, however, object to witness's reading of the notes. Had defendant's attorney objected, the trial judge would have been correct in ruling that the state had laid a proper foundation for the admission of the notes, and that witness could read the notes into the record even if they could not be received as a full exhibit unless offered by defendant's attorney. *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992)*.

Recorded recollection exception applied to defendant's brother's written statement, as his signature on the agreement, in conjunction with his testimony, provided adequate evidence that the contents of the statement were adopted by the brother while they were fresh in his memory. *State v. Lopez-Orozco, 159 Idaho 375, 360 P.3d 1056 (2015)*.

**Sales Charts.**

Defendant pharmaceutical company was permitted to use sales charts at trial under any of three exceptions to the hearsay rule: (1) the business records exception pursuant to subdivision

(6) of this rule, (2) the public records exception pursuant to subdivision (8) of this section, and (3) the market reports exception pursuant to subdivision (17) of this rule. *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1990)*.

**State of Mind.**

Trial court erred in admitting testimony allegedly made by the victim in the week leading up to her death, because the majority of the testimony was irrelevant, the State's asserted state of mind evidence as an attempt to present to the jury defendant's alleged past conduct, which the court had excluded, and its prejudicial effect substantially outweighed any minimal probative value there may have been. *State v. Herrera, 159 Idaho 615, 364 P.3d 1180 (Idaho 2015)*.

Defendant's statement in a verified petition for post-conviction relief that defendant reported that, prior to entry of a guilty plea, he began hearing voices and was suffering greatly from mental illness, deeming him incompetent to stand trial, was inadmissible hearsay, due to foundational deficiencies relating to the circumstances under which the report was made. *Takhsilov v. State, 161 Idaho 669, 389 P.3d 955 (Idaho 2016)*.

**Statements of Victim.**

The individual whose state of mind was relevant to the defendant's defense was not the victim, but rather her ex-boyfriend. The victim's statements that she feared her ex-boyfriend did not show that he possessed an intent to harm her. Therefore, the statements did not bear on a material issue at trial in the same manner as those statements of fear which had been found to be admissible as descriptions of an existing mental state. The victim's fear of a third person did not establish or disprove the defendant's guilt. The victim's statements regarding her concerns about her ex-boyfriend were inadmissible because they failed to meet the test for relevancy. *State v. Gray, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997)*.

In seeking admission of the evidence at trial, the defendant's counsel presented the court the content of the statements. Defense counsel did not provide an offer of proof which indicated the circumstances surrounding the victim's declarations. There was no record of the circumstances surrounding the statements, and the victim's statements regarding her ex-boyfriend's behavior and occupation did not have the circumstantial guarantees of trustworthiness which would have justified admission under susbsection (24). *State v. Gray, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997)*.

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding

defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010)*.

**Statement to Prove Matter Asserted.**

Where an attorney's testimony disclosed that his client had expressed guilt when he told the witness he was having trouble sleeping and that he wanted to get the matter off his conscience, the statement sought to prove the matter asserted, and was inadmissible hearsay. *State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)*.

**Testimony of Spouse.**

At trial, the defendant's counsel inquired into the happiness of the defendant's marriage. The defendant placed the happiness of his marriage at issue through the cross-examination of a witness for the state. The wife's state of mind regarding her marriage thereby became relevant to the defendant's defense against the charges. However, the court did not admit the statements under subdivision (24), and instead the court admitted the statements under the firmly rooted hearsay exception of subdivision (3). Hence, the court's admission of statements reflecting the wife's state of mind was proper. *State v. Gray, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997)*.

**Videotape of Testimony.**

Where the state put defendant on notice that it would seek to admit videotaped testimony of victim's prior inconsistent statements as evidence, and not just for the purpose of impeachment, and where defendant failed to object to the testimony or to request a limiting instruction at that time, defendant's later requested limiting instruction was neither timely nor specific. *State v. Vaughn, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993)*.

**Cited in:**

*State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986)*; *State v. Carpenter, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988)*; *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*; *Pass v. Kenny, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990)*; *State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)*; *Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993)*; *Viebrock v. Gill, 125 Idaho 948, 877 P.2d 919 (1994)*; *State v. Frederick, 126 Idaho 286, 882 P.2d 453 (Ct. App. 1994)*; *State v. McAway, 127 Idaho 54, 896 P.2d 962 (1995)*; *Lunders v. Estate of Snyder, 131 Idaho 689, 963 P.2d 372 (1998)*; *State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)*; *Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 245 P.3d 992 (2010)*; *In re Doe, 170 Idaho 581, 514 P.3d 991 (2022)*.

## Research References & Practice Aids

## RESEARCH REFERENCES

### A.L.R.

When is hearsay statement made to 911 operator admissible as "present sense impression" under Uniform Rules of Evidence 803(1) or similar state rule. *125 A.L.R.5th 357*.

Construction and Application of Uniform Rule of Evidence 803(17), Providing Hearsay Exception for Market Reports, and Commercial Publications. *54 A.L.R.6th 593*.

When is hearsay statement "present sense impression" admissible under Rule 803(1) of Federal Rules of Evidence.165 A.L.R. Fed. 491.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of Federal Rules of Evidence.186 A.L.R. Fed. 485.

Idaho Court Rules Annotated
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# *I.R.E. Rule 804*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Unavailable as a Witness.

**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

**(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

**(2)** refuses to testify about the subject matter despite a court order to do so;

**(3)** testifies to not remembering the subject matter;

**(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

**(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

**(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

**(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

**(1) Former Testimony.** Testimony that:

**(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

**(B)** is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

**(2) Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

**(3) Statement Against Interest.** A statement that:

**(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

**(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

**(4) Statement of Personal or Family History.** A statement about:

**(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

**(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

**(5) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

**(6) Other exceptions.**

**(A) In General.** A statement not specifically covered by any of the foregoing exceptions if:

**(i)** the statement has equivalent circumstantial guarantees of trustworthiness;

**(ii)** it is offered as evidence of a material fact;

**(iii)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

**(iv)** admitting it will best serve the purposes of these rules and the interests of justice.

**(B) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it

## History

(Adopted January 8, 1985, effective July 1, 1985; amended April 4, 2008, effective July 1, 2008; amended September 1, 2015, effective January 1, 2016; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

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**Appellate Review.**

Where trial court determines whether party opposing use of preliminary hearing testimony had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, and where such findings are challenged on appeal the Court of Appeals will apply the "clear error" standard of review. If the factual predicates of I.R.E. 804 are met, and if there are no other reasons shown under the rules for its exclusion, the court may admit the evidence at trial. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

**Death of Witness.**

Affidavit of a witness prepared in support of a pre-trial motion for summary judgment was inadmissible hearsay at trial where witness died before trial without being deposed; affidavit was not the product of a proceeding wherein opposing party had an opportunity to develop its contents through direct cross, or redirect examination. *Beco Constr. Co. v. City of Idaho Falls, 124 Idaho 859, 865 P.2d 950 (1993)*.

In an aggravated assault case where the victim testified in a preliminary hearing but died before trial, defendant's confrontation right was not violated by admission of that testimony at trial. Defendant was represented at the preliminary hearing by counsel who engaged the victim in full and effective cross-examination as to his truthfulness, bias, memory, and motive. *State v. Mantz, 148 Idaho 303, 222 P.3d 471 (2009)*.

**Evidence.**

**--Admissible.**

Preliminary hearing testimony of a witness not present at trial is not admissible. *State v. Elisondo, 114 Idaho 412, 757 P.2d 675 (1988)*.

Trial judge properly considered the factors of I.R.E., Rule 803(24), and his ruling admitting into evidence the alleged child molestation victim's out-of-court statements to his mother under that exception was correct; moreover, since the judge found the victim to be "unavailable," subsection (b)(5) of this rule would also be applicable and would allow the admission of his statements to his mother regarding incidents of sexual molestation. *State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988)*.

**Former Testimony.**

Among the factors which may influence a party's motive to develop testimony are: (1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

The right of confrontation is no longer a basis for excluding the prior testimony of an absent witness. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

Defendant failed to demonstrate, and the court could not see, how *§ 9-336* and subsection (b)(1) of this rule were inconsistent. Both allow the use at trial of the preliminary hearing testimony of a witness who, at the time of trial, is shown to be unavailable. Moreover, the statute is consistent with the inherent policy of *I.R.E. 402. State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

Trial court did not err in admitting testimony of witness into evidence through the preliminary hearing transcript where there was no other evidence to support count 17 except the testimony of this witness, where substantial efforts were made to locate the witness but such efforts were unsuccessful and where defendant's counsel during the preliminary hearing cross-examined the witness and it was evident from the jury instructions that the manner in which the theft in count 17 was alleged to have occurred remained consistent in both the preliminary hearing and the trial as required by subdivision (b)(1) of this rule. *State v. Owen, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997)*.

In a suit by former wife seeking partition of real property held by former husband and his father as tenants in common, district court did not err in admitting an exhibit that had been previously admitted during the divorce action, since did not challenge the admission of the father's testimony in the divorce proceeding, and that testimony provided the foundation for the admission of the exhibit. *Bahnmiller v. Bahnmiller, 145 Idaho 517, 181 P.3d 443 (2008)*.

**--Opportunity Requirement.**

The "opportunity" requirement of subsection (b)(1) of this rule is no different from the requirement in § 9-*336. State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

Where there was no indication in the record that counsel's opportunity to cross-examine was curtailed in any way by the magistrate, and whether counsel chose to utilize that opportunity fully was more a matter of tactics or strategy than opportunity, district court did not err in deciding that defendant's counsel had an opportunity to develop the testimony by cross-examination at the preliminary hearing. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

**--Preliminary Hearing.**

If the requirements of subsection (b)(1) of this rule and *§ 9-336* are satisfied, then the use of the evidence from the preliminary hearing in the case must be allowed. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

The court could not adopt a per se rule that preliminary hearing testimony is inadmissible in light of the explicit statement of policy in *§ 9-336* and the implicit statement of policy in I.R.E. 402 and subsection (b)(1) of this rule. A case-by-case approach is the better way to determine whether the district court was correct in ruling that the preliminary hearing testimony was admissible. Such an approach would allow the trial court to determine, as matters of fact, whether the party opposing the use of such testimony had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

Identity of the issues remained the same throughout the proceedings in the courts below since the arresting officer was the only person whose testimony could provide the state with "substantial evidence on every material element of the offense charged." Where, while the standard of proof is obviously different for the two proceedings, the factual elements to be established at the preliminary hearing and at the trial are exactly the same, and where the alignment of the parties in relation to each other and to the witness were exactly the same, the district court did not commit clear error in finding that defendant had a similar motive and opportunity to develop the officer's testimony at the preliminary hearing as she would have at trial. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

District court erred by denying the State of Idaho's motion to admit a transcript of the preliminary hearing testimony of a witness unavailable to testify at trial because, although defendant's motives at trial and at the preliminary hearing were not necessarily identical, they were similar. *State v. Richardson, 156 Idaho 524, 328 P.3d 504 (2014)*.

**Precedence of Rule over *§ 9-336*.**

To the extent that subsection (b)(1) of this rule places greater strictures upon the use of evidence than does *§ 9-336*, the rule must govern. *State v. Ricks, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992)*.

**Preliminary Hearing.**

Defendant's challenge to the admission of his brother's preliminary hearing testimony failed on the merits: although the brother's trial testimony supported the trial court's finding that his memory of defendant's confession was so diminished at trial that it rendered him unavailable to testify, defendant did have ample opportunity to cross-examine his brother at the preliminary hearing. *State v. Lopez-Orozco, 159 Idaho 375, 360 P.3d 1056 (2015)*.

**Reasonable Means.**

Where the witness was not present within city limits at the precise time he was to be called as a witness at the second trial, by not seeking a continuance to allow the witness time to make a flight into the city, the state failed to use reasonable means to procure the witness's testimony as required by subsection (a)(5), and due to the critical nature of the testimony, the error was not harmless beyond a reasonable doubt. *State v. Button, 134 Idaho 864, 11 P.3d 483 (Ct. App. 2000)*.

**Statement Against Interest.**

In action for misdelivery of lumber, introduction of documents that showed that party to whom lumber was delivered was purchasing lumber from plaintiff and that plaintiff had authorized said party to sell the lumber and did so and credited plaintiff at a price above market value were statements as likely to be self-serving as they were to be against the author's pecuniary interest and as they lacked the indicia of trustworthiness, were not admissible under subdivision (b)(3) of this rule as being against declarant's pecuniary or proprietary interest. *Quinto v. Millwood Forest Prods., Inc., 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997)*.

Where the statement of a friend of the defendant was not made during or in furtherance of a conspiracy, but after the completion of the crime and after arrest, and where it was not made to conceal or perpetuate the conspiracy, the statement was not properly admissible under this rule, either as a statement against interest or as a statement of a *co-conspirator. State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998)*.

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor, 141 Idaho 459, 111 P.3d 144 (2005)*.

The factors for determining the reliability and corroboration of a statement subjected to the hearsay exception established in subdivision (b)(3) are: (1) whether the declarant is unavailable; (2) whether the statement is against the declarant's interest; (3) whether corroborating circumstances exist which clearly indicate the trustworthiness of the exculpatory statement, taking into account contradictory evidence, the relationship between the declarant and the listener, and the relationship between the declarant and the defendant; (4) whether the declarant

has issued the statement multiple times; (5) whether a significant amount of time has passed between the incident and the statement; (6) whether the declarant will benefit from making the statement; and (7) whether the psychological and physical surroundings could affect the statement. *State v. Meister, 148 Idaho 236, 220 P.3d 1055 (2009)*.

A judge's inquiry, made to assure himself that the corroboration requirement of subdivision (b)(3) has been satisfied, should be limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. *State v. Meister, 148 Idaho 236, 220 P.3d 1055 (2009)*.

Habeas petitioner's due process rights were not violated at his trial by the exclusion under Idaho R. Evid. 804(b)(3) of a confession by another person to the murder for which the petitioner was being tried because the confession lacked persuasive assurances of trustworthiness as the declarant was intoxicated when he confessed and recanted when he was sober, his alibi checked out, and there was no other evidence linking him to the crime. *Rhoades v. Henry, 596 F.3d 1170 (2010)*.

District court erred by admitting into evidence in full a letter that a jailhouse inmate allegedly intercepted from a co-defendant as a statement against interest, because, when parsed individually, only one statement in the letter met the standard described in *Williansom v. United States, 512 U.S. 594 (1994)*. The remainder of the statements could not be considered genuinely self-inculpatory and, therefore, they should not have been admitted as statements against interest. *State v. Robins, 164 Idaho 425, 431 P.3d 260 (2018)*.

Exclusion under Idaho R. Evid. 804(b)(3) of testimony that another person confessed to a kidnapping and murder for which an inmate was convicted did not violate due process; the other person confessed while intoxicated and recanted when sober, the other person had an alibi, and no other evidence linked the other person to the crime. *Rhoades v. Henry, 638 F.3d 1027 (9th Cir. 2011)*, cert. denied, -- *U.S. --, 132 S. Ct. 401, 181 L. Ed. 2d 263 (2011)*.

A statement tending to expose the declarant to criminal liability, and offered in a criminal case, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. *Smith v. Smith (In re Estate of Smith), 164 Idaho 457, 432 P.3d 6 (2018)*.

Witness's statement that was attirbutable to his father was not one that was against interest under subdivision (b)(3), because the father's statement that he built a fence to keep children off other portions of his property did not open him up to the possibility of civil action. It was a self-serving statement, not one against interest. *E. Side Highway Dist. v. Delavan, 167 Idaho 325, 470 P.3d 1134 (2019)*.

**Unavailability of Witness.**

The trial court erred in ruling that the jailed witness who refused to testify was in fact an unavailable witness without first bringing him back into court and ordering him to testify under the direct threat of contempt; therefore, the witness was not an unavailable witness as defined

by subsection (a)(2) and the admission of his preliminary hearing testimony was error. *State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000)*.

Having opposed a continuance until a former girlfriend, who was pregnant, was able to attend defendant's trial, defendant waived the claim that defendant's right to confront adverse witnesses was violated when the trial court admitted the former girlfriend's videotaped testimony. *State v. Bagshaw, 137 Idaho 613, 51 P.3d 427 (Ct. App. 2002)*.

Trial court did not violate the confrontation clause by admitting a victim's deposition in lieu of live testimony, where the victim was unavailable, given that she was too ill and frail to be safely transported to court. *State v. Smalley, 164 Idaho 780, 435 P.3d 1100 (2019)*.

State made a good-faith showing of the victim's unavailability, where two of the victim's physicians wrote letters stating that the victim could not tolerate a court appearance or the long drive to court, due to her bed-to-chair existence; and the victim's nurse stated that the victim was incapable of standing, traveling (other than by ambulance), hearing, or even getting into a wheelchair. *State v. Smalley, 164 Idaho 780, 435 P.3d 1100 (2019)*.

District court erred in determining that defendant's wife was unavailable to testify at trial where the State had not rested its case at the time the ruling was sought, she was scheduled to appear at trial the next day per a defense subpoena and did so, and thus, the State had not shown that she was unavailable under this rule. *State v. Reyes, 169 Idaho 781, 503 P.3d 997 (2022)*.

**Cited in:**

*State v. Holman, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985)*; *State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*; *State v. Rodgers, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990)*; *Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991)*; *Wooden v. Martin (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012)*; *Takhsilov v. State, 161 Idaho 669, 389 P.3d 955 (Idaho 2016)*; *Charboneau v. State, 162 Idaho 160, 395 P.3d 379 (2017)*; *State v. Ogden, 171 Idaho 843, 526 P.3d 1013 (2023)*.

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**A.L.R.**

*Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004)*, with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. *30 A.L.R.6th 1*.

When is witness "unavailable" for purposes of admission of evidence under *Rule 804 of Federal Rules of Evidence*, providing hearsay exception where declarant is unavailable. *174 A.L.R. Fed. 1*.

Construction and application of *Fed. Rules Evid. Rule 804(b)(6)*, 28 U.S.C.A., hearsay exception based on unavailable witness' wrongfully procured absence. *193 A.L.R. Fed. 703*.

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# I.R.E. Rule 805

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 805. Hearsay Within Hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018; amended and effective May 28, 2019.)

Annotations

## Case Notes

**Evidence Inadmissible.**

Statement of defendant in police report, that he denied having dropped drugs while running from officer, was inadmissible on the grounds that it was hearsay within hearsay not within any exception to the hearsay rule, and district court did not err in excluding such statement. *State v. Vivian, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996)*.

**Cited in:**

*State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988)*; *Charboneau v. State, 162 Idaho 160, 395 P.3d 379 (2017)*.

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# I.R.E. Rule 806

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE VIII. HEARSAY.***

## Rule 806. Attacking and Supporting the Declarant's Credibility.

When a hearsay statement - or a statement described in Rule 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Impeachment.**

Transcript of the preliminary hearing testimony of a witness unavailable to testify at trial was admissible at defendant's trial because, upon the admission of the preliminary hearing testimony at trial, defendant was able to impeach the witness within the confines of the rules of evidence. *State v. Richardson, 156 Idaho 524, 328 P.3d 504 (2014)*.

**Cited in:**

*State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)*; *State v. Fisher, 123 Idaho 481, 849 P.2d 942 (1993)*.

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# *I.R.E. Rule 901*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.***

## Rule 901. Authenticating or Identifying Evidence.

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

**(b) Examples.** The following are examples only--not a complete list--of evidence that satisfies the requirement:

**(1) Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

**(2) Nonexpert Opinion About Handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

**(3) Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

**(4) Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

**(5) Opinion About a Voice.** An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

**(6) Evidence About a Telephone Conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

**(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

**(B)** a purported public record or statement is from the office where items of this kind are kept.

**(7) Evidence About Public Records.** Evidence that:

**(A)** a document was recorded or filed in a public office as authorized by law; or

**(B)** a purported public record or statement is from the office where items of this kind are kept.

**(8) Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that it:

**(A)** is in a condition that creates no suspicion about its authenticity;

**(B)** was in a place where, if authentic, it would likely be; and

**(C)** is at least 30 years old when offered.

**(9) Evidence About a Process or System.** Evidence describing a process or system and showing that it produces an accurate result.

**(10) Methods Provided by a Statute or Rule.** Any method of authentication or identification allowed by a Supreme Court rule, by an Idaho statute, or by the Idaho Constitution.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Admission Proper.
Blood Test Results.
Electronic Communications.
Evidence Inadmissible.
Harmless Error.
Intoximeter.
Progress Notes.
Public Records and Reports.
Standard for Admission.
Writings.

**Admission Proper.**

Where both agents involved in the seizure of a poker machine testified that the machine was the one taken, that they observed a sticker on the machine and that one of the agents placed his initials on the machine, and the defendants offered no rebuttal testimony other than eliciting the fact that the machine's coin box had been removed after the machine was taken from the trunk and before it had been recovered by the police, the machine was sufficiently identified for the hearing officer to admit it into evidence. *State, Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985)*.

In a prosecution for aggravated driving under the influence, allegations, not specified as grounds for objection at trial, that the state failed to prove the blood sample was withdrawn in the proper manner and properly processed for testing, or that the hospital's automatic chemical analyzer operated on the basis of accepted scientific principles, did not establish failure of

authentication and identification constituting plain error in admitting evidence of the test result. *State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988)*.

There was sufficient foundation to admit into evidence stolen silver coins because, although defendant was arrested possessing only four silver dollars out of the nearly 300 that were stolen, defendant had, on two recent, previous occasions, sold a large number of silver dollars to a coin shop, the victim's rare 1898-S Morgan dollar was found in a group of coins defendant sold to the store and was identified by two people as belonging to the victim's collection, and defendant was arrested attempting to sell four other silver dollars in protective containers to a pawn shop. *State v. Simmons, 120 Idaho 672, 818 P.2d 787 (Ct. App. 1991)*.

Loss prevention officer's testimony was not offered to identify or authenticate any of the signatures as being that of a particular individual, nor was the testimony foundational for introduction of copies of the signatures. The purpose was to show that the signatures from the earlier transactions looked different from the signature presented in the transaction giving rise to the charged offense. *State v. Waller, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004)*.

District court did not abuse its discretion in admitting certain audio recordings into evidence because the foundation was made by a police sergeant's testimony that he set up a recording device, was present during the phone calls, heard a majority of what was said during the telephone conversations, recognized the voices of both defendant and the confidential informant, and defendant merely speculated that the recordings could have been modified by some unknown party. *State v. Bradley, 158 Idaho 66, 343 P.3d 508 (2015)*.

District court properly admitted an exhibit as a handwriting exemplar, where the primary issue at trial was whether an enforceable contract bound the defendant to pay the plaintiff. The district court redacted the exhibit so that only the defendant's signature on the exhibit was submitted to the jury and admonished the jury that the exhibit was to be considered for the limited purpose of considering what the defendant's signature was and the exhibit was offered to impeach the defendant's denial that he signed two other exhibits, which did not need not be disclosed before trial. *Safaris Unlimited, LLC v. Jones, 163 Idaho 874, 421 P.3d 205 (2018)*.

Defendant's murder conviction was upheld because the district court did not err by admitting the audio recordings or call logs into evidence or by refusing to instruct the jury that the driver who brought defendant to and from the victim's house was an accomplice as a matter of law. *State v. Colpitts, 170 Idaho 453, 511 P.3d 873 (2022)*, review denied, -- *Idaho --, 2022 Ida. LEXIS 83 (Idaho July 1, 2022)*.

During defendant's trial for trafficking in methamphetamine, the court did not abuse its discretion in overruling defendant's foundational objection to a detective's testimony and admitting text messages into evidence because the detective provided sufficient testimony to support a conclusion that the extracted data came from defendant's phone. *State v. Green, -- Idaho --, 543 P.3d 484 (2024)*.

**Blood Test Results.**

Where a detailed explanation regarding hospital procedure and protocol was presented, and where the defendant failed to offer any evidence that her blood samples were tampered with or mishandled, the district court did not abuse its discretion in denying the defendant's motion to suppress blood test results. *State v. Gilpin, 132 Idaho 643, 977 P.2d 905 (Ct. App. 1999)*.

The requirement of authentication or identification as a condition precedent to admissibility was satisfied by evidence sufficient to support a finding that the matter in question was what its proponent claimed. Blood alcohol test results from an automobile accident victim were properly admitted where testimony established the chain of custody and tests were performed according to established methods. *Dachlet v. State, 136 Idaho 752, 40 P.3d 110 (2002)*.

**Electronic Communications.**

When there has been an objection to admissibility of a text message, the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission; authenticating a text message or email may be done in much the same way as authenticating a telephone call. Therefore, in a case involving lewd conduct with a minor under sixteen, an email, several texts, and a telephone call were properly authenticated by identifying information, but texts sent to the victim's mother were not; however, the error was harmless. *State v. Koch, 157 Idaho 89, 334 P.3d 280 (2014)*.

**Evidence Inadmissible.**

Where minor submitted a letter purporting to be from the U.S. Department of Justice purporting to show that the federal government intended his mother to hold and spend death benefits as a fiduciary, for his benefit, the district court properly determined that the letter was inadmissible hearsay because there was no testimony by a witness with knowledge regarding the letter and no evidence of authentication. *Herman v. Herman, 136 Idaho 781, 41 P.3d 209 (2002)*.

District court properly excluded from the evidence a photograph of the scene of a car wash where a customer alleged that the customer slipped and fell on ice because the photograph was taken six days after the incident and no testimony or other evidence showed that the photograph depicted the same conditions as at the time of the accident. The photograph may have been admissible to show the general layout of the car wash, but the photograph was not submitted for that purpose. *Shea v. Kevic Corp., 156 Idaho 540, 328 P.3d 520 (2014)*.

**Harmless Error.**

Although foundational evidence was minimal, any error, in admitting into trial notebook pages containing names and phone numbers found in defendant's residence as evidence that defendant possessed marijuana with intent to deliver, was harmless given the overwhelming evidence against defendant. *State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989)*.

In a controlled substances prosecution, an officer's insufficient testimony that a digital scale used to weigh the substance in question was self-calibrating did not cause the admission of testimony of the substance's weight to be reversible error because (1) the subsequent admission of testimony that the substance weighed exactly the same when weighed on a second scale cured the error, and (2) the scale's accuracy was not as critical as if the weight of the substance had barely exceeded the statutory threshold. *State v. Barber, 157 Idaho 822, 340 P.3d 471 (2014)*.

**Intoximeter.**

The state presented proof that the Intoximeter 3000 was a test for alcohol concentration approved by the Idaho Department of Health, administered in accordance with its required procedures, thus meeting the authentication condition of this section and no expert testimony establishing the reliability of the testing process was necessary. *State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)*.

**Progress Notes.**

In prosecution for provider fraud, certain progress notes of personal care provider were adequately authenticated where state investigator testified that these notes were discussed during an interview he had with defendant and during such interview defendant admitted that he had signed these documents and that they accurately reflected the hours he had worked thus, these unrefuted admissions adequately authenticated these documents as his progress notes under this rule. *State v. Silverson, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997)*.

In prosecution for provider fraud where evidence showed state investigator on June 30, 1991 sent defendant by certified mail a written request for defendant's progress notes and he received the notes in the mail on July 20, 1991, it can be reasonably inferred that the delivered documents were what the investigator had requested from defendant and hence what their proponent at trial claimed them to be, therefore, they were sufficiently authenticated. *State v. Silverson, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997)*.

**Public Records and Reports.**

In prosecution for provider fraud where defendant personal care provider was authorized and in fact required to file physician invoices and they were from the public office where such documents were kept, they met the criteria of subdivision (b)(7) of this rule concerning authentication of public records and reports and further the state relied on these documents by issuing checks to defendant for the amounts claimed and he accepted such payment without protest and thus district was correct in overruling defendant's objection that the invoices were inadmissible for lack of authentication. *State v. Silverson, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997)*.

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002' s requirement that he produce the original orders, because his copies were not properly certified or authenticated. *State v. Korn, 148 Idaho 413, 224 P.3d 480 (2009)*.

Photocopies of documents from defendant's "penitentiary packet" were admissible to prove his persistent violator status. The documents in the packet were certified by each court where defendant had been convicted, and the packet itself was a record required to be kept by the state department of corrections. Photocopies of the contents of that packet were certified by the custodian of the packet. Altogether the elements excused the state from producing the original copy of defendant's judgments of conviction. *State v. Marsh, 153 Idaho 360, 283 P.3d 107 (2011)*.

**Standard for Admission.**

The requirement of demonstrating a positive chain of custody is a function of the authentication or identification of evidence. The standard for the admissibility of evidence is whether the hearing officer can determine, in all reasonable probability, that the proffered evidence has not been changed in any material manner. *State, Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985)*.

In a controlled substances prosecution, an officer's testimony that a digital scale used to weigh the substance in question was self-calibrating was insufficient to admit testimony of the substance's weight because (1) no evidence of how the officer knew the scale was self-calibrating was offered, and (2) nothing showed the scale had been tested to verify that the scale's self-calibration function was working properly. *State v. Barber, 157 Idaho 822, 340 P.3d 471 (2014)*.

**Writings.**

Written and signed documents, like any other type of evidence, may be authenticated through any means which is sufficient to support a finding that the matter in questions is what its proponent claims; this may include authentication through circumstantial evidence. *State v. Silverson, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997)*.

**Cited in:**

*State v. Hebner, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985)*; *Alexander v. Stibal, 161 Idaho 253, 385 P.3d 431 (2016)*.

## Research References & Practice Aids

**RESEARCH REFERENCES**

**A.L.R.**

Authentication of bullets and other inorganic substances removed from human body for purposes of analysis. *79 A.L.R.5th 237*.

Admissibility in evidence of aerial photographs. *85 A.L.R.5th 671*.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. *18 A.L.R.6th 613*.

Authentication of Electronically Stored Evidence, Including Text Messages and E-mail. *34 A.L.R.6th 253*.

Authentication and Admission of Foreign Business Records in Federal Criminal Proceeding Pursuant to *18 USCS § 3505*. *41 A.L.R. Fed. 2d 537*.

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# *I.R.E. Rule 902*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.***

## Rule 902. Evidence That Is Self-Authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

**(1) Domestic Public Documents That Are Sealed and Signed.** A document that bears:

**(A)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

**(B)** a signature purporting to be an execution or attestation.

**(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified.** A document that bears no seal if:

**(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

**(B)** another public officer who has a seal and official duties within that same entity certifies under seal - or its equivalent - that the signer has the official capacity and that the signature is genuine.

**(3) Foreign Public Documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

**(A)** order that it be treated as presumptively authentic without final certification; or

**(B)** allow it to be evidenced by an attested summary with or without final certification.

**(4) Certified Copies of Public Records.** A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

**(A)** the custodian or another person authorized to make the certification; or

**(B)** a certificate that complies with Rule 902(1), (2), or (3), an Idaho statute, or a rule prescribed by the Supreme Court.

**(5) Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.

**(6) Newspapers and Periodicals.** Printed material purporting to be a newspaper or periodical.

**(7) Trade Inscriptions and the Like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

**(8) Acknowledged Documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

**(9) Commercial Paper and Related Documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

**(10) Presumptions Created by Law.** A signature, document, or anything else that a federal or Idaho statute or Supreme Court rule declares to be presumptively or prima facie genuine or authentic.

**(11) Certified Domestic Records of a Regularly Conducted Activity.** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person. As used in this subsection, "certification" means a written declaration signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the jurisdiction where the certification is signed. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record - and must make the record and certification available for inspection - so that the party has a fair opportunity to challenge them.

**(12) Certified Foreign Records of a Regularly Conducted Activity.**

The original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: as used in this subsection, "certification" means a written declaration signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

## History

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Fingerprint Cards.
Foreign Judgments.
Manufacturer's Certificates or Labels.
Public Records.
--Witness's Affidavit.
Trade Inscriptions.
Uncertified Copies.

**Fingerprint Cards.**

Although the district court erred in admitting the fingerprint cards over defendant's objection for a lack of foundation, where there was a multitude of other sources of information from which the jury would have come to the same conclusion regarding defendant's guilt, the admission of the fingerprint evidence was harmless. *State v. Norton, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000)*.

**Foreign Judgments.**

A judgment of conviction from a California court may be admitted and proved by satisfying the relevant provisions of this rule and does not also need to satisfy the requirements of *§ 9-312* or *28 U.S.C.S. § 1738*. *Section 9-312* is just one method by which a public record may be certified in accordance with subsection (4) of this rule. *State v. Howard, 150 Idaho 471, 248 P.3d 722 (2011)*.

**Manufacturer's Certificates or Labels.**

In some instances, manufacturers' certificates or labels may constitute prima facie evidence of compliance with the requirements in § 49-62*3(3). State v. Monaghan, 116 Idaho 972, 783 P.2d 311 (Ct. App. 1989)*.

**Public Records.**

**--Witness's Affidavit.**

The district court erroneously relied on the fact that a witness's affidavit, as part of the defendant's motion for summary judgment, had become part of the court record, and thereby attained a degree of authenticity, sufficient for admission under subdivision (4) of this rule. *Beco Constr. Co. v. City of Idaho Falls, 124 Idaho 859, 865 P.2d 950 (1993)*.

Enhancement of sentence based in part on a "penitentiary packet" containing authenticated photocopies of certified copies of prior felony conviction judgments was not an abuse of discretion. The state department of corrections was legally required to keep certified copies of defendant's judgments, and was a proper authority to certify to the authenticity of the photocopies. *State v. Marsh, 153 Idaho 360, 283 P.3d 107 (2011)*.

**Trade Inscriptions.**

In a prosecution for aggravated driving while under the influence of alcohol, the labeling on the blood-alcohol test kit with its manufacturer's certificate satisfied for foundational purposes the requisite showing of authenticity required to establish the presence of the contested chemicals. *State v. Bell, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988)*.

**Uncertified Copies.**

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002' s requirement that he produce the original orders, because his copies were not certified in accordance with this rule. *State v. Korn, 148 Idaho 413, 224 P.3d 480 (2009)*.

Exhibit did not satisfy the requirements of Idaho R. Evid. 803(6), because plaintiffs failed to provide a certification from a record custodian or a qualified witness, as the surveyor's stamp on the exhibit did not attest to the elements of Rule 803(6)(A)-(C) and did not satisfy the requirements of this rule. *Sankey v. Ivey, -- Idaho --, 535 P.3d 198 (2023)*.

**Cited in:**

*State v. Alger, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988)*; *State v. Augerlavoie, -- Idaho --, 539 P.3d 981 (2023)*.

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# *I.R.E. Rule 903*

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.***

## Rule 903. Subscribing Witness's Testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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## Rule 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.

**(a) Authentication of Items Described in Rule 803(23).** An item described in Rule 803(23) is self-authenticating, and no extrinsic evidence of authenticity is required for its admission, if:

**(1)** the proposed exhibit identifies the person or entity who conducted or interpreted the test, the name of the patient, and the date the test was performed; and

**(2)** notice was given as provided in subsection (b) of this rule.

**(b) Notice.** No less than 45 days before trial, any party intending to offer an item under this rule must serve on all parties a notice, stating that the item is being offered under this rule and shall be deemed authentic and admissible without testimony or further identification, unless objection is filed and served within 14 days of the date of notice, pursuant to subsection (c) of this rule. The notice served on the parties shall include a brief description of the item along with the name, address and telephone number of the item's author or maker, and the notice shall be accompanied by a copy of the item if it is practicable to provide a copy. The notice, but not the accompanying item, shall be filed with the court.

**(c) Objection to Authenticity or Admissibility.** Within 14 days of notice, any other party may object by filing and serving on all parties a written objection to any item offered under this rule, identifying each item to which objection is made. The grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial. If the court in a civil case finds that an objection was made without reasonable basis and the item is admitted at trial, the court may award the offering party any expenses incurred and reasonable attorney fees.

**(d) Effect of Rule.** This rule does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties. Nothing contained in this rule shall prohibit the admissibility of a written, graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

## History

(Adopted October 23, 2008, effective January 1, 2009; amended March 26, 2018, effective July 1, 2018.)

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# I.R.E. Rule 1001

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.***

## Rule 1001. Definitions That Apply to This Article.

In this article:

**(a)** A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

**(b)** A "recording" consists of letters, words, sounds, numbers, or their equivalent recorded in any manner.

**(c)** A "photograph" means a photographic image or its equivalent stored in any form.

**(d)** An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout -- or other output readable by sight -- if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

**(e)** A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Duplicate.
Original.

**Duplicate.**

Where sellers admitted that a duplicate of the tape recording of a conversation between buyers and sellers was an edited version of the original and that the original had been lost, the duplicate did not meet the standards set forth in this rule because it was a version of the original edited

only by one party, and thus did not accurately reproduce the original tape recording. *Christensen v. Ransom, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992)*.

**Original.**

In a child protective custody case, the magistrate did not err in admitting the photographs of the children's injuries into evidence as "original" under subsection (3) of this rule and Idaho R. Evid. 1002 because, while the photos might have been somewhat discolored, such distortion went to the weight of the evidence and did not automatically render the photos inaccurate and inadmissible. *Idaho Dep't of Health & Welfare v. Doe, 150 Idaho 103, 244 P.3d 247 (2010)*.

**Cited in:**

*State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*.

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# I.R.E. Rule 1002

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.***

## Rule 1002. Requirement of Original.

An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes



**Evidence Held Admissible.**

The "best evidence" rule did not bar admission of the officer's testimony of an interview with the defendant where a tape recording of the interview existed, and the officer used the tape recording only to refresh his memory. *State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*.

It was not an abuse of discretion to allow English translations of Spanish audio recordings to be read to a jury without playing the recordings, because the best evidence rule did not apply as (1) the accuracy of the translation was not at issue, and (2) the original recordings were admitted as evidence. *State v. Rodriguez, 161 Idaho 368, 386 P.3d 509 (2016)*.

**In General.**

The "best evidence" rule, codified as *§ 9-411* and essentially reproduced in this rule, states a preference in favor of original written instruments -- as opposed to copies, testimony, or other secondary sources of information -- to prove the terms of a writing; the rule is not applicable if

the writing is collateral to testimony about an extrinsic event. *State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)*.

**Photograph.**

In a child protective custody case, the magistrate did not err in admitting the photographs of the children's injuries into evidence as "original" under Idaho R. Evid. 1001(3) and this rule, because, while the photos might have been somewhat discolored, such distortion went to the weight of the evidence and did not automatically render the photos inaccurate and inadmissible. *Idaho Dep't of Health & Welfare v. Doe, 150 Idaho 103, 244 P.3d 247 (2010)*.

**Uncertified Copies.**

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from producing the original orders, because his copies were not certified in accordance with *Idaho R. Evid. 902. State v. Korn, 148 Idaho 413, 224 P.3d 480 (2009)*.

**Cited in:**

*State v. Marsh, 153 Idaho 360, 283 P.3d 107 (2011)*; *Seward v. Musick Auction, LLC, 164 Idaho 149, 426 P.3d 1249 (2018)*.

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# I.R.E. Rule 1003

State and Federal through Rules promulgated through January 31, 2022

***ID - Idaho State & Federal Court Rules > IDAHO RULES OF EVIDENCE > ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.***

## Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity, or the circumstances make it unfair to admit the duplicate.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Authenticity of Original.
Second, Re-Recorded Copy.

**Authenticity of Original.**

A duplicate tape recording should not have been admitted because there was a genuine question regarding the authenticity of the original. The party submitting the tape admitted that the original tape had "turned on and off" when the party's jacket blew in the wind. This raised a significant question regarding the admissibility of the original tape had it been available. *Christensen v. Ransom, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992)*.

**Second, Re-Recorded Copy.**

It was not a violation of this rule for trial court to admit a second, re-recorded copy of an audio tape of a planning and zoning commission's hearing in a real estate fraud action, where the first re-recorded copy of the tape was available to be played for jury. *Large v. Cafferty Realty, Inc., 123 Idaho 676, 851 P.2d 972 (1993)*.

**Cited in:**

*Simons v. Simons, 134 Idaho 824, 11 P.3d 20 (2000)*.

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# *I.R.E. Rule 1004*

State and Federal through Rules promulgated through January 31, 2022

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## Rule 1004. Admissibility of Other Evidence of Content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

**(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith;

**(b)** an original cannot be obtained by any reasonably practicable, available judicial process;

**(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

**(d)** the writing, recording, or photograph is not closely related to a controlling issue.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Admissibility.**

In an action on a credit card account, a district court, at worst, committed harmless error in not admitting a prospectus and pooling agreement under Idaho R. Evid. 1004(3) and 1008(3) because those documents, even if admitted, would have shown that the bank remained the owner of the account and that it was required to collect payments due under the receivables; thus, the bank was the real party in interest. *Capps v. FIA Card Servs., N.A., 149 Idaho 737, 240 P.3d 583 (2010)*.

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# I.R.E. Rule 1005

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## Rule 1005. Copies of Public Records to Prove Content.

**(a) Proof of public record.** The proponent may use a copy to prove the content of an official record - or of a document that was recorded or filed in a public office as authorized by law - if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

**(b) Use of official transcripts of district court proceedings.** In all cases where a party desires to place in evidence a transcript or partial transcript of a district court proceeding, or disclose the contents of a transcript during the examination of a witness, the transcript must be an official transcript as provided in, Idaho Court Administrative Rule 27(d).

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 15, 2004, effective July 1, 2004; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Fingerprint Cards.
Photocopies of Certified Copies of Judgments of Conviction.
Uncertified Copies.
Homestead Certificate of Entry.
Legal Custodian.
Proof of Publication of Ordinances.
Records of Sister State.

**Fingerprint Cards.**

Although the district court erred in admitting the fingerprint cards over defendant's objection for a lack of foundation, where there were numerous other sources of information from which the

jury would have come to the same conclusion regarding defendant's guilt, the admission of the fingerprint evidence was harmless. *State v. Norton, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000)*.

**Photocopies of Certified Copies of Judgments of Conviction.**

Enhancement of sentence based in part upon a penitentiary packet containing authenticated photocopies of certified copies of prior felony conviction judgments was proper because the state department of corrections was legally required to keep certified copies of defendant's judgments and was therefore authorized to certify to the authenticity of the photocopies under *Idaho R. Evid. 902(4). State v. Marsh, 153 Idaho 360, 283 P.3d 107 (2011)*.

**Uncertified Copies.**

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002' s requirement that he produce the original orders; because his copies were not certified, the public records exception did not apply. *State v. Korn, 148 Idaho 413, 224 P.3d 480 (2009)*.

**Decisions Under Prior Rule or Statute**

**Homestead Certificate of Entry.**

Homestead is recognized as private property and certificate of entry is primary evidence that holder thereof is owner of land therein described. *Johnson v. Oregon S. L. R.R., 7 Idaho 355, 63 P. 112 (1900)*; *Fall Creek Sheep Co. v. Walton, 24 Idaho 760, 136 P. 438 (1913)*.

**Legal Custodian.**

It was error to admit in evidence a purported photocopy of fingerprint records on testimony of the county recorder that he had compared it with the original and found them to be identical without evidence that the county recorder was the legal custodian of the original record. *State v. Polson, 92 Idaho 615, 448 P.2d 229 (1968)*, cert. denied, *395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969)*.

**Proof of Publication of Ordinances.**

Proof of publication of ordinance as a prerequisite to their introduction in evidence is not required. *State v. Dawe, 31 Idaho 796, 177 P. 393 (1918)*.

**Records of Sister State.**

A certified copy of a record of a sister state, not certified by the officer who is a legal keeper of the records of that state, is not admissible in evidence. *Kleinschmidt v. Scribner, 54 Idaho 185, 30 P.2d 362 (1934)*.

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# I.R.E. Rule 1006

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## Rule 1006. Summaries to Prove Content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

Foundation.
Notice.

**Foundation.**

The party offering a summary must lay a foundation showing that the underlying documents would be admissible. *State v. Barlow, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987)*.

Hearsay summary that is prepared in anticipation of litigation is analyzed under this rule; if the summarizing document was not prepared in anticipation of litigation, then proper analysis is under the business records exception to the hearsay rule. *Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002)*.

In a suit by former wife seeking partition of real property held by former husband and his father as tenants in common, district court did not err in admitting an exhibit that had been previously admitted during the divorce action, since did not challenge the admission of the father's testimony in the divorce proceeding, and that testimony provided the foundation for the admission of the exhibit. *Bahnmiller v. Bahnmiller, 145 Idaho 517, 181 P.3d 443 (2008)*.

**Notice.**

To facilitate meaningful cross-examination, the party planning to offer a summary should notify the opposing party and should make the underlying documents available to him or her. *State v. Barlow, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987)*.

**Cited in:**

*Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d 1120 (1988)*; *Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001)*; *Hurtado v. Land O'Lakes, Inc., 147 Idaho 813, 215 P.3d 533 (2009)*.

## Research References & Practice Aids

### RESEARCH REFERENCES

### A.L.R.

Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence.198 A.L.R. Fed. 427.

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## Rule 1007. Testimony or Statement of a Party to Prove Content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

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# I.R.E. Rule 1008

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## Rule 1008. Functions of the Court and Jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines -- in accordance with Rule 104(b) -- any issue about whether:

**(a)** an asserted writing, recording, or photograph ever existed;

**(b)** another one produced at the trial or hearing is the original; or

**(c)** other evidence of content accurately reflects the content.

## History

(Adopted January 8, 1985, effective July 1, 1985; amended March 26, 2018, effective July 1, 2018.)

Annotations

## Case Notes

**Admissibility.**

In an action on a credit card account, a district court, at worst, committed harmless error in not admitting a prospectus and pooling agreement under Idaho R. Evid. 1004(3) and 1008(3) because those documents, even if admitted, would have shown that the bank remained the owner of the account and that it was required to collect payments due under the receivables; thus, the bank was the real party in interest. *Capps v. FIA Card Servs., N.A., 149 Idaho 737, 240 P.3d 583 (2010)*.

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