IX. Evidence

HENRY C. KARLSON*

A. Hearsay

1. Patterson *Limited.*—A limitation upon the *Patterson* rule[1] permitting prior statements of witnesses available for cross-examination to be used as substantive evidence is the product of a convicted robber's appeal in *Carter v. State*.[2] The appellant in *Carter* objected to a witness' relating the contents of an extrajudicial statement prior to its declarant's appearance as a witness. Although ruling that the error was harmless due to the witness' subsequent testimony, the court of appeals held that the appellant's objection was correct.[3]

In reaching this determination, the court created foundational requirements for the substantive use of out-of-court statements under the *Patterson* rule. The foundation has two parts. The declarant must be confronted with the statement while on the witness stand, and he must admit or deny making it.[4] If the declarant denies making the statement or denies present recollection of the statement, the statement if merely oral may not be used as substantive

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[1]In Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975), the Indiana Supreme Court permitted two extrajudicial statements to be used as substantive evidence. One statement was admitted after the defendant confronted a prosecution witness with parts of a prior statement seeking to impeach her. Thereafter, the court permitted the prosecution to introduce the entire written statement. Even if the entire statement were not substantive evidence, the prosecution would have been permitted to introduce excerpts of the statement referred to by the defense so as to rebut any inference that her present testimony was inconsistent with her prior statement. *See* Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975) (entire portions of deposition may be read into record if part is used); FED. R. EVID. 106. The second statement was offered by the prosecution as a prior inconsistent statement to impeach its own witness, who was the wife of the accused. Assuming that the prosecution had shown a proper foundation for impeaching its own witness, her prior statement was admissible for purposes of impeachment. Teague v. State, 269 Ind. 103, 379 N.E.2d 418 (1978); Rogers v. State, 262 Ind. 315, 315 N.E.2d 707 (1974); IND. CODE § 34-1-14-15 (1976). *See generally* M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 33 (1977). Although the holding in *Patterson* only indicated that limiting instructions were not necessary, it has been interpreted to permit the use of all extrajudicial statements as substantive evidence. *See* Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978); Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977); Lamar v. State, 266 Ind. 689, 366 N.E.2d 652 (1977); Carter v. State, 266 Ind. 196, 361 N.E.2d 1208, *cert. denied*, 434 U.S. 866 (1977).

[2]412 N.E.2d 825 (Ind. Ct. App. 1980).

[3]*Id.* at 828.

[4]*Id.* at 827-28.

evidence.[5] A statement in writing or that was electronically recorded is admissible even if the declarant denies or fails to remember making it.[6]

Insofar as the court in *Carter* required that a declarant be confronted with an extrajudicial statement prior to its use as substantive evidence, it created a foundation similar to, but not the same as, that necessary for the use of a prior inconsistent statement for impeachment of a witness. Indiana law has long required that in order to impeach a witness by evidence of a prior statement, the witness must be confronted with it while on the witness stand.[7] To permit the substantive use of an extrajudical statement with less foundation than required for it to be used for impeachment serves no purpose. The court's requirement that the declarant admit making the statement if it were oral and unrecorded, however, creates the danger that important evidence will be lost through perjury.[8]

The opinion in *Carter* found support for this requirement in the *Patterson* decision wherein it is stated, "The out-of-court asserters . . . were upon the witness stand at the time their out-of-court assertions were offered. Neither denied giving the statements attributed to her, nor did they profess ignorance of such statements."[9] However, if this were meant to be a requirement for substantive use of out-of-court statements, it would apply to prior written or recorded statements as well as those which were merely oral in nature. Both of

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[5]*Id.* at 829-30 n.4. The statement if inconsistent could still be used for impeachment. IND. CODE § 34-1-15-1 (1976) provides in part that:

> [w]hen a witness, whether a party to the record or not, is cross-examined to lay foundation for his impeachment by proof of an act or statement inconsistent with his testimony, and is asked if he did not do the act or make the statement, and he answers that he does not recollect having done the act or made the statement, the party thus laying the foundation for impeachment shall have the right to introduce evidence of the act or statement in the same manner as if the witness had answered that he had not done the act or made the statement.

[6]412 N.E.2d at 829-30 n.5.

[7]The foundation for impeachment of a witness by evidence of a prior inconsistent statement requires that the witness be confronted with the substance of the statement and told the date, place and person to whom it was made. Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975); Gradison v. State, 260 Ind. 688, 300 N.E.2d 67 (1973); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 37, at 72-75 (2d ed. E. Cleary 1972); M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 34 (1977).

[8]The Indiana Supreme Court has recognized that one purpose of the *Patterson* rule is to prevent loss of evidence due to a turncoat witness. In commenting on the use of the *Patterson* rule in Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978), the court wrote, "Here, the prosecution was faced with a 'turncoat witness' and the potential loss of major evidence of guilt, and therefore there was no misapplication of the rule in this case." *Id.* at 678-79, 377 N.E.2d at 1375.

[9]263 Ind. at 58, 324 N.E.2d at 484-85, *quoted in* Carter v. State, 412 N.E.2d at 829.

the statements in the *Patterson* decision were prior written statements.[10] If the court intended the segment cited in the *Carter* opinion to create foundational requirements for the use of prior out-of-court statements as substantive evidence, it must have meant for the foundation to apply to the written statements which were the subject of its opinion. This position was rejected in *Carter*[11]

The *Patterson* rule does not require that a declarant acknowledge making a statement in order for it to be used as substantive evidence. It merely requires that the declarant be subject to cross-examination concerning the statement. As stated in the *Patterson* decision, "We note, however, that in all three versions of the federal rules, the availability of the declarant for cross-examination is required. *It is our judgment that this safeguard is of paramount importance and is adequate.*"[12] The court of appeals in *Carter* created a requirement not found in *Patterson* when it required the declarant of a prior unrecorded oral statement to acknowledge its making prior to its use as substantive evidence.

The concern of the court of appeals that the admission of extrajudicial statements which are denied or unrecalled may constitute a violation of the confrontation clause of the sixth amendment[13] is not shared by the United States Supreme Court. As a basis for its concern, the court cited a number of law review articles[14] that rely upon the United States Supreme Court decision in *California v. Green*.[15] The issue dealt with in *Green*,[16] however, is not that of a witness who denies or fails to recall making a statement. It dealt with a witness who claims a loss of memory concerning the event that is the subject of the statement.[17] The sixth amendment right of confrontation as it relates to use of a statement which the declarant denies making is dealt with by the United States Supreme Court in *Nelson v. O'Neil*,[18] a case decided after *California v. Green*.

In *Nelson* the question before the court was whether or not the

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[10]263 Ind. at 57, 324 N.E.2d at 484.

[11]412 N.E.2d at 831-40 n.4.

[12]263 Ind. at 58, 324 N.E.2d at 485 (emphasis added).

[13]412 N.E.2d at 831-40 n.4.

[14]Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory v. Reality*, 3 IND. L.F. 309 (1970); Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 U.C.L.A. L. REV. 967 (1979); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974).

[15]412 N.E.2d at 829-30 n.4.

[16]399 U.S. 149 (1970).

[17]*Id.*

[18]402 U.S. 622 (1971).

respondent's sixth amendment right of confrontation was violated when his co-defendant's unrecorded oral prior statement implicating him was received in evidence.[19] His co-defendant, Runnels, had taken the witness stand and denied making the oral statement as well as the truth of the statement. As stated by the court the issue was whether or not "cross-examination can be full and effective where the declarant is present at trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false."[20] The court in *Nelson* held that the respondent had not been denied his right of confrontation. Cross-examination of Runnels could not have been more effective than his voluntary testimony denying the out-of-court statement. The re spondent, held the court, would have been in a less favorable position had his co-defendant admitted making the statement but denied its truth.[21]

Similarly, an accused who has an extrajudicial statement used against him as substantive evidence under the *Patterson* rule is not denied full and effective cross-examination merely because the declarant of the statement denies making it. His position is not more favorable if the declarant admits making the statement. That part of the *Carter* opinion that would prohibit the substantive use of oral extrajudicial statements that the declarant does not acknowledge making should be rejected by the Indiana Supreme Court.[22]

2. Nonassertive Conduct.— Watt v. State[23] indicates that conduct which is not meant to be an assertion will be treated differently in Indiana courts than in federal courts. Nonassertive conduct is hearsay, according to *Watt*, if it is offered to prove a belief or thought on the part of the actor which is impliedly asserted by the

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[19]*Id.*

[20]*Id.* at 627.

[21]Had Runnels in this case "affirmed the statement as his," the respondent would certainly have been in far worse straits than those in which he found himself when Runnels testified as he did. . . . To be sure, Runnels might have "affirmed the statement" but denied its truthfulness, claiming, for example, that it had been coerced, or made as part of a plea bargain. But cross-examination . . . would have been futile in that event as well.

Id. at 628-29.

[22]The Indiana Supreme Court has previously permitted a statement to be used as substantive evidence even though the declarant denied memory of the statement. In Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978), the court held it proper to use as substantive evidence the record of a guilty plea proceeding in which a witness had pled guilty to second degree murder, even though the witness testified he did remember telling the court during the plea proceeding the facts making him guilty of second degree murder.

[23]412 N.E.2d 90 (Ind. Ct. App. 1980).

conduct. The court in *Watt* states that "[c]onduct as hearsay involves an implied assertion by the out-of-court asserter. . . . It means that the conduct that is the result of a *thought* is being used as proof of the matter impliedly asserted."[24] In contrast to this holding, Federal Rule of Evidence 801 excludes from the definition of hearsay conduct that is not meant to be an assertion.[25]

The question of whether or not conduct that is not meant to be an assertion should be considered hearsay was first discussed in the English case of *Wright v. Doe d. Tatham*.[26] In the words of the English opinion, "the proof of a particular fact, which is not itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible . . . ."[27] American courts that have considered the question at first followed this English precedent, however, the current trend is to admit nonassertive conduct.[28] Until the decision in *Watt*, Indiana courts had not directly considered the issue.[29]

In contrast to court decisions, the Federal Rules of Evidence exclude nonassertive conduct from the definition of hearsay. The reason for this exclusion is amply explained in the Advisory Committee's Note to Federal Rule of Evidence 801:

> Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other verbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, properly includable within the hearsay concept. . . . Admittedly, evidence of this character is untested with respect to the perception, memory and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in

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[24]*Id.* at 96 (citations omitted).

[25]FED. R. EVID. 801(a) provides that a "Statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Under this definition, nonassertive conduct is not a statement for purposes of the hearsay rule.

[26]112 Eng. Rep. 488 (Exch. Ch. 1837).

[27]*Id.* at 516-17.

[28]C. MCCORMICK, *supra* note 7, § 250, at 598.

[29]*But see* Romey v. Glass, 120 Ind. App. 279, 91 N.E.2d 850 (1950); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345 (1940).

> the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence."[30]

The position taken by the drafters of the Federal Rules of Evidence is one that has been accepted by the drafters of other codes of evidence.[31]

The Indiana Court of Appeals in *Watt* has adopted a position which creates an unnecessary conflict with the rule in federal courts. It is clear that evidence which will be rejected as hearsay in future Indiana cases in conformity with *Watt* would be admitted in federal courts. This may lead parties to select a forum for their civil actions based upon considerations of evidence admissibility. It will serve to increase forum shopping and may make the outcome depend upon the fortuity of federal jurisdiction. Absent strong policy interests in maintaining a specific rule of evidence, rules of evidence in both state and federal courts should be similar. When the state rule is in conflict with the position adopted by modern evidence codes, the federal rules should be adopted.

B. Best Evidence Rule

An objection to testimony on the theory that it violated the best evidence rule was properly overruled by the Indiana Supreme Court in *Jackson v. State*.[32] The appellant in *Jackson* was convicted of murder committed while in the perpetration of a robbery. His conviction rested in part upon the testimony of a witness who operated the video-tape equipment used to record his confession. During examination by the prosecution, he was asked to demonstrate the manner in which the defendant, during the confession, had demonstrated

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[30]P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 351 (Student ed. 1979).

[31]The following states have adopted FED. R. EVID. 801(a): Alaska, Arizona, Arkansas, Delaware, Florida, Hawaii, Maine, Minnesota, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Washington, Wisconsin and Wyoming. Colorado has in effect adopted the rule. However, its rule substitutes "to be communicative" for "as an assertion." *See* FED. EVID. REP., STATE CORRELATION TABLES. California's Evidence Code also excludes nonassertive conduct from operation of the hearsay rule. CAL. EVID. CODE §3225, at 1200 (West). UNIFORM RULES OF EVIDENCE 801(a) (1974 revision) is the same as FED. R. EVID. 801(a).

[32]411 N.E.2d 609 (Ind. 1980).

firing the murder weapon.[33] The defendant objected to this request and contended that best evidence of what was sought to be proved was the video-tape.[34] His objection was properly overruled.[35]

The best evidence rule does not apply merely because the subject matter of a witness' testimony is also contained in a document, recording, or photograph. Testimony is properly excludable under the best evidence rule only when it seeks to prove the contents.[36] In *Jackson* the witness was not seeking to prove the contents of the video-tape, he was merely describing an event he had personally observed. As noted by the supreme court:

> [r]ather, he testified as to things he had personally seen and heard. In other words, Captain Wleklinski was not asked to reveal the contents of the video-tape, he was asked to relate what he had personally seen the defendant demonstrate at the time of the confession. Because of this, the "best evidence" rule is not applicable.[37]

The court also held that any appeal based upon a violation of the best evidence rule must include some indication that the appellant disputes the accuracy of the evidence received concerning the contents of the writing.[38] It cites as authority for this holding *Sanders v. State*,[39] wherein the court wrote:

> "That purpose [of the best evidence/original writing rules] is to secure the most reliable information as to the contents of documents, when those terms are disputed. A mystical idea of seeking the 'best evidence' or the 'original document' as an end in itself is no longer the goal. Consequently when an attack is made, on motion for new trial or an appeal, upon the judge's admission of secondary evidence,

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[33]*Id.* at 611.

[34]Indiana has applied the best evidence rule only to writings. Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976); Pinkerton v. State, 258 Ind. 610, 283 N.E.2d 376 (1972). FED. R. EVID. 1002, however, applies the best evidence rule to proof of the contents of recordings and photographs as well as writings.

[35]411 N.E.2d at 611.

[36]C. MCCORMICK, *supra* note 7, § 233, at 563-65. *See* Meyers v. United States, 171 F.2d 800 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 912 (1949); Elkins v. State, 250 Ala. 672, 35 So. 2d 693 (1948); People v. Sweeney, 55 Cal. 2d 27, 9 Cal. Rptr. 793, 357 P.2d 1049 (1960); Hill v. State, 201 Ga. 300, 39 S.E.2d 675 (1946); People v. Spencer, 264 Ill. 124, 106 N.E. 219 (1914); Sanders v. State, 237 Miss. 772, 115 So. 2d 145 (1959); People v. Giro, 19 N.Y. 152, 90 N.E. 432 (1910); Commonwealth v. Lennon, 124 Pa. Super. Ct. 47, 188 A. 84 (1936); McDaniel v. Commonwealth, 183 Va. 481, 32 S.E.2d 667 (1945).

[37]411 N.E.2d at 611 (citations omitted).

[38]*Id.* at 612.

[39]264 Ind. 688, 348 N.E.2d 642 (1976).

> it seems that the reviewing tribunal should ordinarily make inquiry of the complaining counsel, 'Does the party whom you represent actually dispute the accuracy of the evidence received as to the material terms of the writing?' If counsel cannot assure the court that such good faith dispute exists, it seems clear that any departure from the regulations in respect to secondary evidence must be classified as harmless error."[40]

Thus the court determined that even if the best evidence rule applied to the testimony, any error was harmless because there was no dispute as to its accuracy.[41]

Although no court opinion other than *Sanders* is cited in support of a requirement for an actual dispute concerning the accuracy of secondary evidence before a violation of the best evidence rule will be other than harmless error, the requirement is a reasonable one.[42] To provide that violation of the best evidence rule created reversible error even if the secondary evidence used was accurate would be to elevate form over substance. A similar analysis led the drafters of Federal Rule of Evidence 1003 to permit use of a duplicate unless there was some proper reason for its exclusion.[43]

C. Impeachment

The propriety of cross-examination aimed at disclosing an intimate relationship between a prosecution witness and the undercover police officer involved in an arrest was discussed in *Harrington v. State*.[44] The appellant in *Harrington* was convicted of dealing in a

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[40]*Id.* at 691, 348 N.E.2d at 644 (quoting C. McCORMICK, *supra* note 7, § 243).

[41]411 N.E.2d at 612.

[42]*See* C. McCORMICK, *supra* note 7, § 243, at 577-78. *But see* National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N.W.2d 489 (1959). In *Evertson*, the court reversed partly on the ground that a carbon copy was used to prove the terms of a written settlement, despite the fact that it was shown on appeal that the carbon copy and the original were exactly the same.

[43]FED. R. EVID. 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Indiana has in effect adopted this rule. McDonough v. State, 242 Ind. 376, 175 N.E.2d 418 (1961); Wilson v. State, 169 Ind. App. 297, 348 N.E.2d 90 (1976). The Advisory Committee Note to FED. R. EVID. 1003 states that

> [w]hen the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition, in Rule 1001(4), *supra*, a 'duplicate' possesses this character.

[44]413 N.E.2d 622 (Ind. Ct. App. 1980), *transfer denied*, March 26, 1981.

controlled substance.[45] His conviction rested in part upon the testimony of an informant. During the trial, the appellant sought to cross-examine the informant concerning an intimate relationship between the informant and the undercover police officer.[46] The trial court prohibited this line of questioning.

On appeal, the conviction was overturned due to an erroneous instruction on entrapment,[47] and the court of appeals sought to give some guidance to the trial court concerning admission of evidence relating to the relationship at the re-trial. The relationship between the informant and the police officer would not be admissible to impeach her general moral character,[48] however, it might be admissible as evidence of bias.[49] The feelings of a witness concerning another witness are a proper subject for cross-examination.[50] However, the court cites with approval the statement of the United States Seventh Circuit Court of Appeals that "[w]e do not find that a sexual relationship will per se give rise to bias, either favorable or unfavorable."[51] The quotation, from *United States v. Harris*,[52] is taken out of context.

In *Harris* the sexual relationship which the defendant sought to prove was "that she was and has been continuously a prostitute . . . and she has at one time or another sold herself to almost everybody she had testified with regard to . . . ."[53] Although the business relationship between a prostitute and her customers may not give rise

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[45]*Id.*

[46]*Id.* at 626.

[47]*Id.*

[48]*Id.* A witness' general moral character may not be impeached by evidence of specific acts other than convictions for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, or willful and corrupt perjury as well as crimes involving dishonesty or false statement. Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972). *See also* Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976); Adams v. State, 366 N.E.2d 692 (Ind. Ct. App. 1977).

[49]Credibility of a witness may always be impeached by evidence of bias, interest, or prejudice on the part of the witness. Hall v. State, 267 Ind. 512, 371 N.E.2d 700 (1978); Haeger v. State, 390 N.E.2d 239 (Ind. Ct. App. 1979); Hunter v. State, 360 N.E.2d 588 (Ind. Ct. App. 1977), *cert. denied*, 434 U.S. 906 (1977). *See also* C. McCORMICK, *supra* note 7, § 40, at 78-81; E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 70 (5th ed. J. Weinstein 1976); M. SEIDMAN, *supra* note 7, at 43-44 (1977). This may be done on cross-examination by specific questions calling the act or statement showing bias to the attention of the witness. Taylor v. State, 249 Ind. 238, 241, 231 N.E.2d 507, 508 (1967). If the witness denies the act or statement showing bias, he may be contradicted by extrinsic evidence. Hunter v. State, 267 Ind. 512, 371 N.E.2d 700 (1978).

[50]*See* Pickett v. Kolb, 250 Ind. 449, 451, 237 N.E.2d 105, 107 (1968).

[51]413 N.E.2d at 626 (citing United States v. Harris, 542 F.2d 1283, 1302 (7th Cir. 1976)).

[52]542 F.2d 1283 (7th Cir. 1976).

[53]*Id.*

to any bias, the emotional involvement of a nonbusiness intimate relationship is evidence of which the trier of fact should be aware to properly evaluate a witness' credibility.[54]

For this purpose a police officer should not be considered a nonparty. A police officer who apprehends a person has both a professional and personal interest in his conviction. If the person is not convicted the police officer may face a suit for false arrest and a conviction may increase his chances for promotion. The exclusionary rule, which rejects evidence obtained through police misconduct,[55] is based, at least in part, upon the rationale that a police officer may be punished by denying him a conviction.[56] An intimate relationship between a witness and a party is generally admissible to show bias.[57] The intimate relationship between a prosecution witness and the undercover police officer involved in the case should also be admissible. Evidence of this nature creates a reasonable degree of probability that the witness is biased[58] unless as in *Harris* the relationship is sexual but is not intimate.

D. Competency

In *Cherry v. State*,[59] the Indiana Supreme Court approved a prosecuting attorney's acting in the dual role of lawyer and witness. Defense counsel in *Cherry* cross-examined the victim of the appellant's alleged rape concerning the description she gave police of her assailant as a thin man with either brown or reddish-brown hair. At the time of trial appellant was not thin, and had either dark brown or black hair.[60] To rebut the inference of misidentification created by cross-examination, the state called two deputy prosecutors who had observed the appellant at a prior trial.[61]

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[54]*See* McFarland v. United States, 174 F.2d 538 (D.C. Cir. 1949); State v. Vidalez, 89 Ariz. 215, 360 P.2d 224 (1961); People v. Sweeney, 55 Cal. 2d 27, 357 P.2d 1049 (1960); Perdue v. State, 126 Ga. 112, 54 S.E. 820 (1906); Holly v. Commonwealth, 18 Ky. 441, 36 S.W. 532 (1896); State v. Johnson, 48 La. Ann. 437, 19 So. 476 (1896); State v. Cole, 213 S.W. 110 (Mo. 1919); Rasnake v. Commonwealth, 135 Va. 677, 115 S.E. 543 (1923); Porath v. State, 90 Wis. 527, 63 N.W. 1061 (1895). *But see* Adkinson v. State, 48 Fla. 1, 37 So. 522 (1904); People v. Goodrich, 251 Ill. 558, 96 N.E. 542 (1911).

[55]*See* Mapp v. Ohio, 367 U.S. 643 (1961).

[56]The primary purpose of the exclusionary rule is to deter unlawful police conduct. *See* United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976). Inherent in the rule therefore must be the belief that police are punished when they are denied a conviction.

[57]*See* 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 949, at 784-92 (Chadbourn rev. 1970).

[58]*See* cases cited note 54 *supra*.

[59]414 N.E.2d 301 (Ind. 1981).

[60]*Id.* at 306.

[61]*Id.*

Both witnesses testified that the appellant's appearance had changed substantially. He had gained weight following treatment for severe thyroid and heart conditions. One deputy prosecutor also testified that appellant formerly had reddish hair.[62] Their testimony was critical to the proper identification of the appellant. Although it does not appear that the two deputy prosecutors were acting in that capacity at the trial, their testimony does raise some ethical problems.

The Code of Professional Responsibility provides in DR 5-501(B):

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify . . . .
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> (4) as any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.[63]

The issue to be resolved in light of DR 5-501(B) is whether or not the same considerations that apply to private law firms should control a prosecutor's office.[64] Unlike the members of a private law firm, an attorney employed by the state has no monetary stake in the outcome of a trial.[65] It must also be considered that disqualifying

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[62]*Id.* at 307.

[63]A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) should be read in relation to DR 5-102(A) which provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

[64]Although not cited in *Cherry*, substantially the same question was before the court in State *ex rel.* Goldsmith v. Superior Court, 386 N.E.2d 942 (Ind. 1979). The specific question in *Goldsmith* was whether or not the entire prosecutor's office should have been disqualified from the trial of a case when one member of the office was a witness in the case. The court held that the entire office was not disqualified. *Id.* at 945.

[65]In *Goldsmith*, the court wrote:

> The lawyers in a law firm have a common financial interest in the case whereas the deputies in a prosecutor's office have an independent duty by law to represent the State of Indiana in criminal matters. Their relationship to each other, rather than pecuniary, is no more than sharing the same statutory duties; and the interest of one deputy which requires him to testify will ordinarily have no financial or personal impact on the other deputies in the office.

Id. at 945.

all members of a prosecutor's office may work a substantial hardship on the state, which is the prosecutor's client. The supreme court in *Cherry* was correct in its holding that the trial judge did not abuse his discretion in permitting the testimony of the deputy prosecutors.

E. Informant's Privilege

A defendant's need to depose a material witness must yield to the state's privilege to withhold the identity of a confidential informant[66] according to *Silva v. State*.[67] Defendant in *Silva* was convicted of two counts of dealing in marijuana in excess of thirty grams. Evidence introduced at trial showed that the informant, known to the defendant as Mick Smith, had observed one of the alleged sales and had been the only other witness to the negotiations leading to the second alleged sale.[68] A motion to quash the deposition of the informant was granted by the trial court.[69]

The appellate court found that:

> the defendant has not demonstrated how the deposition, and thus the disclosure, of the informant would have been relevant or helpful to the defense or essential to the fairness of the trial, since the role of the informant in the entire incident was to introduce the undercover officer to the defendant.[70]

Because the burden is upon a defendant to justify an exception to the general policy that prevents disclosure of an informant's identity,[71] the court in *Silva* held that the motion to quash the deposition was properly granted.[72] The opinion in *Silva* puts an impossible burden on the defendant.

Circumstances surrounding the two alleged sales were relevant

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[66]What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. 53, 59 (1957) (citations omitted).

[67]410 N.E.2d 1342 (Ind. Ct. App. 1980), *transfer denied*, April 22, 1981.

[68]*Id.* at 1344.

[69]*Id.* at 1344-45.

[70]*Id.* at 1345.

[71]*See* United States v. Alvarez, 472 F.2d 111 (9th Cir. 1973), *cert. denied*, 412 U.S. 921; Lewandowski v. State, 389 N.E.2d 706 (Ind. 1979); Gill v. State, 11 Md. App. 593, 275 A.2d 505 (1971); Oregon v. Cortman, 251 Or. 566, 446 P.2d 681 (1968) (on rehearing), *cert. denied*, 394 U.S. 951 (1969).

[72]410 N.E.2d at 1345.

to defendant's claim of entrapment.[73] The only evidence used by the prosecution to prove defendant's predisposition to sell marijuana was the description of circumstances surrounding the sales.[74] Mick Smith, the informant, was in a position to have personal knowledge of the facts used to determine guilt.[75] A stronger showing of relevance is not possible, as the defendant is not able to predict what the informant would say under oath. A defendant need not shoulder the impossible burden of showing in advance that an informant's testimony would be favorable.[76]

A procedure that should be adopted by Indiana courts for determining whether or not an informant's identity should be disclosed is that contained in proposed Federal Rule of Evidence 510(c)(2).[77] This rule would provide that when it appears that an informant may be able to give testimony necessary for a fair determination of guilt or innocence, the judge should give the government an opportunity to show *in camera* that there is not a reasonable probability the informer can give the testimony. The determination would ordinarily be made on the basis of affidavits. A procedure of this nature ensures that an informant's identity will not be unnecessarily disclosed and that a defendant will not be denied a critical witness due to the government's claim of privilege.[78]

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[73]IND. CODE § 35-41-3-9 (Supp. 1981) provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

[74]410 N.E.2d at 1345.

[75]See "Statement of the Facts," *id.* at 1344.

[76]*See* Price v. Superior Court of San Diego County, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970). A defendant need show only a reasonable possibility that the informer has personal knowledge of facts concerning the merits of the case. *See* People v. Kelly, 49 Cal. App. 3d 214, 122 Cal. Rptr. 393 (1975) *vacated on other grounds*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

[77]*See* J. WEINSTEIN, FEDERAL RULES OF EVIDENCE ¶ 510(01), at 510-11 (1981). This rule, which was not adopted, states:

> *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary for a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits.

Id.

[78]A procedure similar to that proposed by FED. R. EVID. 510(c)(2) has been adopted by some federal courts. *See* United States v. Howell, 514 F.2d 710 (5th Cir.

F. Opening the Door

The use of unconvicted acts of misconduct to dispell a false or misleading impression created by direct examination was upheld in *Haynes v. State*.[79] Extraneous acts of misconduct that have not been reduced to a conviction are generally inadmissible on the issue of guilt or innocence and may not be used to impeach the credibility of a witness.[80] Even acts of misconduct which have resulted in convictions are not admissible for purposes of impeachment unless the convictions are for crimes of an infamous nature or involve dishonesty or false statement.[81] However, these rules do not prevent presentation of evidence necessary to rebut a false impression created by direct examination.[82]

The appellant's wife in *Haynes* testified concerning police conduct when she and appellant were stopped by police for allegedly driving with defective brake lights. Although no criminal charges resulted from the incident, the appellant was searched, both were taken to the police station for interrogation, and the wife was offered a breathalyzer test.[83] On cross-examination the prosecutor was, over defense objection, permitted to ask, " 'And, Mrs. Haynes, was it not a fact that there were five pounds of marijuana in your car at the time?' "[84]

On appeal, the appellant raised two allegations of error based on this question. The appellant first claimed that the question interjected extraneous acts of misconduct into the case.[85] This claim was properly rejected by the court of appeals. As stated by the appellant on appeal, his wife's testimony concerning the incident was of-

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1975) (defendant and defense counsel both excluded from the hearing); United States v. Anderson, 509 F.2d 724 (9th Cir.), *cert. denied*, 420 U.S. 910 (1975) (defense counsel but not defendant permitted at hearing). The procedure has been upheld by federal courts against confrontation and due process challenges. United States v. Doe, 525 F.2d 878 (5th Cir. 1976); United States v. Rawlinson, 487 F.2d 5 (9th Cir. 1973).

[79]411 N.E.2d 659 (Ind. Ct. App. 1980).

[80]*See* Chambers v. State, 392 N.E.2d 1156 (Ind. 1979); Swan v. State, 268 Ind. 317, 375 N.E.2d 198 (1978); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980), *transfer denied*, June 3, 1980. *But see* Niemeyer v. McCarty, 221 Ind. 668, 51 N.E.2d 365 (1943). *See also* Karlson, *Evidence, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 359, 362-64 (1981).

[81]*See* note 48 *supra*.

[82]Gilliam v. State, 383 N.E.2d 297 (Ind. 1978); Baker v. State, 267 Ind. 646, 372 N.E.2d 1172 (1978); Pearish v. State, 264 Ind. 339, 344 N.E.2d 296 (1976); Martin v. State, 261 Ind. 492, 306 N.E.2d 93 (1973); Roby v. State, 173 Ind. App. 280, 363 N.E.2d 1039 (1977); McDonald v. State, 163 Ind. App. 667, 325 N.E.2d 862 (1975).

[83]411 N.E.2d at 663.

[84]*Id.*

[85]*Id.*

fered to show "that his wife and he were subjected to continuous police harassment and to bolster his contention that the police, through Sergeant Emmons, fabricated the marijuana charge for which he was being prosecuted."[86] His wife's direct examination did create the impression police subjected both to unusually severe treatment for a minor moving vehicle violation.

Where direct examination tells an incomplete story and thereby creates a false impression, otherwise inadmissible evidence may be used to complete the story and rebut the impression.[87] As stated by the court in *Haynes*, "[i]f this testimony left a false or misleading impression in the jurors' minds, then the prosecutor should have attempted to establish on cross-examination what actually precipitated the actions of the police. The prosecutor was free to refute this picture of harrassment painted by Mrs. Haynes on direct examination."[88] In *Gilliam v. State*,[89] the Indiana Supreme Court held that in order for testimony to open the door for evidence of otherwise inadmissible acts of misconduct it must leave the trier of fact with a false or misleading impression of the facts related.[90] Mrs. Haynes' direct examination met this test.

The appellant's second claim of error raises the issue of the basis an attorney must have for asking a question designed to impeach a witness on a collateral matter.[91] The court held that if a witness denies a question on cross-examination designed to impeach him on a collateral matter, the attorney must be prepared to dispute the denial of the question.[92] It cites Justice Jackson in *Michelson v. United States*,[93] that a prosecutor may not "ask a groundless question to waft an unwarranted inuendo [sic] into the jury box."[94] Counsel must, under this standard, have a reasonable basis for asking the question.[95] In *Haynes*, the court held that the prosecutor had,

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[86]*Id.* at 664.

[87]*See* note 82 *supra*.

[88]411 N.E.2d at 664-65.

[89]383 N.E.2d 297 (Ind. 1978). For further discussion of this case, see Karlson, *Evidence, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 257, 276-278 (1980).

[90]383 N.E.2d at 301.

[91]411 N.E.2d at 665.

[92]*Id.* (citing Marsh v. State, 387 N.E.2d 1346, 1348 (Ind. Ct. App. 1979), *reversed on other grounds*, 393 N.E.2d 757 (Ind. 1979)).

[93]335 U.S. 469 (1948).

[94]411 N.E.2d at 665 (quoting Michelson v. United States, 335 U.S. 469, 481 (1948)).

[95]The Indiana Supreme Court has written that "[a]n attorney should not contrive a cross-examination based on fictitious assumptions when to do so would only confuse the fact finder and impede the search for truth." Lowe v. State, 260 Ind. 610, 613, 298 N.E.2d 421, 423 (1973), *quoted in* 411 N.E.2d at 665.

reasonable cause to believe marijuana was found in appellant's vehicle during the incident in question.[96]

G. Opinion Testimony

1. Expert Witness Defined.—When is an expert not an expert witness was the issue decided by the Indiana Supreme Court in *McCall v. State*.[97] The defendant in *McCall* gave notice of his intent to present an insanity defense but refused to cooperate with two psychiatrists appointed by the court to examine him. As a sanction for this refusal, the trial court excluded testimony of a marriage counselor called by the defendant to give an opinion on defendant's sanity.[98] After voir dire examination, the trial judge concluded that the counselor, who held numerous academic degrees and had extensive schooling in psychology and psychiatry, was an expert witness.[99] Adopting the New York holding in *Lee v. County Court of Erie County*,[100] the trial judge held that the proper sanction for the defendant's refusal to cooperate with the court's expert witnesses was to bar testimony by the defendant's expert.[101] On appeal a bare majority of the supreme court rejected *Lee*[102] and also determined that *Lee* was improperly applied because the marriage counselor was not called to testify as an expert.[103]

The majority found the distinction between a lay and an expert witness, at least upon an issue of sanity, to lie in the foundation required to render the opinion admissible. The lay witness' testimony is admissible because of his particular experience with the person. An expert witness' testimony is admissible because of his special-

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[96]411 N.E.2d at 665. The record revealed that Mr. Hayne's attorney stated that the February 20 incident "involves something else and no arrest took place, but the car was searched and something was found." *Id.* at 665. The court also assumed that the prosecutor had access to police reports which specified the nature and quantity of the contraband found in the appellant's vehicle. *Id.*

[97]408 N.E.2d 1218 (Ind. 1980).

[98]*Id.* at 1219.

[99]*Id.* at 1219-20.

[100]27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971), *cert. denied*, 404 U.S. 823 (1971). *Lee* held that when a defendant refuses to cooperate with court appointed psychiatrists he is foreclosed from presenting expert testimony on the issue of insanity. Some federal courts would also bar lay testimony on the issue of insanity when a defendant refuses to cooperate with court appointed experts. *See* United States v. Malcolm, 475 F.2d 420 (9th Cir. 1973); United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); United States v. Baird, 414 F.2d 700 (2nd Cir. 1969); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[101]408 N.E.2d at 1219-20.

[102]*Id.* at 1220.

[103]*Id.* at 1221-23.

[104]*Id.*

ized knowledge of the subject of insanity. As the marriage counselor had been dealing with the defendant in a professional capacity for a long period of time, the majority opinion held that he was a lay witness because his testimony concerning the defendant's sanity was based upon personal observation of the defendant for purposes other than for preparation for trial.[104]

The majority opinion is incorrect in its determination that the defendant's witness was not called as an expert. It is well settled that an expert may base his testimony upon personal observation as well as facts made known to him at trial.[105] The true distinction between a lay and expert witness must take into consideration not only the basis of the testimony but also its content. An offer of proof made by the defendant indicated that the witness would, based on his observation of the defendant over a period of years, testify that the defendant was not able to discern right from wrong and could not conform his conduct to the law.[106] This testimony goes far beyond prior cases which have permitted lay witnesses to give a general opinion on a person's sanity.[107] The better rule would be to limit the use of specific opinions dealing with the legal standard for sanity in criminal cases to expert witnesses.

The majority opinion is also incorrect in its statement that:

> Expert witnesses are witnesses injected into a case, because of their expertise in a given field, either to assist the jury in understanding some technical subject not ordinarily within the ken of a lay person or to express an opinion, often hypothetically, upon a disputed issue, following a proper foundation, both as to his knowledge of the subject matter involved and the specifics of the particular case. *Expert opinions are manufactured expressly for trial.*[108]

The most effective expert opinions are not manufactured expressly for trial. They are created for use or treatment and testified to at trial.[109]

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[105]*See* Fischer v. State, 160 Ind. App. 641, 312 N.E.2d 904 (1974); Mutual Life Ins. Co. v. Jay, 112 Ind. App. 383, 44 N.E.2d 1020 (1942); *See also* FED. R. EVID. 703; C. MCCORMICK, *supra* note 7, § 14, at 31-34.

[106]408 N.E.2d at 1225 (Pivarnik, J., dissenting).

[107]*See* Lynn v. State, 392 N.E.2d 449 (Ind. 1979); Washington v. State, 390 N.E.2d 983 (Ind. 1979); Blake v. State, 390 N.E.2d 158 (Ind. 1979); Baum v. State, 264 Ind. 421, 345 N.E.2d 831 (1976).

[108]408 N.E.2d at 1221-22 (emphasis added).

[109]A manufactured expert witness lacks the credibility of a witness whom the defendant relied upon for treatment. Professor Jeans in his handbook on trial advocacy states:

The next step is to establish the expert's relation to the case. In many in-

2. Basis of Expert Testimony.—The appeal from a decision of the Industrial Board gave the court of appeals in *Duncan v. George Moser Leather Co.*[110] an opportunity to examine use of hearsay reports by expert witnesses. At his hearing before the Industrial Board, the appellant sought to introduce testimony from a rehabilitation counselor employed by the Indiana State Rehabilitation Services. The counselor's testimony was, in part, based upon reports from two physicians concerning their previous treatment of the appellant.[111] He did not have knowledge of the procedures used, the tests given, or the conclusions drawn by the physicians. The witness admitted that he had no expertise to verify the reliability or accuracy of the reports.[112]

In determining that his testimony insofar as it was based on hearsay medical reports was properly excluded, the court of appeals held that Indiana law imposes a three-part test to determine if an expert opinion is admissible when it is based on a report that is either not in evidence or inadmissible as substantive evidence due to the hearsay rule.

> In order for the opinion to be admissible (1) the expert must have sufficient expertise to evaluate the reliability and accuracy of the report, (2) the report must be of a type normally found reliable, and, (3) the report must be of a type customarily relied upon by the expert in the practice of his profession or expertise.[113]

Applying this test to the testimony of the appellant's expert witness, the court correctly determined that insofar as it was based on hearsay reports, it was properly excluded.[114]

Although the opinion of an expert witness may properly be based upon hearsay reports,[115] it may not be based upon reports whose re-

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> stances he will be a 'manufactured witness' who has been brought into the case at the instance of lawyers for specific litigation purposes and paid by them for such services. If this is the case it is advisable to disclose such facts to the jury at the outset. They will hear about them at some time and if left to cross-examination *the whole relationship might be depicted as unfair and sinister.*

J. JEANS, TRIAL ADVOCACY §12.13, at 283 (1975) (emphasis added).

[110]408 N.E.2d 1332 (Ind. Ct. App. 1980).

[111]*Id.* at 1342.

[112]*Id.* at 1343.

[113]*Id.*

[114]*Id.* at 1343-44.

[115]*See* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); Morris v. State, 266 Ind. 473, 364 N.E.2d 132 (1977), *cert. denied*, 434 U.S. 972 (1978); Smith v. State, 259 Ind. 187, 285 N.E.2d 275 (1972), *cert. denied*, 409 U.S. 1129 (1973); Rosenbalm v. Winski, 165 Ind. App. 378, 332 N.E.2d 249 (1975); FED. R. EVID. 703; C. MCCORMICK, *supra* note 7, § 15, at 34-36.

liability and accuracy he is unable to determine. As noted by the Ninth Circuit in *United States v. Sims*,[116] "the admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion."[117] When an expert is not able to determine the reliability of hearsay reports, his opinion may not be based upon them. If this were not the rule, the use of hearsay reports in criminal cases would violate a defendant's sixth amendment right to confrontation.[118]

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[116]514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975).

[117]514 F.2d at 149.

[118]U.S. CONST. amend. VI. *See* United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).