Washington Law Review

Volume 29
Issue 2 *Washington Case Law-1953*

5-1-1954

Evidence

Sally Campbell

Joan Smith

Thomas J. Brennan

the child to him, and the question presented was which court had jurisdiction of the child. The Supreme Court said: "When the superior court[33] found the relator was a fit and proper person to have the custody of her, at that moment the child ceased to be a dependent or delinquent person, for whose protection the juvenile law was enacted."[34] This is a square holding on the direct issue of jurisdiction between the two courts. It cannot be presumed that the dicta in the principal case will overrule the *Marmo* holding.

ALICE D. HUBBARD

Grounds for Divorce—Insanity. In *Wolfe v. Wolfe*, 42 Wn.2d 834, 258 P.2d 1211 (1953), an action for divorce brought on the grounds of cruelty, the husband was granted a divorce by the trial court. The case was appealed by the wife (represented by her guardian ad litem), who, according to the evidence introduced at the trial, had been insane for more than two years preceding the commencement of the action. The Supreme Court reversed, holding that under RCW 26.08.020(10), where a party to a divorce action has been suffering from chronic mania for a period of more than two years prior to the beginning of the action, such insanity shall be the sole and exclusive ground upon which the court may grant a divorce, and that this statute is a defense to an action for divorce upon any other statutory grounds. This is the first case decided under this section of the Divorce Act of 1949, and is a literal application of the statute.

EVIDENCE

Witnesses—Competency of Insane Person. The court in *State v. Moorison*[1] affirmed the trial court's ruling that a person was a competent witness even though previously adjudicated insane by a Colorado court. The precise question had not previously been before the court.[2] The relevant Washington statute[3] excluding persons of unsound mind is merely declaratory of the common law. The present generally recognized common law interpretation is that an insane person is competent to testify if at the time of his presentation as a witness he understands the nature of an oath and is capable of giving a correct account of what he has seen and heard.[4] Dicta in the instant case indicated that competency also depends on mental capacity at the time of the events concerning which the witness is to testify.

The court further stated that competency is a matter within the discretion of the trial court to be determined by the use of a *voir dire*

[33] Reference is to Superior Court of Spokane County in which divorce proceedings and subsequent modification of divorce decree were had.

[34] *Supra* note 9, at 158, 196 Pac. at 578.

[1] 143 Wash. Dec. 21, 259 P.2d 1105 (1953).

[2] *Cf.* State v. Hardung, 161 Wash. 379, 297 Pac. 167 (1931); Summerlin v. Department of Labor and Industries, 8 Wn.2d 43, 111 P.2d 603 (1941) (guardian appointed).

[3] RCW 5.60.050.

[4] District of Columbia v. Ames, 107 U.S. 519 (1883).

hearing which may be aided by extrinsic evidence.

The adjudication of the witness as insane creates a rebuttable presumption that the witness is incompetent. The offering party has the burden of proving competency. This is the opposite of the situation in which there is no adjudication of insanity, the burden of showing incompetency being on him who objects on that ground.

Relevancy—Fact of Arrest in Civil Suits. In a subsequent civil action a traffic citation is inadmissible for the purpose of proving any fact in connection with an accident or to impeach a witness by showing a previous act of misconduct. This was the rule announced in *Billington v. Schaal*,[5] which expressly overruled *Segerstrom v. Lawrence*.[6] In the *Billington*[7] case the plaintiff offered to prove by the testimony of the arresting officer that the defendant was following the plaintiff's car too closely. The court said that mere arrest was quite consistent with innocence, and even if the defendant had been convicted—except on a plea of guilty—the conviction could not be used to prove the fact that the defendant was following too closely. The reason given was that it would be opinion testimony on a matter not requiring expert knowledge.

It should be noted that in this case the arresting officer did not arrive until after the accident occurred. The case relied on by the Washington court was *Fitch v. Bemis*.[8] Dicta in the *Fitch* case indicated the Vermont court would hold such arrest admissible if the arresting officer were an eye-witness to the accident. However, dicta in the instant case indicated the Washington court would be reluctant to follow Vermont to this extent, stating that the fact of *arrest* is inadmissible as evidence of an on-the-spot opinion of the officer as to the defendant's negligence. The court stated the rule to be that an opinion may not be given where no expert knowledge is required or where it involves the very issue presented to the jury. It is submitted that the court would admit the testimony of the arresting officer in either case as to what he saw, but not as to the ultimate fact of negligence itself.

Criminal Record of Plaintiff—Admissibility to Limit Claim to Damages for Unemployment. In *Minch v. Local Union No. 370, I. U. O. E.*,[9] it was held that the trial court erred in denying the de-

[5] 42 Wn.2d 878, 259 P.2d 634 (1953).
[6] 64 Wash. 245, 116 Pac. 876 (1911).
[7] Billington v. Schaal, *supra* note 5.
[8] 107 Vt. 165, 177 Atl. 193 (1935).
[9] 144 Wash. Dec. 14, 265 P.2d 286 (1953).

fendant the right to prove the plaintiff's criminal record for the purpose of limiting his claim to damages for unemployment. The plaintiff was a power-shovel operator and the main source of work in the area was the atomic bomb project at Hanford. Before one could work there he had to obtain security clearance from the F. B. I. If the criminal record of the plaintiff had been known to the F. B. I. he might have been denied work on the project.

The court stated that the lack of authority in this type of case stems from the fact that the situation presented is unique. There are, of course, many situations where a part of the damages claimed is loss of wages, *e.g.*, actions for personal injuries or wrongful death. In *Hill v. Erie R. Co.*,[10] an action by the next of kin for loss of support from a minor child, the court held that proof of the juvenile court record of the plaintiff's decedent was inadmissible. The reason given was that a juvenile court adjudication could have no probative effect, *not* that a criminal conviction would have no bearing on future earnings. The reason the New York court gave for the lack of probative effect was that a juvenile court adjudication could not denominate the child as a criminal, likening such adjudication to parental chastisement. This case leaves the inference that a criminal conviction would have bearing on future earnings and would be admissible for such purpose.[11]

The Washington court, however, in the instant case stood squarely on the proposition that the criminal record of the plaintiff is important where security clearance by the F. B. I. is a condition precedent to the plaintiff's obtaining work.

It is submitted that the court would not be willing to extend the holding beyond the fact situation here presented.[12] However, by a combination of the instant case and *Hill v. Erie R. Co.*[13] it is possible to arrive at the conclusion that proof of the injured party's or the decedent's criminal conviction should be admissible when an element of damages is loss of wages. All that would be necessary would be factual proof or judicial notice of facts leading to the conclusion that ex-convicts don't obtain employment as readily as others, and then the prior convictions would be admissible.

---

[10] 225 App. Div. 19, 232 N.Y. Supp. 66 (1928).

[11] WIGMORE, EVIDENCE § 211 (3d ed. 1940).

[12] "We cannot see how the problem will arise frequently in the future." Minch v. Local Union No. 370, I. U. O. E., *supra* note 9 at 24, 265 P.2d at 292.

[13] *Supra* note 10.

Witnesses—Competency—Interested Party—Time at Which Interest Is to Be Determined In *Adams Marine Service, Inc. v. Fishel*[14] the plaintiff company sued for specific performance of an alleged oral contract for the sale of land. The defendant was the executrix and widow of the deceased vendor. Invoking the "dead man" statute[15] the defendant challenged the competency of the witness to testify, stating the witness was president of and had owned stock in the plaintiff company at the time of the commencement of the action and was, therefore, an "interested party." The trial court found the witness to be competent since he had made a bona fide transfer of the stock and had severed relations with the company before the time he testified. The Supreme Court in affirming the decision emphasized the fact that this was a bona fide transfer not made merely to qualify the witness. The court adopted the rule that the interest of the witness is to be determined at the date he testifies and not before. This erases any inference to be drawn from *Gilmore v. H. W. Baker Co.*[16] to the effect that the interest of the witness is to be determined at the time of the transaction rather than at the time of testifying.

The contention was also made that the witness was a party in interest because the outcome of the suit might have a bearing upon a subsequent suit by the defendant against the witness for trespass. The court rejected this, and the test was stated to be whether the witness will gain or lose by direct legal operation of a judgment of the court in the action in which his competency is in issue.

In both of the questions presented it would seem that the court has followed the purposes of the statute.

Relevancy—Fact of No Insurance. In *King v. Starr*,[17] an action for personal injuries, the defendant's counsel in his opening statement said that the defendant had no insurance. Objection to this was made and sustained. The court instructed the jury to disregard that reference. The plaintiff made a motion for a mistrial which was denied. The Supreme Court reversed the denial of the motion, thus complementing the rule against deliberate injection of the subject of insurance into the trial.

This is a case of first impression in Washington, the previous cases being confined to the questions presented by the deliberate injection

[14] 42 Wn.2d 555, 357 P.2d 203 (1953).
[15] RCW 5.60.030.
[16] 12 Wash. 468, 41 Pac. 124 (1895).
[17] 143 Wash. Dec. 105, 260 P.2d 351 (1953).

by the plaintiff of the fact that the defendant did have insurance,[18] or an inadvertent injection of such fact.[19] The deciding factor remains the manner of disclosure and not the disclosure itself. Deliberate injection is a ground for a mistrial, whereas inadvertent injection is not. The conduct of counsel decides the evidentiary matter of insurance in this state, regardless of how prejudicial the inadvertent injection may be.

SALLY CAMPBELL

Admission of Certified Copies of Foreign Divorce Decrees. In *Edlin v. Edlin*,[20] the court held that a divorce decree from a sister state was admissible evidence in an action for arrearages in alimony and child support payments, although the decree did not bear the signature of any judge. Annexed to the decree was a certificate of the clerk of the court of the sister state reciting that the instrument was a full, true and complete copy of the divorce decree, together with a certificate of a judge attesting the validity of the clerk's certificate. This decision is consistent with *Allard v. La Plain*,[21] in which it was held that if the document from the sister state is authenticated as required by federal statute,[22] its validity as admissible evidence cannot be questioned. By reason of the full faith and credit clause,[23] it cannot be presumed that the law of procedure in the sister state is the same as that in Washington, which requires authentication by the signature of the presiding judge.[24]

JOAN SMITH

Uniform Business Records as Evidence Act—Liberal Construction. In *Cantrill v. American Mail Line*,[25] the court held that under RCW 5.44.110, hospital records were admissible in evidence to show that some of the injuries complained of by the plaintiff in a negligence action actually existed prior to the accident. The plaintiff's objection

[18] Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202 (1904).
[19] Williams v. Hofer, 30 Wn.2d 253, 191 P.2d 306 (1948).
[20] 42 Wn.2d 445, 256 P.2d 283 (1953).
[21] 147 Wash. 497, 266 Pac. 688 (1928).
[22] ". . . The records and judicial proceedings of any court of any such state, territory or possession, or copies thereof, shall be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. . . ." 62 STAT. 947, 28 U.S.C.A. § 1738 (1948).
[23] U.S. CONST. ART. IV, § 1.
[24] RCW 4.64.010.
[25] 42 Wn.2d 590, 257 P 2d 179 (1953).

that the entries were not shown by a witness with actual knowledge to have been made in the usual course of business or at or near the time that the act or event took place was considered to be without merit,[26] since the trial court was satisfied that sufficient testimony had been adduced regarding the record's identity.[27] "In this state the ruling of the trial judge in admitting or excluding such records is given much weight and will not be reversed unless there has been a manifest abuse of discretion." The court affirmed that the person who has actually created the record need not be examined as to the record's identity and the mode of its preparation "so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation."[28]

In *Cerkonek v. Dibble*,[29] the court did not disturb the trial court's refusal to admit a form listing card reciting that a specified number of acres of land sold to the plaintiffs were irrigated, since there was no evidence by a qualified witness that the card was part of the office records of the realtor who took the listing, and no explanation of where the card came from.

In *State v. Emmanuel*,[30] the defendant complained that a pencil notation on the business record was "self-serving and prejudicial" inasmuch as other notations made in the course of business were in ink. The court summarily dismissed this contention. "This objection might affect the reliability of the check register as a business record but the

[26] The court cited Gallagher v. Portland Traction Co., 181 Ore. 385, 182 P.2d 354 (1947), where hospital records covering a fifteen year period were admitted.

[27] As to the requirement of identification of business records generally, see 21 ALR 2d 773 (1952), (Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business under Uniform Business Records as Evidence Act, or under similar "Model Acts"). There are a few Washington cases illustrating some of the records which are admissible when properly identified: Choate v. Robertson, 31 Wn.2d 118, 195 P.2d 630 (1948) (county hospital records); Witenberg v. Sylvia, 35 Wn.2d 626, 214 P.2d 690 (1950) (ledger sheet in an action on a check); Griffith v. Whittier, 27 Wn.2d 351, 223 P.2d 1062 (1950) (notations on personal desk calendar not admissible); State v. Meyer, 37 Wn.2d 759, 226 P.2d 204 (1951) (clinical record of interview with patient); Morrison v. Nelson, 38 Wn.2d 649, 231 P.2d 336 (1951) (minute books, journal and ledger of corporation).

[28] Many courts, in absence of statute, extended the common-law "regular entries" exception to the hearsay rule to cover hospital records. *E.g.*, Gearhart v. Des Moines Ry., 237 Iowa 213, 21 N.W.2d 569 (1946). But their admittance was restricted by the requirement of the rule excluding them when the original entrant was not produced or accounted for. 5 WIGMORE, EVIDENCE § 1530 (3d ed. 1940). The purpose of the business records act, in this respect, was "to avoid the necessity and thereby the expense, inconvenience and sometimes the impossibility of calling as witnesses the attendants, nurses and physicians who have collaborated to make the hospital record of a patient." Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947), and cases cited therein.

[29] 42 Wn.2d 451, 256 P.2d 488 (1953).

[30] 42 Wn.2d 799, 259 P.2d 845 (1953).

statute referred to gives the trial judge a discretion as to the admissibility of such records. . . . We cannot find any abuse of discretion in admitting them."[31]

These cases, taken together, illustrate a reluctance to tamper with the trial court's discretion in application of the Uniform Business Records Act. This would seem to indicate a desirable tendency toward liberal interpretation of the statute. Many courts[32] have not been so lenient in their interpretation. This perhaps is understandable in view of the tradition observed by one writer that "transgressors tread no harder way than do those who seek to liberalize the law of evidence."[33] At any rate, it is to be hoped that this trend of the Washington court will continue so that the framers' intention to abrogate "all the defects and needless fetters of the common-law business-entries rule"[34] will be given full effect.[35]

Attorney-Client Privilege—Communications in the Presence of Two or More Interested Persons. In *State v. Emmanuel*,[36] the court held that where two defendants and their respective counsel meet to discuss their procedure in defending a breach of contract action, and where one defendant makes an oral statement in answer to a question directed to him by the other defendant's attorney, such statement is privileged, but the State is not a party who can claim the privilege.

The problem arose in an action charging the defendant with bribery. A vital issue in the case was whether the payment by the prosecuting witness to the defendant was taken by the defendant in settlement of his claim for "a commission" in connection with sale of certain timber, or was a bribe to induce the defendant, as secretary of the Board of Land Commissioners, to extend the time within which the timber was to be cut upon penalty of reversion to the State. In a previous con-

[31] Similar statements have recurred in previous cases: Choate v. Robertson, *supra* note 27; Witenberg v. Sylvia, *supra* note 27; State v. Meyer, *supra* note 27.

[32] Notably, the United States Supreme Court. Palmer v. Hoffman, 318 U.S. 109, 63 Sup.Ct. 477, 87 L.Ed. 645 (1943).

[33] Note, 56 HARV. L. REV. 458, 459 (1942). This is a comment on Hoffman v. Palmer, 129 F.2d 976 (C.A.2d 1942), which was subsequently affirmed by the Supreme Court. Note 32 *supra*.

[34] Norville, *The Uniform Business Records as Evidence Act*, 27 ORE. L. REV. 188 (1948). This is a lengthy and exhaustive discussion of the impact of the Business Records Act on the Shopbook and Regular Entries in Course of Business rules.

[35] For a short comment as to "the final step taken by the legislature to free the business man, the lawyer, and the courts from the archaic absurdities of the common law rules of evidence relating to the proof of business and public records," see Richards, *The Uniform Photographic Copies of Business Records as Evidence Act*, 28 WASH. L. REV. 176 (1953).

[36] 42 Wn.2d 799, 259 P.2d 845 (1953).

tract action regarding the sale of the timber, the defendant and prosecuting witness were named as defendants. A meeting was held between them and their respective counsel to discuss their course of action in defending against this suit. In the present case, on cross-examination of the prosecuting witness and on direct examination of the defendant and of his then attorney, the defendant's counsel attempted to prove an oral statement made by the prosecuting witness at this meeting in answer to a question directed to him by the defendant's then attorney. Each time counsel for the State objected on the ground that the communication was privileged. The lower court sustained these objections. The Supreme Court reversed, holding that these were privileged communications, but that the State could not claim the privilege. Judge Finley concurred in the result, but denied that any such privilege existed.[37]

This case represents, in Washington, a somewhat further extension of the attorney-client privilege under RCW 5.60.060(2). Specifically, this extension relates to those rules which are applied to a communication made in the presence of two or more interested persons. The statute is acknowledged to be declaratory of the common law privilege.[38] This, of course, requires resort to established case law.

A common law principle "universally conceded" is that when the same attorney acts for two parties having a common interest, and each party communicates with him, the communications are privileged from disclosure at the instance of a third person.[39] Similarly, where the attorney represents only one of those present at a conference (though

---

[37] Judge Finley, in this opinion, questions the value of the privilege generally as it now exists, and suggests that "some reconsideration and qualification regarding the rule may well be in order. . . ." Professor Wigmore, on the other hand, in his treatise ably reviews the arguments and answers of the various exponents, and concludes that the privilege "is well worth preserving for the sake of general policy." 8 WIGMORE, EVIDENCE § 2291 (3d ed. 1940). The comprehensive treatment given the entire subject by Professor Wigmore precludes any necessity for a review here. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928), presents a brief and provocative inquiry into the background and justification of the privilege.

[38] Hartness v. Brown, 21 Wash. 655, 59 Pac. 491 (1899); Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 693 (1901); Hurlburt v. Hurlburt, 128 N.Y. 420, 28 N.E. 651 (1891); Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900); *In re* Young, 33 Utah 382, 94 Pac. 731 (1908).

[39] 8 WIGMORE, EVIDENCE § 2312 (3d ed. 1940); *E.g.*, Baldwin v. Commissioner, 125 F.2d 812, 141 ALR 548 (C.A.9th 1942). This privilage cannot be asserted, however, in a suit between the parties since "as between themselves, their statements were not intended to be confidential." Halffman v. Halffman, 113 Wash. 320, 194 Pac. 371 (1920); Billias v. Panageoton, 193 Wash. 523, 76 P.2d 987 (1938). Nor does the privilege exist where the interests of the parties are opposed. Stone v. Minter, *supra* note 38; Scott v. Aultman Co., 211 Ill. 612, 71 N.E. 1112 (1904); Allan v. Shiffman, 172 N.C. 578, 90 S.E. 577 (1916).

all are interested parties), the matters discussed constitute privileged communications as to strangers to the conference. The rule was established in *Hartness v. Brown*,[40] based on the court's contention that the privilege rule "should be fairly construed so that the freest communication may be made between counsel and client, and their communications thus made, involving the necessary and useful intervention of others, may be equally protected." The court also adopted the view that the privilege may be asserted by those persons present who are not actually represented by the attorney. The Maine case of *Wade v. Ridley*[41] was cited with approval. Here the Maine court asserted that statements of fact made in good faith to an attorney at law for the purpose of obtaining his professional guidance or opinion are privileged communications, and that it is "not necessary that the relation of attorney and client should exist."

The principal case seems consistent with these previous adjudications. At the conference, the prosecuting witness, accompanied by counsel, was an interested party as to matters considered by the defendant and his attorney. Applying the rules of the *Hartness* case suggests the conclusion that the privilege could be asserted, as against third persons, by either party. It seems consistent with the logic of the principal that the additional fact that each party was accompanied by separate counsel should not alter the confidential relationship.[42]

That a third party cannot claim the privilege is settled both in reason and in case law.[43]

Privileged Communications Between Spouses—Acts as Communications. In *State v. Americk*,[44] the defendant was convicted of placing

[40] 21 Wash. 655, 59 Pac. 491 (1899).

[41] 87 Me. 368, 32 Atl. 975 (1895).

[42] It might be noted, however, that at least one jurisdiction has, under a similar fact situation, apparently reached the opposite result. State v. Hodgdon, 89 Vt. 148, 94 Atl. 301 (1915), was an action charging the defendant and others with burglary. The parties did not make a common defense, and were represented by separate counsel. At the trial, the attorney for one defendant was permitted to cross-examine another defendant, who took the stand as a witness, concerning a conversation among such defendants, his lawyer, and the cross-examining counsel. This was held proper. "It was not a communication between (the defendant) and his own counsel, nor between (the defendant) and an attorney acting in his interests." Although the court did not qualify its statement that the communications were not privileged, the case might well be rationalized and distinguished on the basis of the rule that no privilege exists as between the parties to the conference. Note 39 *supra*. By this rationale, the conversations could be considered as privileged as to third persons.

[43] Martin v. Shaen, 22 Wn.2d 505, 156 P.2d 681 (1945); State v. Dunkley, 85 Utah 546, 39 P.2d 1097 (1935), overruled on other grounds, State v. Crank, 105 Utah 332, 142 P.2d 178 (1943); State v. Madden, 161 Minn. 132, 201 N.W. 297 (1924); *Cf.*, 8 WIGMORE, EVIDENCE § 2327 (3d ed. 1940).

[44] 42 Wn.2d 504, 256 P.2d 278 (1953).

an explosive in a car so as to endanger his ex-wife and another. He assigned as error the admission in evidence of the testimony of his former wife as to beatings he had inflicted upon her during their marriage. He contended that this evidence was not admissible because it was a privileged communication under the purview of RCW 5.60.060(1). The assignment of error was considered to be without merit. "It is the general rule that the beating of one spouse by the other is not induced by confidence incident to the marital relationship."[45]

THOMAS J. BRENNAN

Patient-Physician Privilege—Waiver of Privilege to One Physician Constitutes Waiver as to Other Physicians. In *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953), a personal injury action, the plaintiff introduced three physicians who testified to the extent of his injuries. The plaintiff himself testified that his health was good prior to the accident, and that he had not consulted a doctor "for years." Following a verdict for the plaintiff, the defendant was granted a new trial on the issue of damages because of newly discovered evidence consisting of a doctor who would testify that during four years prior to the accident he treated the plaintiff a total of twenty times for various ailments. The plaintiff contended that this evidence was privileged under RCW 5.60.060(4). The Supreme Court affirmed the order for a new trial, holding that a waiver as to one physician is a waiver as to all other physicians. The court here assumes the minority position. This is commendable in that it denies the trickery of placing a physician with favorable testimony on the stand and suppressing available adverse testimony of other physicians by a claim of privilege—a maneuver which Professor Wigmore terms playing "fast and loose with medical testimony." 8 WIGMORE, EVIDENCE, § 2390 (3d ed. 1940). This case is the subject of a Note in 28 WASH. L. REV. 237 (1953).

Presumption of Due Care by Decedent. *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953), destroyed the presumption of due care on the part of the decedent. However, a later case, *Smith v. Yamashita*, 42 Wn.2d 490, 256 P.2d 281 (1953), questions the force of this decision. See Comment, 29 WASH. L. REV. 79 (1954).

Privilege Against Self-Incrimination—Inferences from Refusal to Testify. It was established in *Ikeda v. Curtis*, 143 Wash. Dec. 413, 261 P.2d 684 (1953), that when a witness in a civil suit refuses to answer a question on the ground that the answer might tend to incriminate him, such refusal cannot be used against him in subsequent criminal proceedings, but the trier of facts in the civil case is entitled to draw inferences from such refusal to testify. Noted, 27 TEMP. L. Q. 366 (1954).

Privileged Communications Between Spouses—Statements Overheard by Third Party. In *State v. Thorne*, 143 Wash. Dec. 43, 260 P.2d 331 (1953), the court held that where a communication between spouses is heard by a third party, even if by eaves-dropping, the third party may testify to it if the testimony is otherwise admissible.

[45] That the testimony related to other crimes did not affect its admissibility, since the rule excluding such evidence is subject to the exception that such evidence may be admitted to show motive, intent, absence of accident or mistake, a common scheme or plan, or identity. See State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950); 40 Wn.2d 18, 240 P.2d 251 (1952). State v. Robbins, 35 Wn.2d 389, 213 P.2d 310 (1950), extended the confidential communication privilege to include acts, though no attempt was made to distinguish between those acts which are communications and those which are not. The case is noted in 26 WASH. L. REV. 64 (1951)