

House Bill 3467

Sponsored by Representative WILLIAMSON

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates hearsay exception for certain audio recordings of certified interpreter translating witness statement in criminal matter. Provides that recording is admissible without calling interpreter as witness unless defendant files written objection.

A BILL FOR AN ACT

1
2 Relating to crime; creating new provisions; and amending ORS 40.460.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 40.460 is amended to read:

5 40.460. The following are not excluded by ORS 40.455, even though the declarant is available
6 as a witness:

7 (1) (Reserved.)

8 (2) A statement relating to a startling event or condition made while the declarant was under
9 the stress of excitement caused by the event or condition.

10 (3) A statement of the declarant's then existing state of mind, emotion, sensation or physical
11 condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not includ-
12 ing a statement of memory or belief to prove the fact remembered or believed unless it relates to
13 the execution, revocation, identification, or terms of the declarant's will.

14 (4) Statements made for purposes of medical diagnosis or treatment and describing medical his-
15 tory, or past or present symptoms, pain or sensations, or the inception or general character of the
16 cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

17 (5) A memorandum or record concerning a matter about which a witness once had knowledge
18 but now has insufficient recollection to enable the witness to testify fully and accurately, shown to
19 have been made or adopted by the witness when the matter was fresh in the memory of the witness
20 and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into
21 evidence but may not itself be received as an exhibit unless offered by an adverse party.

22 (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions,
23 opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person
24 with knowledge, if kept in the course of a regularly conducted business activity, and if it was the
25 regular practice of that business activity to make the memorandum, report, record, or data compi-
26 lation, all as shown by the testimony of the custodian or other qualified witness, unless the source
27 of information or the method of circumstances of preparation indicate lack of trustworthiness. The
28 term "business" as used in this subsection includes business, institution, association, profession, oc-
29 cupation, and calling of every kind, whether or not conducted for profit.

30 (7) Evidence that a matter is not included in the memoranda, reports, records, or data compila-
31 tions, and in any form, kept in accordance with the provisions of subsection (6) of this section, to

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a
2 memorandum, report, record, or data compilation was regularly made and preserved, unless the
3 sources of information or other circumstances indicate lack of trustworthiness.

4 (8) Records, reports, statements or data compilations, in any form, of public offices or agencies,
5 including federally recognized American Indian tribal governments, setting forth:

6 (a) The activities of the office or agency;

7 (b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to
8 report, excluding, in criminal cases, matters observed by police officers and other law enforcement
9 personnel;

10 (c) In civil actions and proceedings and against the government in criminal cases, factual
11 findings, resulting from an investigation made pursuant to authority granted by law, unless the
12 sources of information or other circumstances indicate lack of trustworthiness; or

13 (d) In civil actions and criminal proceedings, a sheriff's return of service.

14 (9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the
15 report thereof was made to a public office, including a federally recognized American Indian tribal
16 government, pursuant to requirements of law.

17 (10) To prove the absence of a record, report, statement or data compilation, in any form, or the
18 nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation,
19 in any form, was regularly made and preserved by a public office or agency, including a federally
20 recognized American Indian tribal government, evidence in the form of a certification in accordance
21 with ORS 40.510, or testimony, that diligent search failed to disclose the record, report, statement
22 or data compilation, or entry.

23 (11) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood
24 or marriage, or other similar facts of personal or family history, contained in a regularly kept record
25 of a religious organization.

26 (12) A statement of fact contained in a certificate that the maker performed a marriage or other
27 ceremony or administered a sacrament, made by a member of the clergy, a public official, an official
28 of a federally recognized American Indian tribal government or any other person authorized by the
29 rules or practices of a religious organization or by law to perform the act certified, and purporting
30 to have been issued at the time of the act or within a reasonable time thereafter.

31 (13) Statements of facts concerning personal or family history contained in family bibles,
32 genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts,
33 or tombstones, or the like.

34 (14) The record of a document purporting to establish or affect an interest in property, as proof
35 of content of the original recorded document and its execution and delivery by each person by whom
36 it purports to have been executed, if the record is a record of a public office, including a federally
37 recognized American Indian tribal government, and an applicable statute authorizes the recording
38 of documents of that kind in that office.

39 (15) A statement contained in a document purporting to establish or affect an interest in prop-
40 erty if the matter stated was relevant to the purpose of the document, unless dealings with the
41 property since the document was made have been inconsistent with the truth of the statement or
42 the purport of the document.

43 (16) Statements in a document in existence 20 years or more the authenticity of which is es-
44 tablished.

45 (17) Market quotations, tabulations, lists, directories, or other published compilations, generally

1 used and relied upon by the public or by persons in particular occupations.

2 (18) (Reserved.)

3 (18a)(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or
 4 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a
 5 complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or
 6 older is the victim, made by the witness after the commission of the alleged misconduct or abuse
 7 at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to
 8 the fact that the complaint was made.

9 (b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or
 10 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those
 11 terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS
 12 163.205 or 164.015 in which a person 65 years of age or older is the victim, is not excluded by ORS
 13 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is
 14 unavailable as a witness but was chronologically or mentally under 12 years of age when the
 15 statement was made or was 65 years of age or older when the statement was made. However, if a
 16 declarant is unavailable, the statement may be admitted in evidence only if the proponent estab-
 17 lishes that the time, content and circumstances of the statement provide indicia of reliability, and
 18 in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged
 19 perpetrator’s opportunity to participate in the conduct and that the statement possesses indicia of
 20 reliability as is constitutionally required to be admitted. No statement may be admitted under this
 21 paragraph unless the proponent of the statement makes known to the adverse party the proponent’s
 22 intention to offer the statement and the particulars of the statement no later than 15 days before
 23 trial, except for good cause shown. For purposes of this paragraph, in addition to those situations
 24 described in ORS 40.465 (1), the declarant shall be considered “unavailable” if the declarant has a
 25 substantial lack of memory of the subject matter of the statement, is presently incompetent to tes-
 26 tify, is unable to communicate about the abuse or sexual conduct because of fear or other similar
 27 reason or is substantially likely, as established by expert testimony, to suffer lasting severe emo-
 28 tional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the
 29 declarant in chambers and on the record or outside the presence of the jury and on the record. The
 30 examination shall be conducted immediately prior to the commencement of the trial in the presence
 31 of the attorney and the legal guardian or other suitable person as designated by the court. If the
 32 declarant is found to be unavailable, the court shall then determine the admissibility of the evidence.
 33 The determinations shall be appealable under ORS 138.060 (1)(c) or (2)(a). The purpose of the ex-
 34 amination shall be to aid the court in making its findings regarding the availability of the declarant
 35 as a witness and the reliability of the statement of the declarant. In determining whether a state-
 36 ment possesses indicia of reliability under this paragraph, the court may consider, but is not limited
 37 to, the following factors:

38 (A) The personal knowledge of the declarant of the event;

39 (B) The age and maturity of the declarant or extent of disability if the declarant is a person
 40 with a developmental disability;

41 (C) Certainty that the statement was made, including the credibility of the person testifying
 42 about the statement and any motive the person may have to falsify or distort the statement;

43 (D) Any apparent motive the declarant may have to falsify or distort the event, including bias,
 44 corruption or coercion;

45 (E) The timing of the statement of the declarant;

1 (F) Whether more than one person heard the statement;

2 (G) Whether the declarant was suffering pain or distress when making the statement;

3 (H) Whether the declarant's young age or disability makes it unlikely that the declarant fabri-
4 cated a statement that represents a graphic, detailed account beyond the knowledge and experience
5 of the declarant;

6 (I) Whether the statement has internal consistency or coherence and uses terminology appro-
7 priate to the declarant's age or to the extent of the declarant's disability if the declarant is a person
8 with a developmental disability;

9 (J) Whether the statement is spontaneous or directly responsive to questions; and

10 (K) Whether the statement was elicited by leading questions.

11 (c) This subsection applies to all civil, criminal and juvenile proceedings.

12 (d) This subsection applies to a child declarant, a declarant who is an elderly person as defined
13 in ORS 124.050 or an adult declarant with a developmental disability. For the purposes of this sub-
14 section, "developmental disability" means any disability attributable to mental retardation, autism,
15 cerebral palsy, epilepsy or other disabling neurological condition that requires training or support
16 similar to that required by persons with mental retardation, if either of the following apply:

17 (A) The disability originates before the person attains 22 years of age, or if the disability is at-
18 tributable to mental retardation the condition is manifested before the person attains 18 years of
19 age, the disability can be expected to continue indefinitely, and the disability constitutes a sub-
20 stantial handicap to the ability of the person to function in society.

21 (B) The disability results in a significant subaverage general intellectual functioning with con-
22 current deficits in adaptive behavior that are manifested during the developmental period.

23 (19) Reputation among members of a person's family by blood, adoption or marriage, or among
24 a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce,
25 death, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of
26 a person's personal or family history.

27 (20) Reputation in a community, arising before the controversy, as to boundaries of or customs
28 affecting lands in the community, and reputation as to events of general history important to the
29 community or state or nation in which located.

30 (21) Reputation of a person's character among associates of the person or in the community.

31 (22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a
32 plea of no contest, adjudging a person guilty of a crime other than a traffic offense, to prove any
33 fact essential to sustain the judgment, but not including, when offered by the government in a
34 criminal prosecution for purposes other than impeachment, judgments against persons other than the
35 accused. The pendency of an appeal may be shown but does not affect admissibility.

36 (23) Judgments as proof of matters of personal, family or general history, or boundaries, essen-
37 tial to the judgment, if the same would be provable by evidence of reputation.

38 (24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding
39 in which a child under 12 years of age at the time of trial, or a person with a developmental disa-
40 bility as described in subsection (18a)(d) of this section, may be called as a witness to testify con-
41 cerning an act of abuse, as defined in ORS 419B.005, or sexual conduct performed with or on the
42 child or person with a developmental disability by another, the testimony of the child or person with
43 a developmental disability taken by contemporaneous examination and cross-examination in another
44 place under the supervision of the trial judge and communicated to the courtroom by closed-circuit
45 television or other audiovisual means. Testimony will be allowed as provided in this subsection only

1 if the court finds that there is a substantial likelihood, established by expert testimony, that the
 2 child or person with a developmental disability will suffer severe emotional or psychological harm
 3 if required to testify in open court. If the court makes such a finding, the court, on motion of a
 4 party, the child, the person with a developmental disability or the court in a civil proceeding, or on
 5 motion of the district attorney, the child or the person with a developmental disability in a criminal
 6 or juvenile proceeding, may order that the testimony of the child or the person with a developmental
 7 disability be taken as described in this subsection. Only the judge, the attorneys for the parties, the
 8 parties, individuals necessary to operate the equipment and any individual the court finds would
 9 contribute to the welfare and well-being of the child or person with a developmental disability may
 10 be present during the testimony of the child or person with a developmental disability.

11 (25)(a) Any document containing data prepared or recorded by the Oregon State Police pursuant
 12 to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data
 13 retrieval from the Law Enforcement Data System or other computer system maintained and operated
 14 by the Oregon State Police, and the person retrieving the data attests that the information was re-
 15 trieved directly from the system and that the document accurately reflects the data retrieved.

16 (b) Any document containing data prepared or recorded by the Oregon State Police that is
 17 produced by data retrieval from the Law Enforcement Data System or other computer system
 18 maintained and operated by the Oregon State Police and that is electronically transmitted through
 19 public or private computer networks under an electronic signature adopted by the Oregon State
 20 Police if the person receiving the data attests that the document accurately reflects the data re-
 21 ceived.

22 (c) Notwithstanding any statute or rule to the contrary, in any criminal case in which docu-
 23 ments are introduced under the provisions of this subsection, the defendant may subpoena the ana-
 24 lyst, as defined in ORS 475.235 (6), or other person that generated or keeps the original document
 25 for the purpose of testifying at the preliminary hearing and trial of the issue. Except as provided
 26 in ORS 44.550 to 44.566, no charge shall be made to the defendant for the appearance of the analyst
 27 or other person.

28 (26)(a) A statement that purports to narrate, describe, report or explain an incident of domestic
 29 violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after
 30 the incident occurred, if the statement:

31 (A) Was recorded, either electronically or in writing, or was made to a peace officer as defined
 32 in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency
 33 medical services provider or firefighter; and

34 (B) Has sufficient indicia of reliability.

35 (b) In determining whether a statement has sufficient indicia of reliability under paragraph (a)
 36 of this subsection, the court shall consider all circumstances surrounding the statement. The court
 37 may consider, but is not limited to, the following factors in determining whether a statement has
 38 sufficient indicia of reliability:

39 (A) The personal knowledge of the declarant.

40 (B) Whether the statement is corroborated by evidence other than statements that are subject
 41 to admission only pursuant to this subsection.

42 (C) The timing of the statement.

43 (D) Whether the statement was elicited by leading questions.

44 (E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient
 45 reason for denying admission of a statement under this subsection in the absence of other factors

1 indicating unreliability.

2 (27) A report prepared by a forensic scientist that contains the results of a presumptive test
3 conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that
4 the report accurately reflects the results of the presumptive test.

5 **(28) An audio recording of a declarant translating a statement made by a witness in a
6 criminal matter from a foreign language to English, provided that:**

7 **(a) The declarant is an interpreter certified under ORS 45.291; and**

8 **(b) The declarant certifies or declares on the audio recording that the translated state-
9 ment is a true and accurate translation of the witness's statement made to the best of the
10 declarant's ability.**

11 [(28)(a)] **(29)(a)** A statement not specifically covered by any of the foregoing exceptions but
12 having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

13 (A) The statement is relevant;

14 (B) The statement is more probative on the point for which it is offered than any other evidence
15 that the proponent can procure through reasonable efforts; and

16 (C) The general purposes of the Oregon Evidence Code and the interests of justice will best be
17 served by admission of the statement into evidence.

18 (b) A statement may not be admitted under this subsection unless the proponent of it makes
19 known to the adverse party the intention to offer the statement and the particulars of it, including
20 the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as
21 practicable after it becomes apparent that such statement is probative of the issues at hand, to
22 provide the adverse party with a fair opportunity to prepare to meet it.

23 **SECTION 2. Notwithstanding any other provision of law, in a criminal prosecution, an
24 audio recording of an interpreter translating a statement made by a witness from a foreign
25 language to English that complies with ORS 40.460 (28) shall be considered authenticated and
26 is admissible as evidence without calling the interpreter as a witness, unless the defendant
27 has filed a written objection within 30 days after receiving the audio recording.**

28