ARIZONA EVIDENCE REPORTER

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ARTICLE 1. GENERAL PROVISIONS.

Rule103(a) — Effect of erroneous ruling.

103.a.090 To preserve for appeal the question of exclusion of evidence, a party must make a **specific and timely objection,** and must make an offer of proof showing that the excluded evidence would be admissible and relevant, unless either the substance of the evidence is apparent from the context of the record, or the trial court excludes the evidence on substantive rather than evidentiary grounds.

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–44 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary; defendant failed to make offer of proof, thus court had no basis for determining precisely what evidence was excluded).

Rule 104(a) — Questions of admissibility generally.

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence.

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶ 17 (Ct. App. 2011) (in hearing to determine whether witness was "unavailable," trial court was not bound Rules of Evidence).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

344. Judicial officers.

344.030 A trial judge is presumed to be free of bias or prejudice, thus a party moving for a change of judge for cause based on bias or prejudice has the burden of proving alleged facts by a preponderance of the evidence; bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption and do not require recusal.

Costa v. MacKey, 227 Ariz. 565, 261 P.3d 449, ¶¶ 11–13 (Ct. App. 2011) (defendant was charged with two counts of continuous sexual abuse of child; court held mere fact that trial court set bond at $75 million in cash was insufficient to meet defendant's burden).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

401.civ.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

Oliver v. Henry, ___ Ariz. ___, 260 P.3d 314, ¶¶ 2–17 (Ct. App. 2011) (plaintiff purchased vehicle new in October 2008 for $23,296; in December 2008, vehicle was involved in collision; court noted measure of damages to personal property that is not destroyed is difference in value immediately before and immediately after injury; for vehicle that was repaired, measure of damages was cost of repair ($15,535) plus difference in value of vehicle before and after collision ($8,975)).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 1, 14, 23–31 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court held insurer that seeks judicial interpretation of disputed policy term may not ignore claims-handling responsibilities while declaratory judgment action proceeds, and it was jury question whether insurance companies acted in good faith).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 18–22 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court noted insured suing for bad faith based on denial of coverage must prove not only that insurer lacked objectively reasonable basis for denying claim, but also insured knew or was conscious of fact it lacked reasonable basis for claim; court held trial court's initial determination that damages Lennar sought did not relate to "occurrence" within meaning of policy was relevant, as was court of appeals' contrary conclusion, and evidence of how these insurance companies, other insurance companies, and other courts have interpreted this policy language would be relevant, and this was question for jurors to resolve).

401.civ.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Oliver v. Henry, ___ Ariz. ___, 260 P.3d 314, ¶¶ 2–17 (Ct. App. 2011) (plaintiff purchased vehicle new in October 2008 for $23,296; in December 2008, vehicle was involved in collision; court noted measure of damages to personal property that is not destroyed is difference in value immediately before and immediately after injury; for vehicle that was repaired, measure of damages was cost of repair ($15,535) plus difference in value of vehicle before and after collision ($8,975)).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 18–22 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court noted insured

suing for bad faith based on denial of coverage must prove not only that insurer lacked objectively reasonable basis for denying claim, but also insured knew or was conscious of fact it lacked reasonable basis for claim; court held trial court's initial determination that damages Lennar sought did not relate to "occurrence" within meaning of policy was relevant, as was court of appeals' contrary conclusion, and evidence of how these insurance companies, other insurance companies, and other courts have interpreted this policy language would be relevant, and this was question for jurors to resolve).

Rule 401. Definition of "Relevant Evidence." (Criminal Cases.)

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone call wherein caller admitted committing crime related to fact that was of consequence to determination of action, thus evidence of telephone call was material).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–45 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary, which he claimed contained victim's statement she had been sexually assaulted in Europe and would fight back if sexually assaulted again; court held statements had little probative value, thus trial court did not abuse discretion in precluding them).

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone caller admitted committing crime and there were strong indications defendant was not caller, thus evidence of telephone call made facts of defendant's guilt less probable and was therefore relevant).

401.cr.100 Evidence that a party did not call a certain person as a witness (negative evidence) is relevant if (1) the person was under the exclusive control of that party, (2) the party would be expected to produce the person if that person's testimony would be favorable to that party, and (3) the person had exclusive knowledge of the existence or nonexistence of certain facts.

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 19–20 (Ct. App. 2011) (court held that, for jury instruction that neither side is required to call as witnesses all persons who may have been present at the time of the events in question or who may have some knowledge of those events or to produce all objects or documents mentioned or suggested by the evidence, jurors would take that instruction to mean state need not produce every scrap of evidence available).

401.cr.120 In determining whether to admit evidence that another person may have committed the crime, the trial court must assess the effect this evidence would have on the defendant's culpability; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it.

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 16 (2011) (court held trial court erred in excluding evidence indicating someone other than defendant killed victim).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–43 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that victim's wife murdered victim: (1) victim had recently increased amount of life insurance for which wife was sole beneficiary; (2) wife was not excluded as contributor to DNA found in victim's vehicle; and (3) wife had acted suspiciously when officers came to her home night victim was murdered; court stated proposed evidence constituted no more than vague grounds of suspicion and was trivial once placed in context, and thus held evidence did not create reasonable doubt about defendant's guilt, so trial court did not abuse discretion in precluding that evidence).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–46 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that co-defendant dentist's friend's husband, D.H., murdered victim: (1) co-workers saw D.H. cleaning and discarding "bloody knife," (2) D.H.'s whereabouts were unknown night of murder, and (3) D.H. asked co-worker if she would ever kill for money; court noted that, after initial uncertainty, co-worker K.E. was certain D.H. cleaned and discarded "bloody knife" months before murder, and question about killing for money was hearsay and did not come under any hearsay exception, and was not more than hypothetical question, and thus held trial court did not abuse discretion in precluding that evidence).

401.cr.340 If a party offers an experiment or model as an attempted replication of the litigated event, the conditions in the experiment or the model must substantially match the circumstances surrounding that event; if the experiment or model is not a purported replication but is more in the nature of a demonstration, it is appropriately admitted if it fairly illustrates a disputed trait or characteristic.

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 6–7 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic).

Rule 401. Definition of "Relevant Evidence." (Impeachment Cases.)

401.imp.013 If evidence does not test, sustain, or impeach a witness's credibility or character, it is not admissible for impeachment or rehabilitation purposes.

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 21–25 (Ct. App. 2011) (defendant claimed victim's immigration status would be in jeopardy if he had been aggressor, thus evidence of victim's immigration was relevant; court held defendant made no showing victim's immigration status would be in jeopardy; thus evidence was not relevant).

401.imp.020 Evidence showing that the witness's mental condition may have had an effect on the witness's ability to perceive, remember, or relate is admissible for impeachment and rehabilitation purposes.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia; thus trial court did not abuse discretion in precluding this evidence).

401.imp.030 Before a party may introduce evidence about the witness's mental condition or drug use in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition or drug use did have an effect on the witness's ability to perceive, remember, or relate.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia; thus trial court did not abuse discretion in precluding this evidence).

401.imp.075 A party may question the other party's expert witness about the extent of compensation the witness has received testifying as an expert witness.

State v. Manuel, ___ Ariz. ___, ___ P.3d ___, ¶¶ 28–29 (Dec. 21, 2011) (on cross-examination, defense mitigation expert testified he and wife earned about $200–300,000 annually from work on capital cases, that total income was about $400,000, and gross income was about $650,000 from both capital and non-capital cases, and acknowledged prosecution had never asked him to testify for state in capital case).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

403.cr.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 25 (2011) (only issue in case was whether defendant or someone else committed murder; evidence of telephone call wherein caller admitted committing crime was relevant, and because it did not have potential of distracting jurors from central issue of case, probative value was not outweighed by prejudicial effect).

403.cr.050 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of undue delay or waste of time, and establishes that this danger of undue delay or waste of time substantially outweighs the probative value.

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 28–30 (Ct. App. 2011) (defendant testified he had been in refugee camp in Kenya at age 13 and that police in refugee camp had been corrupt and had beaten him; because that evidence would have supported defendant's explanation of why he ran from scene of stabbing and why he initially denied involvement when questioned by police, trial court did not abuse discretion in precluding as being cumulative defendant's testimony about being tortured as child in Somalia).

403.cr.055 If the trial court determines evidence that another person may have committed the crime is relevant in that it tends to create a reasonable doubt about the defendant's guilt, the trial court may exclude that evidence if it determines that the evidence poses the danger of undue delay or waste of time, and establishes that this danger of undue delay or waste of time substantially outweighs the probative value.

Rule 404(b). Other crimes, wrongs, or acts. (Criminal cases.)

404.b.cr.220 In determining whether the **extrinsic** evidence of another crime, wrong, or act is relevant to show *modus operandi* and thus to prove **identity**, the trial court should determine whether there are similarities where normally there would be expected to be differences.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–21 (2011) (defendant noted other attacks occurred at different times and on different days of week, victims varied in age, and other differences; trial court identified extensive similarities; court held other acts need not be perfectly similar to be admissible under this rule).

404.b.cr.240 Extrinsic evidence of another crime, wrong, or act is relevant to show **knowledge**.

State ex rel. Montgomery v. Duncan (Fries), ___ Ariz. ___, ___ P.3d ___, ¶¶ 5–8 (Ct. App. Dec. 27, 2011) (38-year-old defendant was charged with four acts of oral sexual intercourse with 15-year-old victim; trial court ruled defendant could cross-examine victim about statement defendant alleged she made to him that she previously had oral sex with two other individuals; court held trial court erred in not balancing to determine whether there was due process or other constitutional violation that would occur if evidence were precluded and thus remanded for trial court to make that determination; court further held cross-examining victim about her past sexual acts would not be relevant to show what defendant thought about victim's age, and thus held only evidence that would be relevant would be defendant's testimony (should he choose to testify) of how victim's alleged statements about prior acts of oral sex led him to conclude she was at least 18 years of age).

404.b.cr.505 Because the state must prove a crime beyond a reasonable doubt, but must only prove other acts by clear and convincing evidence, trial court may admit evidence of crimes for which defendant has been acquitted without violating prohibition against double jeopardy.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶ 26 (2011) (in trial involving multiple victims, fact that at previous trial state had failed to prove murder of victim B.C. was especially heinous, cruel, or depraved did not preclude state from introducing that evidence under Rule 404(b)).

Rule 404(c). Character evidence in sexual misconduct cases. (Criminal Cases.)

404.c.cr.020 Before admitting evidence that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense, the trial court must go through the analysis stated in Rule 404(c)(1)(A)–(C), and make the findings required by those sections.

State v. Vega, 228 Ariz. 24, 262 P.3d 628, ¶¶ 9–25 (Ct. App. 2011) (defendant charged with committing sexual crimes against his two nieces, ages 6 and 11; trial court admitted evidence defendant had improperly touched 11-year-old several months prior to charged incidents; court did not decide whether that evidence would have been admissible under Rule 404(b); court held it could have been admissible under Rule 404(c), but held trial court erred in not making analysis, and not making findings, required by that rule, but held any error was harmless in light of evidence admitted to prove charged offenses).

Rule 404(c)(1)(A). Character evidence in sexual misconduct cases—Sufficiency of evidence.

404.c.1.A.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the evidence is sufficient to permit the trier-of-fact to find by clear and convincing evidence that the defendant committed the other act.

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–14 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because previous jurors had found defendant guilty beyond reasonable doubt of sexual assault, prosecutor presented sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant had committed prior offense).

Rule 404(c)(1)(B). Character evidence in sexual misconduct cases—Aberrant sexual propensity.

404.c.1.B.cr.010 Before admitting character evidence in a sexual misconduct case, the trial court must first find the commission of the other act provides a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–15 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because expert testified about similarities between prior sexual assault and charged offense and opined that defendant had aberrant propensity to commit sexual assault, trial court's propensity determination was appropriate).

Rule 404(c)(1)(C). Character evidence in sexual misconduct cases—Balancing against probative value.

404.c.1.C.cr.010 Before admitting evidence of another act in a sexual misconduct case, the trial court must find that the probative value of the other act evidence is not substantially outweighed by the danger of unfair prejudice, and in making that determination, the trial court may consider the remoteness of the other act, the similarity or dissimilarity of the other act, the strength of the evidence that defendant committed the other act, the frequency of the other acts, the surrounding circumstances, any relevant intervening events, any other similarities or differences, and any other relevant factors.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 19–20 (2011) (state presented expert testimony and trial court found evidence provided reasonable basis to infer defendant had character trait giving rise to aberrant sexual propensity to commit violent and sexual acts against non-consenting females, and trial court found probative value was not substantially outweighed by danger of unfair prejudice).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 12–16 (2011) (defendant was convicted of felony murder with sexual assault as charged predicate felony; trial court admitted evidence that defendant had prior conviction for sexual assault; because defendant had been out of

custody for only about 1 year before date of charged offense, and because defendant repeatedly intimated sex between victim and himself was consensual, and because circumstances of prior sexual assault and charged offense were strikingly similar, trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

ARTICLE 5. PRIVILEGES

Rule 501. Privileges.

Physician-Patient.

501.635 When a plaintiff sues a hospital and certain hospital employees in a medical malpractice case, the patient-physician privilege does not preclude the hospital's counsel from communicating with hospital employees who had treated plaintiff.

Phoenix Child. Hosp. v. Grant, 228 Ariz. 235, 265 P.3d 417, ¶¶ 8–18 (Ct. App. 2011) (trial court erred in entering order precluding hospital's counsel from communicating with hospital employees who had treated plaintiff, other than hospital employees for whom plaintiff was making claim of negligence).

ARTICLE 6. WITNESSES

Rule 611(a). Mode and Order of Interrogation and Presentation — Control by the court.

611.a.095 Before a party may introduce evidence about the witness's mental condition in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition did have an effect on the witness's ability to perceive, remember, or relate.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia; thus trial court did not abuse discretion in precluding this evidence).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witness.

701.020 The opinion must be rationally based on the witness's own perceptions.

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶ 13 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held witness was not testifying as expert and was instead testifying based on witness's own perceptions).

Rule 702. Testimony by Experts.

702.073 The Expert witness requirements of A.R.S. § 12–2604 apply if the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist; the statute does not require, however, that the party against whom the testimony is offered was acting as a specialist at the time of the occurrence that is the basis for the action.

Awsienko v. Cohen, 227 Ariz. 256, 257 P.3d 175, ¶¶ 16–18 (Ct. App. 2011) (decedent suffered cardiac arrest and died; defendant Dr. H. was board-certified specialist in cardiovascular disease and interventional cardiology; plaintiffs contended their expert witness did not have to be board-certified specialist in cardiovascular disease or interventional cardiology because (1) Dr. H. never asserted he was acting as specialist at time of alleged malpractice and (2) their expert witness's opinions were unrelated to any cardiac treatment; court rejected plaintiffs' contention, noting that statute only requires that defendant be specialist or board-certified specialist, and did not require defendant to be acting as a specialist).

702.075 Under A.R.S. § 12–2604, if the party against whom the testimony is offered is or claims to be a **specialist,** the witness offering testimony must specialize in the same specialty at the time of the **occurrence** that is the basis for the action, but if the party against whom the testimony is offered is or claims to be a **board-certified specialist,** the witness offering testimony must be board-certified specialist only at the time of the **proceedings.**

Awsienko v. Cohen, 227 Ariz. 256, 257 P.3d 175, ¶¶ 8–15 (Ct. App. 2011) (decedent died in 2006; defendant Dr. C. was board-certified in nephrology; plaintiff's expert witness was board-certified in nephrology in 2007; trial court granted motion for summary judgment because expert witness was not board-certified at time Dr. C. treated decedent; court reversed because expert witness was board-certified at time of proceedings).

702.170 To withstand a motion for summary judgment or a motion for directed verdict in a malpractice action, unless the defendant's negligence is so grossly apparent that a lay person would have no difficulty recognizing the negligent conduct, the plaintiff must have evidence showing (1) the general standard of care in the particular area and under similar circumstances, (2) the defendant's performance fell below the applicable standard of care, and (3) these deviations from the standard of care proximately caused the claimed injury.

Ryan v. San Francisco Peaks Truck. Co., 228 Ariz. 42, 262 P.3d 863, ¶¶ 19–40 (Ct. App. 2011) (court stated these requirements apply equally to defendant asserting that nonparty health care provider negligently caused or contributed to plaintiff's injury, and held defendant could use affidavits from plaintiff's experts in its claim that persons plaintiff had originally sued as defendants but with whom plaintiff had settled were non-parties at fault).

702.290 DNA random match probability calculations and opinions based on those calculations are generally accepted in the relevant scientific community.

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 23–34 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim's car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended there was no generally accepted method of generating statistics for "low-level mixture" or "low-copy number (LCN)" situations; court noted LR, RMNE, and modified product rule are DNA interpretations generally accepted in relevant scientific community, and thus held trial court properly admitted expert witness testimony).

702.295 If a particular technique has gained acceptance in the scientific community, the accuracy of its implementation in a particular case is subject to ordinary foundational considerations; if claimed deficiencies in procedure are sufficiently serious, trial court should not admit evidence; otherwise, if trial court concludes claimed deficiencies in procedure do not make this evidence inadmissible, then claimed deficiencies go to weight of the evidence of the procedure, and the jurors must be permitted at trial to hear evidence of procedure.

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 35–39 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim's car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended expert witnesses' formulas were flawed because they were based on partial information; court held this went to weight of evidence and not its admissibility).

Rule 703. Bases of Opinion Testimony by Experts.

703.095 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation.

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 33–37 (2011) (Dr. H.K. conducted autopsy in 1978; at trial held 11/13/07, Dr. P.K. testified based on his review of autopsy report and photographs, neither of which were admitted in evidence; court rejected defendant's contention that Dr. P.K.'s testimony violated his right of confrontation).

Rule 706. Court Appointed Experts.

706.a.040 To determine whether a treating physician should be considered a fact witness, for which no compensation is due, or an expert witness, for which compensation is due, the trial court should view the party's disclosure stating the capacity in which the physician will testify, with these considerations: (1) questions about the physician's experience and specialization do not mean the physician is being treated as an expert witness because this information is necessary for the jurors to determine the weight to give to that testimony; (2) if the physician testifies based on information acquired independent of the litigation, or testifies about the who, what, when, where, and why relating to the patient or the patient's records, the physician will generally be testifying as a fact witness; (3) if the physician testifies based on reviewing records of other health care providers, or based on medical research or literature, the physician will generally be testifying as an expert witness; (4) if the physician is asked to give an opinion formulated in the course of treating the patient, the physician will generally be testifying as a fact witness; (3) if the physician is asked to give an opinion in general, the physician will generally be testifying as an expert witness; and (5) asking the physician to explain terms or procedures in a manner the trier-of-fact may more easily comprehend does not turn a fact witness into an expert witness.

State ex rel Montgomery v. Whitten (Martinez), 228 Ariz. 17, 262 P.3d 238, ¶¶ 10–21 (Ct. App. 2011) (more than two dozen physicians and health care professionals treated 7-week-old victim for massive brain injury and skull fractures; when victim died, state charged defendant with murder; state disclosed it would call eight of the physicians as witnesses; court entered order that state would have to pay six of them as expert witnesses; court granted relief to state and apparently ordered trial court to base payment on above considerations).

ARTICLE 8. HEARSAY

Rule 801. Hearsay Definitions.

801.020 For an out-of-court statement considered "testimonial evidence" to be admissible under the confrontation clause, there are two requirements : (1) the declarant must be unavailable, and (2) the defendant must have had a prior opportunity to cross-examine the declarant.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (at pretrial hearing before retrial, victim T.H. testified she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

Rule 801(d)(2)(D). Statements that are not hearsay: Statement by party's agent.

801.d.2.D.023 Because a party's disclosure statement prepared by the party's attorney was (1) made by the party's agent, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment, it is not hearsay and may be offered as affirmative evidence of the truth of the matters asserted.

Ryan v. San Francisco Peaks Truck. Co., 228 Ariz. 42, 262 P.3d 863, ¶¶ 12–17 (Ct. App. 2011) (court held trial court properly ruled plaintiff's disclosure statement was admissible as admission by party-opponent, but further held evidence was not conclusive of nonparty-at-fault, thus plaintiff was properly given opportunity to explain or deny information contained in disclosure statement).

Rule 804(a)(2). Definition of unavailability—Refusal to testify.

804.a.2.010 A witness will be considered unavailable if the witness persists in refusing to testify about the subject matter of the witness's statement despite an order of the court to do so.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (at pretrial hearing before retrial, victim T.H. testified she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

Rule 804(a)(5). Definition of unavailability—Unable to testify because of absence.

804.a.5.020 "Good faith effort" to locate a witness is not subject to a precise definition and is instead left to the sound discretion of the trial court.

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶¶ 12–16 (Ct. App. 2011) (evidence showed state attempted to contact witness through attorney who had been in contact during first trial, mailed subpoena to last known address, checked utilities, driver's licenses, and criminal history, contacted law enforcement personnel and other civilian witnesses, and called three telephone numbers it had for witness; court held these efforts were reasonable; because state did not know if witness was in Mexico, state was not required to invoke international treaties in attempt to locate witness).

Rule 804(b)(1). Former testimony.

804.b.1.020 An exception to the confrontation clause exists when the witness is unavailable but has previously testified at a judicial proceeding, subject to cross-examination, against the same defendant.

State v. Prince, 226 Ariz. 516, 250 P.3d 1145, ¶¶ 41–43 (2011) (issue of defendant's guilt was determined by one jury, and issue of sentence was determined by another jury; at aggravation phase, state had read to jurors transcript of testimony state's gun expert gave at guilt phase; court noted such testimony would be admissible if (1) declarant were unavailable, and (2) defendant had right and opportunity to cross-examine witness; because defendant did not object at trial, court reviewed for fundamental error only, and held defendant failed to prove prejudice because testimony had no bearing on aggravating circumstance state presented).

Rule 804(b)(3). Statements against interest.

804.b.3.005 For a statement to be admissible under this exception: (1) the declarant must be unavailable; (2) the statement must be against the declarant's interest; and (3) there must be corroborating evidence that indicates the statement's trustworthiness.

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶¶ 19–22 (2011) ((1) because telephone call was from anonymous caller, caller was unavailable; (2) although call from anonymous caller usually would not be against caller's penal interest (because caller was seeking to protect against consequences of call), in this case, police used call to get warrant for suspect's voice sample, thus call was against penal interest; (3) other evidence corroborated statements in call about vehicles and when they arrived at house; evidence of telephone call was thus admissible).

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901(a). Requirement of Authentication or Identification — General provision.

901.a.020 The trial court does not determine whether the matter in question is what the proponent claims it to be; the extent of the trial court's duty is to determine whether the proponent has presented sufficient evidence from which the trier-of-fact could find that the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation are questions of weight and not admissibility, and are for the trier-of-fact.

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used).

Rule 901(b)(1). Testimony of witness with knowledge.

901.b.1.010 This section permits authentication or identification by a person with knowledge that the matter is what it is claimed to be.

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used; court held witness was person with knowledge that demonstrations were what they were claimed to be).

Rule 901(b)(4). Distinctive characteristics and the like.

901.b.4.010 Distinctive characteristics, taken in conjunction with other circumstances, may provide authentication or identification.

State v. Trujillo, 227 Ariz. 314, 257 P.3d 1194, ¶ 28 (Ct. App. 2011) (in defendant's "pen pack," name at top of fingerprint page could not be read because of way pages were stapled together, and as result, on copy disclosed to defendant's attorney, defendant's name did not appear at top of fingerprint page; court noted defendant's social security number was visible on fingerprint page, and held this connected document to defendant).

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