# SHERI'S SIDEBAR

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

# SHERI'S SIDEBAR

## Let's play legal distinctions….

## Well trained police dogs do what? Bite "the aggressor"….just sayin'!




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# And let's be effective counsel…ALWAYS advocate…





## 1. Are you aware that "Opening the door" has limitations?

- A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth. *State v. Wafford*, 199 Wn. App. 32, 36-37, 397 P.3d 926 (2017).
    - A party can open the door with their opening statement (despite an attorney's statements not being evidence). *Wafford*.
        - This is a Div. 1 2017 case allowing the door to be opened to hearsay.

- But see *Rushworth* below, Div. 3 2020 case indicating one cannot open the door to hearsay because hearsay is not competent evidence to begin with, even if otherwise relevant.
- See also, Div. 2 *Ang v. Martin*, 118 Wn. App. 553, 76 P.3d 787 (2003), *aff'd on other grounds*, 154 Wn.2d 477, 114 P.3d 637 (2005)(allowing the open door doctrine to apply to hearsay).

- The open-door doctrine applies to *relevant* evidence excluded due to policy or prejudice, not to evidence excluded by rule like hearsay. *State v. Rushworth*, 12 Wash. App. 2d 466, 473, 458 P.3d 1192 (2020).

  - The doctrine "permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice *when raised by the party who would ordinarily benefit from exclusion*." *Fite v. Mudd*, 19 Wn. App. 2d 917, 935, 498 P.3d 538, 549 (2021), *review denied sub nom. Fite v. City of Puyallup*, 200 Wn.2d 1004, 516 P.3d 377 (2022)(citing *Rushworth*, at 473).

  - Therefore, a party may not open the door through strategic questioning of a witness and then seek to admit excluded evidence based on its own questioning. *Fite v. Mudd*.

- As explained in *Gefeller*, "when a party opens up a *subject* of inquiry on direct or cross-examination, [the party] contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the *subject* matter was first introduced." 76 Wash.2d at 455, 458 P.2d 17 (emphasis added). *Rushworth*, at 473.

- The fact that an ordinarily forbidden topic has gained increased relevance does not result in automatic admission of evidence. Relevance is only one test for admissibility. Evidence is still subject to possible exclusion based on constitutional requirements, pertinent statutes, and the rules of evidence. *Rushworth*, at 474-75, citing ER 402.

- In criminal trials, "…a defendant has a due process right to a fair trial. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). **Even if the defense improperly introduces inadmissible evidence, "the prosecutor is not absolved of [their] ethical duty to ensure a fair trial by presenting only competent evidence on the subject."** *Id.* at 298, 183 P.3d 307. *If the defense introduces inadmissible evidence, the prosecutor has a remedy. The "proper course of action [is] to object." Id*. at 295, 183 P.3d 307. **But the prosecutor *may not "seize[ ] the opportunity to admit otherwise clearly inadmissible" evidence by failing to act*.** *Id*. "A criminal defendant can 'open the door' to testimony on a particular subject matter, but [they do] so under the rules of evidence." *Id*. Rushworth, at 476.

- **When a defendant** does not merely open the door to a newly relevant topic, but **attempts to introduce incompetent evidence such as hearsay**, **the prosecutor's recourse is to object**. If the objection is successful, nothing more need be done to correct the record (other than a possible motion to strike). If unsuccessful, the prosecutor may either seek an interlocutory appeal or (more realistically) accept the trial court's ruling as the law of the case and introduce responsive evidence within the terms of the court's ruling. In the latter scenario, the doctrine of invited error will likely protect against reversal on appeal. Rushworth, at 476

**The Supreme Court Limits:**

- The State alleged defense opened the door to prior misconduct/allegations of abuse which were deemed inadmissible under ER 404(b) previously by creating the impression of a happy family life. The charge was of sexual abuse, of a prior step-child, and not related to any current step children. Although the Court of Appeals agreed, **the Supreme Court overturned that decision, expressly noting ER 403 balancing still applied to open door subjects, and the open door subject must be relevant to the charges, not a collateral issue** (i.e. the happiness or abuse of the current family had no bearing on sexual abuse allegations of a former family member). *State v. Fisher*, 165 Wn.2d 727, 749–50, 202 P.3d 937, 948 (2009)(citing ER 403, ER 402 and *Foxhoven,* 161 Wash.2d at 174, 163 P.3d 786). **Admitting the prior misconduct also prevented a fair trial.**

- Testimony defendant had an open warrant and she had prior criminal history DID NOT open the door to otherwise inadmissible and prejudicial prior felonies that were not integrity violations. This is propensity evidence and always inadmissible. *State v. Vazquez*, 198 Wn.2d 239, 494 P.3d 424 (2021), *as amended* (Oct. 20, 2021)

**2. Did you know there is actually a citation of authority for the premise to not ask a question of a witness when you don't know the answer?**

"This is because a basic tenet of cross-examination is that an attorney should not ask a question to which s/he does not already know the answer." *See* Thomas A. Mauet, *Trial Techniques* 256 (8th Ed. 2010).

**3. Do you know the distinctions for use of Prior Statements?**
**[Feel free to cut and paste to take to trial for defending or making objections]. I will get it added to the WDA Website Practice Tools when I get half a minute to myself, and remember….it could be a while!** 

**PRIOR STATEMENTS DISTINCTIONS**

| ER 613<br><br>INCONSISTENT PRIOR STATEMENTS – IMPEACHMENT | ER 801(D)(1)(A)<br><br>DECLARANT-WITNESS' PRIOR INCONSISTENT STATEMENT | ER 804(B)(1)<br><br>FORMER TESTIMONY | ER 803(5)<br><br>RECORDED RECOLLECTION | ER 612<br><br>REFRESHED MEMORY |
|---|---|---|---|---|
| • Hearsay? No, not offered for the truth<br><br>• Not substantive evidence; impeachment only; not evidence of an essential element<br><br>• Declarant must have opportunity now to explain prior statement<br><br>• Statement need not have been under oath<br><br>• "You're lying" 613 Impeachment, not 608 "You're a liar" character evidence.<br><br>• Thus, extrinsic evidence is allowed here.<br><br>• Adverse lawyer need not show prior statement to witness, but most provide it to opposing counsel if asked<br><br>• EX: Oral statement to police that ends up in officer's narrative | • Hearsay? No, defined as non-hearsay<br><br>• Admitted for the truth; substantive evidence<br><br>• Declarant must testify now and is therefore "available" for cross examination<br><br>• Prior statement must have been given under oath; prior cross examination not required<br><br>• EX: Grand jury testimony; or sworn in for civil NCO testimony | • Hearsay? Yes, but falls within this exception<br><br>• Admitted for the truth; substantive evidence<br><br>• Witness must be unavailable: absent, privilege, no memory, dead<br><br>• Prior statement under oath and subject to cross examination<br><br>• EX: Testimony from prelim hearing or deposition | • Hearsay? Yes, but falls within this exception<br><br>• Admitted for the truth; substantive evidence<br><br>• Witness once knew details well, but now, at trial, cannot recall<br><br>• Statements made when memory was fresh<br><br>• At trial, witness must vouch for the accuracy of the statement introduced<br><br>• If admitted, read to jury but can only be an exhibit for adverse party<br><br>• EX: Written witness account provided to police after stabbing, crash, some event | • Hearsay? No, not admissible as evidence<br><br>• Witness must not have a present memory of the subject<br><br>• A WRITING, shown to the witness on the stand, must trigger present memory<br><br>• The prior statement, once read (to themselves) on the stand causes the witness to remember<br><br>• Witness testifies from the refreshed memory; the writing is not admissible to read or admit into evidence<br><br>• The adverse party can see the writing and cross examine the witness about it |

## 4. Who knows when to object to the State's INAPPROPRIATE ARGUMENT, lessening the State's burden when describing "beyond a reasonable doubt?"

**a. Case. U.S. v. Velazquez, 1 F.4th 1132 (9th Cir. 2021).**

What happened.

Mr. Velazquez went to trial. During closing, the prosecutor compared reasonable doubt to making "every day" decisions like going for a drive or eating a meal.

Held.

Reversed. **It is "highly inappropriate" for a prosecutor to argue reasonable doubt involves "a kind of casual judgment that is so ordinary and so mundane" that it need not be given much thought, as that comparison "hardly matches our demand for 'near certitude' of guilt before attaching criminal culpability."**

Takeaway.

**Remember these words: "near certitude;"** That's how the Ninth Circuit described "proof beyond a reasonable doubt." This is a fantastic case if searching for language on why anything less than "near certitude" just won't cut it. Consider this language for jury instructions and closing argument.

b. Telling the jury that its job is to "speak the truth," or some variation thereof, misstates the burden of proof and is improper. *State v. Lindsay,* 180 Wn.2d 423, 326 P.3d 125 (2014).

## 5. Who knows we can lose the battle but win the war? PRESERVE OBJECTIONS FOR APPEAL & OTHER OBJECTION INFO

- Any objection or ruling you lose, make sure you *preserve the objection for the record*. Don't say things like "ok, alright, fine" which can be later misconstrued to mean you changed your objection and now agree.
- If you win an objection on something you don't want on the record, make sure you request it also be stricken from the record so the jury cannot consider it. We know the "bell has been rung" for the jury, but it can help on appeal to not have 'x' as evidence that can be considered by the appellate court!

## 6. Are you aware that the immigration consequences on possession with intent to deliver have changed again?

- Rather than read the 102 page case that came down recently, contact the WDA Immigration Project for all types of charges. https://defensenet.org/online-adult-immigration-intake-form/

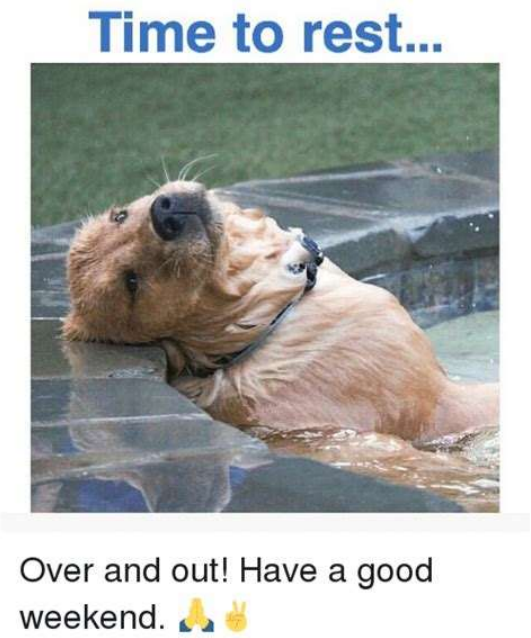
7. **Are you aware that the "loss" and the "restitution amount" have different meanings in federal court, including immigration courts?**
    - For any case that a client stipulates to additional restitution for uncharged or dismissed cases/conduct, include this language for immigration consequences protection: $AMT Restitution for count 1, Additional RT $AMT tethered to dismissed or uncharged conduct.
    - Check in with WDA Immigration Project if you have questions. https://defensenet.org/online-adult-immigration-intake-form/

8. **Did you know DOC will not credit excess time served in custody towards community custody when a resentencing occurs?**
    - *State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011)

    a. Several attorneys have asked the trial court to make credits of excess time served from former *Blake* cases to other in custody sentences. This should be allowed under the discretion of the court, as long as the J&S is clear. A more clear way is for the court to write full sentence has been satisfied, or something along those lines.
    b. The above known exclusion only currently applies to the inability to apply in custody credit to community custody credit.


**A lawyer's mind at work….**


**But now its time to rest….**




Have a great weekend. Enjoy self-care. Tis the season for golfing, landscaping, wine tasting (Walla Walla Spring Release first weekend in May annually), roasting marshmallows by the night fire on the patio, hiking/walking, biking, motorcycle riding, i.e. get out of your offices!

*****Remember to come see us IN PERSON @ the WDA Annual Defender's Conference at Sun Mountain April 28-29th with the Pre-Conference Leadership Training Thurs 27th-Fri 28th am. There are still spots open to register:** https://defensenet.org/events/save-the-date-wdas-defender-conference-and-leadership-pre-conference/

Sheri