RECENT DEVELOPMENTS UNDER THE INDIANA RULES OF EVIDENCE

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INTRODUCTION

This past year was the third year for the Indiana courts under the new regime of the Indiana Rules of Evidence, which took effect on January 1, 1994. Paralleling the two-decades-old Federal Rules of Evidence and similar rules adopted by many states, the Rules have effected a major dislocation of Indiana's prior approach to evidence questions. The courts have thus had to re-evaluate the rationales for their common-law decisions as part of the process of determining the extent of the changes made by the Rules. The cases that came before the courts during the time period covered by this survey required the courts to adopt new approaches to issues spanning the spectrum of evidence law. Although the adaptation to the new Rules can be expected to continue over the coming years, the Indiana courts have already begun to chart an independent path in their interpretations of the text of the Rules, departing in some significant ways from the approaches taken by the federal courts and by other state courts using analogous evidence rules.

This Article surveys the major developments in Indiana evidence caselaw during the past year, organized according to the corresponding Articles in the Indiana Rules of Evidence.

I. SCOPE—RULE 101

The Rules (other than those with respect to privileges) do not apply in "[p]roceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings."[1] Rule 101(c)(2) seems to leave open the question of how evidentiary questions are to be handled in the enumerated proceedings. In *Greer v. State*,[2] the Indiana Court of Appeals essayed an answer to that question, but in doing so raised a host of other questions that remain unresolved.

Greer involved an appeal from a revocation of probation. During the revocation hearing, Greer's probation officer was the principal witness. The probation officer testified that Greer's father had informed him that Greer had been consuming alcoholic beverages, a violation of the probation terms. The officer further testified that he had then spoken with Greer, and that Greer had admitted to drinking. Although this testimony was plainly hearsay,[3] Greer's

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1. IND. R. EVID. 101(c)(2).

2. 669 N.E.2d 751 (Ind. Ct. App. 1996), *trans. granted*, No. 57S03-9610-CR-653 (Ind. Oct. 15, 1996).

3. Greer's statements to the probation officer were, of course, not hearsay because they were the statements of a party-opponent. IND. R. EVID. 801(d)(2)(A).

counsel failed to object, a failure that, Greer contended, denied him effective assistance of counsel.

The court acknowledged the argument that the Rules do not apply in probation revocation proceedings. The court concluded, however, that Rule 101(c)(2) did not mean that hearsay was admissible in such proceedings.[4] Instead, the court referred to Rule 101(a), which states that if the Rules do not address a specific evidentiary issue, common law or statutory law shall apply.[5] On the basis of this provision, the court concluded that the Rules did not evince an intent to eliminate all evidentiary rules in the proceedings enumerated in Rule 101(c)(2). The court then returned to its decision in *Payne v. State*,[6] in which the court had concluded that probation revocation proceedings were in the nature of civil proceedings, and that probationers were entitled to the same protection from hearsay evidence as civil litigants.[7]

It is unclear to what extent the court's rationale can be extended beyond its precise holding. The court is in all likelihood correct that Rule 101(c)(2) should not be read to eliminate all limits on the kinds of evidence that may be presented in the enumerated proceedings. The decision should not be read, however, to mean that the full panoply of evidentiary limitations created by Indiana common law prior to the adoption of the Rules must be observed in these proceedings.[8] Rather, Rule 101(a)'s exhortation to look to common law or statutory law probably should be read to require the courts to examine how the common law and statutory law treated the different types of proceedings listed in Rule 101(c)(2). In the particular issue that arose in *Greer*, the common-law rule had been that the protection from hearsay available to probationers was the equivalent of the protection available to civil litigants.[9] But that does not mean that such hearsay evidence would be inadmissible in a sentencing proceeding,[10] nor indeed does it mean that all evidence that is inadmissible in a civil case is similarly inadmissible in a probation revocation proceeding.[11] Each type of proceeding must be

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4. *Greer*, 669 N.E.2d at 755.

5. *See id.*

6. 515 N.E.2d 1141 (Ind. Ct. App. 1987).

7. *Id.* at 1144.

8. Indeed, one would expect that the admonition that the Rules do not apply would extend, not limit, the admissibility of evidence in the typical case.

9. *See Payne*, 515 N.E.2d at 1144. In this treatment of probation proceedings, Indiana courts differ significantly from federal courts, which allow hearsay evidence to be presented in supervised release revocation proceedings provided that the evidence bears sufficient indicators of reliability. *See, e.g.*, United States v. Pierre, 47 F.3d 241, 242 (7th Cir. 1995). The Federal Rules of Evidence, like the Indiana Rules, state that they do not apply in probation revocation proceedings. *See* FED. R. EVID. 1101(d)(3).

10. *See* Kostopoulos v. State, 654 N.E.2d 44, 47 (Ind. Ct. App. 1995) (citing Dillon v. State, 492 N.E.2d 661, 664 (Ind. 1986) (hearsay is admissible at sentencing).

11. *See, e.g.*, Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (Although the general rule is that a court may not take judicial notice of a different case, even if before the same court and between related parties, this rule is not strictly applied in probation revocation

evaluated on its own to determine the scope of the evidentiary rules to be applied.[12]

II. Character Evidence and Other Acts—Rules 404 and 405

The use of character evidence and acts other than those directly implicated in a particular proceeding presents some of the most difficult issues raised under the Indiana Rules of Evidence. Particularly in criminal cases, evidence of character or other acts can have a powerful impact on the jury, inviting jurors to draw the "forbidden inference" that, because the defendant is a "bad person" or engaged in other wrongful acts, he must have committed the crime with which he is charged.[13] Rule 404(a)(1) prohibits introduction of evidence concerning a criminal defendant's character unless the defendant raises the issue himself. Rule 404(b) states that other acts are not admissible to prove a person's character as a means of suggesting that the person acted in conformity with that character. The rule continues, however, that evidence of other acts "may . . . be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[14]

A. Motive

In years past, the Indiana Supreme Court, mindful of the danger posed by widespread use of other acts evidence, has cast a skeptical eye on arguments that

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proceedings.); Henderson v. State, 544 N.E.2d 507, 512-13 (Ind. 1989) (same).

12. *See, e.g.*, Rzeszutek v. Beck, 649 N.E.2d 673, 681 (Ind. Ct. App. 1995), *trans. denied* (hearsay admissible in small claims proceedings).

13. Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993). At the time *Hardin* was decided, the Indiana Supreme Court had already adopted Rule 404(b) of the Federal Rules of Evidence, displacing Indiana's common law approach to the admissibility of other acts evidence. *See* Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992).

14. Ind. R. Evid. 404(b). The courts frequently refer to the rule allowing admission of other acts for purposes other than to prove character as an "exception." *See, e.g.*, Johnson v. State, 671 N.E.2d 1203, 1208 n.7 (Ind. Ct. App. 1996), *trans. denied*; Bowen v. State, 671 N.E.2d 1182, 1189 (Ind. Ct. App. 1996), *vacated*, 680 N.E.2d 536 (Ind. 1997); Spires v. State, 670 N.E.2d 1313, 1315 (Ind. Ct. App. 1996); Poindexter v. State, 664 N.E.2d 398, 398-99 (Ind. Ct. App. 1996); Brown v. State, 659 N.E.2d 652, 656 (Ind. Ct. App. 1995), *trans. denied*. *See also* Stanage v. State, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996). Strictly speaking, this is incorrect—indeed, the Rule, if anything, provides for the general admissibility of other acts evidence, except when offered to show character in order to prove action in conformity therewith. *See* Lay v. State, 659 N.E.2d 1005, 1010 n.5 (Ind. 1995) (Sullivan, J.) ("Because Rule 404(b) only excludes evidence of prior bad acts when offered to show bad character or conformity therewith, it is, perhaps, mistaken to refer to a common scheme or plan 'exception.' . . . [T]he rule is generally inclusive."). In practical terms, however, the usage makes sense; it places on the proffering party the burden of establishing the evidence's admissibility. Given the danger that jurors will draw improper inferences from evidence of other acts, this allocation of burdens is appropriate. *See* Harris v. State, 597 A.2d 956, 961-62 (Md. 1991).

the evidence was proffered for a proper purpose. In particular, the court has held that, because intent is routinely at issue in criminal cases, the prosecution may use evidence of other acts to prove intent only where the defendant himself "goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent."[15] To conclude otherwise, the court reasoned, would allow the routine introduction of other acts evidence and raise the risk that jurors would frequently draw the "forbidden inference."[16] The court of appeals has gone further, holding that other act evidence may not be introduced for any of the purposes enumerated in Rule 404(b) unless the defendant has gone beyond denying the charged crime and affirmatively presents a claim contrary to the charge.[17] Recently, however, in an extraordinary unanimous decision, the supreme court offered a broad interpretation of the motive "exception," perhaps opening the door to the widespread use of other acts evidence.

In *Tompkins v. State*,[18] defendant Stevan Tompkins, a white man, was charged with the brutal robbery and murder of an African-American. At trial, the prosecution offered testimony from several witnesses concerning Tompkins' racism. Tompkins' accomplice testified that Tompkins was "prejudiced," and that he "like[d] to mess with black people."[19] One of Tompkins' co-workers recounted Tompkins' statement that he called a lane at his lakefront property "no nigger lane."[20] And Tompkins' onetime cellmate testified that Tompkins referred to the murder victim as a "nigger."[21]

Acknowledging that Rule 404(b) does not permit other acts evidence to show character, the court addressed the prosecution's argument that the contested evidence was relevant to the issue of motive.[22] The court concluded that Tompkins' use of the word "nigger" was irrelevant to that issue.[23] The court

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15. Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993). Although the court's concern over the possibility of widespread use of other acts evidence is understandable, it must be acknowledged that it is difficult to derive the court's interpretation from the text of Rule 404(b) itself.

16. *Id.*

17. *See* Reynolds v. State, 651 N.E.2d 313, 316 (Ind. Ct. App. 1995); Bolin v. State, 634 N.E.2d 546, 550 (Ind. Ct. App. 1994). Recently, the court of appeals reaffirmed this approach in *Sundling v. State*, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997).

18. 669 N.E.2d 394 (Ind. 1996).

19. *Id.* at 396.

20. *Id.*

21. *Id.*

22. The admissibility of this evidence was, for the most part, contested only on appeal. Prior to the trial, Tompkins filed a motion in limine to exclude the testimony that he had referred to the lane on his lake property as "no nigger lane;" the trial court denied the motion. Tompkins did not renew his objection at trial, nor did he object to the testimony that he was "prejudiced," "like[d] to mess with black people," and used the word "nigger." *Id.* Although the supreme court concluded that Tompkins had thereby waived his objections, it nevertheless addressed the merits of Tompkins' appeal. *Id.* at 396 n.7. Unless fundamental error is involved, this election seems to contradict Rule 103(a)(1) which requires a "timely objection" to preserve error.

23. The court did not address the admission of the assertion that Tompkins was

determined, however, that the assertion that Tompkins "like[d] to mess with black people" did tend to make it more likely that Tompkins had a motive to kill his victim.[24] And the court concluded that the evidence of the sign reading "no nigger lane" at Tompkins' property "demonstrated a desire to engage in violence against African-Americans at least in certain circumstances."[25] The court therefore concluded that these pieces of evidence were relevant to the issue of motive; the court further concluded that the trial court did not abuse its discretion by holding that the probative value of this evidence outweighed the danger of unfair prejudice to the defendant.[26]

The court's reasoning is problematic in at least three respects. First, the court seemed to treat the accomplice's statement that Tompkins "like[d] to mess with black people" as evidence of other acts, rather than as evidence of character. The lack of specificity about the manner in which Tompkins enjoyed "messing" with African-Americans, however, removes the evidence from the typical evidence of other acts—the evidence does not recount anything that Tompkins did at a particular time and place, but rather represents an assessment of Tompkins' proclivities. This evidence at best straddles the line between pure character evidence barred by Rule 404(a) and other acts evidence. And, because the distinction between use of character to prove action in conformity therewith and use of character to prove motive for action is virtually impossible to maintain, the court's decision to allow the admission of such evidence increases the likelihood that a jury will draw the inference prohibited by Rule 404(a).

Second, even if one were to accept that all the evidence was indeed other acts evidence, there is still the problem that its probative value—the extent to which it demonstrates a motive for murder—stems entirely from the fact that it shows Tompkins' character, because Tompkins' motive arose from his character. Under Rule 404(b), the state cannot argue that Tompkins did and said these things; therefore he is a racist; therefore he acted in conformity with his racist character when he murdered the victim. Why should the state then be able to argue that Tompkins did and said these things; therefore he is a racist; therefore he had a motive for murdering the victim; therefore he acted in accordance with his motive?

Third, and perhaps most troubling, the *Tompkins* decision paid inadequate heed to the racially-charged nature of the evidence the admission of which it permitted. As the supreme court acknowledged, courts will closely scrutinize any attempt to inject racial issues into a criminal proceeding.[27] Courts generally admit such evidence only in very unusual circumstances. Where the defendant's racial

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"prejudiced," a statement that clearly went to Tompkins' character rather than to any prior crimes, wrongs, or other acts. The court also did not discuss whether Tompkins' reference to his victim as "nigger" was admissible insofar as it showed a specific dislike of the victim.

24. "On the other hand, we believe the trial court could reasonably find [the accomplice's] statement that defendant liked to 'mess' with blacks to be evidence of motive for one could hardly imagine being messed with more than Berryhill was here." *Id.*

25. *Id.*

26. *Id.* at 397-98.

27. *Id.* at 396.

motivation is an *element* of the offense, for example, evidence regarding that bias is admissible.[28] Evidence of racial animus also may be admitted to rebut a defendant's alibi where it undermines the believability of that alibi.[29] And courts have, in very limited circumstances, admitted evidence of racial animus to establish motive.[30] Indeed, in *Kimble v. State*,[31] decided several months before *Tompkins*, the court of appeals upheld the admission of evidence of a defendant's membership in a racist organization to show motive for a robbery and felony murder committed with members of that organization.[32]

Evidence of membership in a violent racist organization is, however, more closely tied to the issue of motive than is the more abstract and distant evidence of racial animus at issue in *Tompkins*. In *Kimble*, for example, there was evidence that the defendant committed the crime with other members of the organization,[33]

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28. *See, e.g.*, United States v. Dunnaway, 88 F.3d 617, 619 (8th Cir. 1996) (holding that evidence of the defendant's use of racial epithets, belief that interracial relationships were wrong, and membership in a skinhead group was admissible in a prosecution for interference with a person's enjoyment of public facilities because of race); United States v. McInnis, 976 F.2d 1226, 1232 (9th Cir. 1992) (holding that evidence of the defendant's possession of swastikas and other racist materials was admissible where racial animus was an element of the charged offense). The courts should still treat this type of evidence very carefully. The evidence should not be of a general character, but should relate specifically to why the particular victim was chosen.

29. *See, e.g.*, State v. Grayson, 546 N.W.2d 731, 736-37 (Minn. 1996) (concluding that evidence that the African-American defendant stated that he "hated" white women and referred to them as "bitches" was admissible to rebut the defendant's claim that he had been visiting the white, female murder victim socially). The *Tompkins* court cited *Grayson* for the proposition that evidence of racial bias was sometimes relevant, without focusing on the context of the *Grayson* decision. *See Tompkins*, 669 N.E.2d at 397. It is, of course, undisputable that evidence of Tompkins' racial bias was logically relevant to the broad issue of Tompkins' guilt. But sensitivity to the inflammatory nature of evidence relating to racial bias, when combined with the strictures of Rule 404, requires that the court carefully examine the fit between the proffered evidence and the purpose for which it is offered, to ensure that the evidence is legally relevant to an issue that is properly part of the case. Indiana has recognized the distinction between the logical relevance of character evidence and the legal relevance of that evidence. *See* Lannan v. State, 600 N.E.2d 1334, 1337 (Ind. 1992).

30. *See, e.g.*, O'Neal v. Delo, 44 F.3d 655, 661 (8th Cir. 1995) (concluding that evidence of the defendant's membership in the Aryan Brotherhood, a racist prison organization, was admissible to show the defendant's motive for killing a black inmate). *O'Neal* should be read with caution; the court only decided that admitting that evidence against him did not deprive him of a fair trial.

31. 659 N.E.2d 182 (Ind. Ct. App. 1995), *trans. denied.*

32. *Id.* at 184-85.

33. *Kimble* is clearly distinguishable from *Tompkins*. The evidence in *Kimble* that the defendant "considered himself an 'official' member of the White Brotherhood, because he had committed a crime against the black race" does show racist character, but it also clearly shows a motive apart from his character, namely, a desire to become a full-fledged member of the group. Where the evidence raises the possibility of the jury drawing a permissible influence and an

that the victim was selected specifically because of her race, and that the defendant subsequently took pride in having committed a crime against an African-American.[34] Although the supreme court has eliminated the common law doctrine of res gestae, under which evidence of acts that formed part of an "uninterrupted transaction" with the charged offense was admissible,[35] it remains true that proximity in time of other acts, if otherwise admissible under Rule 404(b), to the charged offense may increase the probative value of the evidence and thus tip the scales of the Rule 403 test toward admissibility.

In *Tompkins*, in contrast, the evidence that Tompkins "like[d] to mess with black people" and had a racist sign on his lakefront property was tied to his offense only by the fact that his victim was African-American. The *Tompkins* decision thus appears not only to open the door to evidence linked to motive only in a very broad sense, but also to allow such evidence in the context of an accusation of racial animus. This accusation, more than most, invites the jury to draw the "forbidden inference" that because the defendant has a bad character[36] (and Tompkins was undeniably a despicable human being), the defendant committed the crime for which he stands accused.[37]

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impermissible influence, Rule 404(b) operates to admit the evidence, subject, of course, to Rule 403. *See* Cliver v. State, 666 N.E.2d 59, 62-63 (Ind. 1996).

34. *Kimble*, 659 N.E.2d at 185.

35. Swanson v. State, 666 N.E.2d 397 (Ind. 1996). It is interesting to note that in *Swanson*, the court rejected the defendant's argument that evidence of what he did to the victim on the day of the murder was governed by Rule 404(b). The court stated, "The paradigm of such inadmissible evidence is a crime committed on another day in another place . . . ." *Id.* at 398. *Swanson* also provides a useful reminder to practitioners: a party on appeal may argue a different basis for the admissibility of evidence than it did at trial if that party won below. *Id.*

36. In *Tompkins*, the prosecution *invited* the jury to make just that inference. "[T]he prosecutor attempted to use the evidence of racial bias to urge the jury to convict, telling the jury that the defendant was the kind of a person who committed murder out of 'hatred, prejudice, or just plain disrespect for human life.'" *Tompkins*, 669 N.E.2d at 398. One wonders whether the holding in this case can be squared with *Johnson v. State*, 665 N.E.2d 502 (Ind. 1995). In *Johnson*, the court reversed a conviction where the prosecution made a similar argument to the jury. *Id.* at 505.

37. Not every case involving evidence of other acts to prove motive is as difficult as *Tompkins*. In *Taylor v. State*, 659 N.E.2d 535 (Ind. 1995), for example, the defendant was accused of murdering the daughter of his longtime girlfriend. The prosecution offered evidence that the murder victim had filed charges of molestation, which had led to an indictment, against the defendant. The defendant argued that the evidence of the indictment was improper character evidence, but the supreme court rejected the argument, concluding that the evidence was probative of a motive to murder. This result is clearly correct. The evidence here did not simply invite the jury to conclude that because the defendant had been accused of other crimes in the past, he was a bad person and, as a bad person, must have committed the crime of which he was presently accused. Rather, the evidence suggested that the defendant committed the murder to escape prosecution, a motive that had nothing to do with the defendant's character. *See supra* note 33.

B. Plan

In contrast to the seemingly expansive approach to admitting evidence of other acts to demonstrate motive, the Indiana Supreme Court emphasized a narrow interpretation of the Rule's admission of other acts evidence to show a plan, and in doing so distinguished Rule 404(b) from Indiana's prior common-law practice. In *Lay v. State*,[38] the defendant was charged with dealing in LSD within 1000 feet of a school. Over the defendant's objection, the trial court allowed testimony of uncharged drug sales during the two months before the charged offense. In an opinion announcing the result for the court, Justice Sullivan analyzed the evidence under the common-law rule allowing evidence of uncharged acts to show a "common scheme or plan" and concluded that the prior drug deals were sufficiently similar and related to the charged offense to fall within the common-law rule.[39] Although the conclusion that the evidence was admissible drew a majority of the court, Justice Sullivan's reasoning did not.

Justice Selby concurred in the result without opinion, and a majority of Justice DeBruler, concurring in the result, and Chief Justice Shepard, with whom Justice Dickson joined, dissenting, concluded that Rule 404(b)'s admission of evidence of other acts to show a plan was "a narrower exception than our old rule, which tended to degenerate into an all-purpose excuse for admitting pretty much any old prior misconduct."[40] Although the multiplicity of opinions prevented a united court from exploring further the parameters of Rule 404(b)'s admission of other acts evidence to show a plan, it is plain that the court will no longer consider arguments based on its pre-Rules jurisprudence in this area.[41]

C. Evidence of the Character of the Victim—Rule 404(a)(2)

Rule 404(a)(2) allows a criminal defendant to offer "evidence of a pertinent character trait of the victim of a crime;" once the defendant has raised the issue, the prosecution is may also introduce evidence of the victim's character to rebut the defendant's proof.[42] In addition, in a homicide case the prosecution is permitted to introduce evidence of the victim's peaceful character to rebut evidence that the victim was the initial aggressor.[43] Although the Indiana Supreme Court did not have occasion to address this provision of Rule 404(a) during 1996, the court of appeals issued two significant opinions addressing the scope of a

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38. 659 N.E.2d 1005 (Ind. 1995).

39. *Id.* at 1010.

40. *Id.* at 1015 (Shepard, C.J., dissenting). Chief Justice Shepard and Justice Dickson asserted that the evidence of the defendant's prior drug sales was inadmissible under Rule 404(b), and Justice DeBruler concluded that the testimony regarding the prior sales was "probative of a discrete and special criminal plan" and was therefore admissible. *Id.* at 1015 (DeBruler, J., concurring).

41. *See* Spires v. State, 670 N.E.2d 1313, 1315 & n.1 (Ind. Ct. App. 1996) (stating that analysis of admissibility of uncharged prior marijuana sales comes from the *Lay* dissent).

42. IND. R. EVID. 404(a)(2).

43. *See id.*

defendant's right to introduce evidence of the victim's character.

In *Johnson v. State*,[44] the court concluded that although a criminal defendant may introduce evidence of a pertinent character trait of the victim, the defendant may do so only through opinion or reputation testimony.[45] Evidence of specific acts by the victim is only admissible on cross-examination or where the victim's character is an essential element of a defense.[46]

The *Johnson* court also emphasized that the right of a defendant to introduce evidence of a victim's character exceeds the prosecution's ability to introduce evidence of the defendant's character and that the defendant's injection of the victim's character into the case does not open the door to similar evidence of the defendant's character by the prosecution.[47] *Johnson* involved a murder which occurred during a fight. The State argued that once Johnson introduced evidence that his victim had a violent character, the State had an equivalent right to introduce evidence that the defendant had a prior record of fighting to show that the defendant had an aggressive character.[48] The court disagreed, holding that Rule 404(b) prohibits the use of uncharged acts to show bad character, and that the State may rebut evidence of the victim's aggressive character only with evidence that the victim was peaceful, not with evidence of the defendant's aggressive tendencies.[49]

The court confronted a more difficult issue in *Williams v. State*.[50] There, the defendant, accused of attempted criminal deviate conduct and criminal confinement, claimed in his defense that the victim had consented to an exchange

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44. 671 N.E.2d 1203 (Ind. Ct. App. 1996), *trans. denied.*

45. *Id.* at 1207.

46. *See id.*; IND. R. EVID. 405(b). It is difficult to imagine a situation in which a victim's character constituted an essential element of a defense. The courts have tended to apply the "essential element" requirement strictly. "The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation." United States v. Keiser, 57 F.3d 847, 856 (9th Cir.), *cert. denied*, 116 S. Ct. 676 (1995). Thus, the federal courts and some state courts have held, for example, that a victim's violent character is not an essential element of the defense of self-defense. *See, e.g., id.*; Perrin v. Anderson, 784 F.2d 1040, 1045 (10th Cir. 1986); State v. Alexander, 765 P.2d 321, 324 (Wash. Ct. App. 1988). Other state courts, however, relying on their states' definitions of self-defense, have held that a victim's aggressive character *is* an essential element of the of the defense. *See, e.g.*, Gonzalez v. State, 838 S.W.2d 848, 859 (Tex. App. 1992, no writ).

47. *Johnson*, 671 N.E.2d at 1207.

48. *Id.* at 1209.

49. The court's holding meant that the trial court's admission of evidence of Johnson's aggressive character was error. The court concluded, however, that the error was harmless in light of the substantial evidence establishing the defendant's culpability and disproving his claim of self-defense. *See id.* at 1208.

50. 669 N.E.2d 178 (Ind. Ct. App. 1996), *vacated and rev'd*, No. 44S02-9706-CR-355, 1997 WL 302398 (Ind. June 6, 1997). [Eds. Note: The discussion of the court of appeals decision is somewhat moot; it has, however, been retained for its insights into this area of the law.]

of sex for cocaine. To bolster his defense, the defendant offered the testimony of a friend of the victim, to the effect that the victim was addicted to cocaine and routinely performed sexual acts in exchange for cocaine or money.[51] The trial court refused to allow the proffered testimony, asserting that it was irrelevant; the court of appeals disagreed and reversed the defendant's conviction.[52]

Williams was a difficult case because it lay uncomfortably at the intersection of Rule 404(a)(2), Rule 412, and the defendant's constitutional right to introduce evidence that is material and favorable to his theory of defense.[53] Whereas Rule 404(a)(2) allows the defendant broad latitude to introduce evidence of the victim's character where pertinent, Rule 412 drastically limits the defendant's ability, in a sex offense case, to introduce evidence of the victim's sexual history. Rule 412 bars evidence of a victim's or witness' past sexual conduct except:

(1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
(2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
(3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
(4) evidence of conviction for a crime to impeach under Rule 609.[54]

Rule 412 cannot override the defendant's right to present a defense or confront his accusers. The extent to which this protection permits a defendant to introduce evidence of a victim's prior sexual conduct is uncertain. A number of courts, however, have concluded that the Constitution requires that a defendant be allowed to show that the victim engaged in a pattern of sexual behavior in circumstances highly similar to those underlying the criminal charge.[55]

Williams addressed both the applicable rules and the constitutional issue. First, treating the evidence of the victim's addiction to cocaine as an issue separate from the evidence of her prior sexual conduct, the court determined that the evidence was "extremely probative of Williams's consent defense that the victim had agreed to have sex with the men in exchange for cocaine or money."[56] This portion of the opinion drew a sharp dissent from Judge Staton, who asserted that

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51. *Id.* at 181.

52. *Id.* at 181-82.

53. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). *See also* Montana v. Egelhoff, 116 S. Ct. 2013, 2021-22 (1996) (characterizing *Chambers* as "a fact-intensive case").

54. IND. R. EVID. 412(a) .

55. *See* State v. Vaughn, 448 So. 2d 1260, 1262 (La. 1983); Davis v. State, 546 N.W.2d 30, 33-34 (Minn. 1996); State v. Hudlow, 659 P.2d 514, 520 (Wash. 1983) (en banc). *See also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.16 (1995) ("A defendant may also have a constitutional right to prove a *pattern* of distinctive, consensual sexual behavior by the alleged victim that is highly similar to the facts of the incident being charged.").

56. *Williams*, 669 N.E.2d at 182. This observation shows that character evidence is often logically relevant. The real question is its legal relevance.

evidence of the victim's character under Rule 404(a) was admissible only in cases of battery and homicide and other cases in which self-defense and the victim's propensity for violence is at issue, as it had been under the common law.[57] Judge Staton conceded that Rule 404(a) contained no such explicit restriction, but argued that in the absence of such a restriction, the broad admission of evidence concerning the victim's character would lead to acquittals based not on evidence of the defendant's acts but on the fact that the victim was a bad person who "got what [s]he deserved."[58]

Second, the court addressed the applicability of Rule 412 and the Constitution to the proffered evidence of the victim's sexual history. The court noted that Williams conceded the inadmissibility of the proffered evidence under Rule 412.[59] The court concluded, however, that under the circumstances of the case, Rule 412 must yield to the constitutional right of confrontation. The court adopted the West Virginia Supreme Court's analysis of the conflict between Rule 412 and the Confrontation Clause:

> We would suggest that evidence of consensual sexual activities with others, not specifically and directly related to the act of which a victim complains, should never be admissible; and that such evidence, that is specifically, directly related to the act for which a defendant stands charged, must be of a quality that its admission is necessary to prevent manifest injustice and therefore outweigh the State's interest in protecting persons who have been sexually abused, from attempts at besmirchment of their character by ones who have trespassed upon their bodies.[60]

Having stated the test, the court in cursory fashion concluded that the evidence of the victim's exchanges of sex for cocaine or money should be admitted on retrial.[61]

To the extent that the *Williams* decision is troubling, it is principally because of the cursory nature of its analysis. Certainly, the proffered testimony that the victim regularly engaged in acts of prostitution in exchange for cocaine or money to buy cocaine appears highly probative of the defendant's theory of the case. But the court did not carefully analyze the fit between the proffered testimony and the defendant's version of his encounter with the victim. Courts typically have required that "[t]o qualify as a pattern of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects."[62] Even small

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57. *Id.* at 183-84 (Staton, J., dissenting).

58. *Id.* at 184-85 (quoting 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 193 (John W. Strong ed., 4th ed. 1992)).

59. *Id.* at 182 n.3.

60. *Id.* (quoting State v. Green, 260 S.E.2d 257, 264 (W. Va. 1979)). The confrontation rights guaranteed by the Sixth Amendment and article I, section 13 of the Indiana Constitution are different. *See* Owings v. State, 622 N.E.2d 948, 950 (Ind. 1993); Hurt v. State, 578 N.E.2d 336, 337 (Ind. 1991). Therefore, practitioners would be well advised to raise arguments based on the Indiana Constitution in these cases.

61. *Williams*, 669 N.E.2d at 182 n.3.

62. Davis v. State, 546 N.W.2d 30, 34 (Minn. 1996) (citing cases).

differences between the alleged prior sexual conduct and the conduct for which the defendant seeks to offer a defense have been deemed sufficient to exclude the evidence of prior sexual conduct.[63] The Indiana Court of Appeals may have undertaken such an analysis before reaching its decision, but it did not detail the analysis in its opinion.

III. Character of a Witness—Rule 609

In the sole case to address the use of a prior conviction to impeach a witness, the supreme court held that where Rule 609(a)(1) was concerned, the court would look only to the offense of conviction, rather than to the underlying conduct, to determine whether the offense fell within the enumerated categories. In *Cason v. State*,[64] the defendant, on trial for murder, attempted to challenge the credibility of one of the numerous witnesses who had identified him as the perpetrator by introducing evidence that the witness had been convicted for assisting a criminal. Assisting a criminal is not among the offenses enumerated in Rule 609(a)(1), an indisputable fact that the defendant readily conceded. The defendant contended, however, that the original charge against the defendant had been robbery, a conviction of which would properly be admissible under Rule 609(a)(1). The supreme court declined the invitation to look to the conduct underlying the offense of conviction, concluding that it could do no more than speculate as to whether it would have been possible to establish the elements of robbery beyond a reasonable doubt. The supreme court therefore concluded that it was not error to prevent the defendant from using the witness's prior conviction to impeach.[65] In doing so, the supreme court implicitly distinguished Rule 609(a)(1) from Rule 609(a)(2), which allows impeachment through evidence of prior offenses that involved dishonesty or deceit. Under that rule, the court has held, it is proper to look to the conduct underlying the offense of conviction to determine if the crime was one involving dishonesty or deceit.[66]

IV. Experts

A. Qualification

Rule 702(a) allows expert testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education."[67] The Indiana courts this year had little opportunity to explore the extent of the showing necessary to demonstrate sufficient knowledge, skill, experience, training, or education to qualify as an expert; rather, in most cases where there was a challenge to a proposed witness's expertise, the proper conclusion was readily apparent. For

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63. *See id.*
64. 672 N.E.2d 74 (Ind. 1996).
65. *Id.* at 75.
66. *See In re* Sheaffer, 655 N.E.2d 1214, 1217 (Ind. 1995).
67. Ind. R. Evid. 702(a).

example, in *Koziol v. Vojvoda*,[68] a case arising out of an automobile accident, the plaintiff sought to prevent the investigating police officer from offering an opinion as to the cause of the accident that would have laid fault on a non-party. The court concluded that the police officer was qualified to give an expert opinion, based on his eight years of experience in accident investigation, including investigation of over 3000 accidents, and his attendance at several training sessions and seminars in accident reconstruction.[69]

B. Reliability

The extent to which a scientifically-based opinion must be shown to rest on a reliable methodology has been a controversial issue for as long as scientific experts have testified.[70] Federal Rule of Evidence 702 makes no explicit reference to reliability. In 1993, however, the U.S. Supreme Court held that Rule 702 allowance of expert testimony based on "scientific, technical, or other specialized knowledge" did incorporate a requirement of reliability.[71]

Unlike the Federal Rule, Indiana's Rule 702 expressly requires that the proponent of scientific expert testimony satisfy the trial court "that the scientific principles upon which the expert testimony rests are reliable."[72] Indiana's Rule, then, might be thought to incorporate a different standard of reliability, perhaps a more stringent one, than the Federal Rule. In *Steward v. State*,[73] however, the Indiana Supreme Court stated that "the federal evidence law of *Daubert* and its progeny is helpful to bench and bar in applying Indiana Rule of Evidence 702(b)."[74] Providing little additional guidance on the issue of scientific reliability, the *Steward* court left elaboration of the test to subsequent cases.

During the survey period, the supreme court has had little opportunity to refine the test of scientific reliability.[75] The court of appeals, however, has drawn

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68. 662 N.E.2d 985 (Ind. Ct. App. 1996).

69. *Id.* at 990. The court also noted that the police officer had sufficient information available to allow him to render an opinion that would be helpful to the jury. In particular, the officer had interviewed those involved in the accident, was familiar with the area where the accident occurred, and was able to observe the scene of the accident shortly after it occurred. *Id.* at 990-91.

70. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Ct. App. 1923) (concluding that expert testimony based on scientific evidence is not admissible unless the method is "sufficiently established to have gained general acceptance in the particular field in which it belongs").

71. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90 (1993).

72. IND. R. EVID. 702(b). Although the federal rule does not explicitly state that scientific reliability must be demonstrated before expert testimony will be permitted, the United States Supreme Court has interpreted the federal rule as requiring such a showing in cases where an expert's scientific methods are challenged. *See Daubert*, 509 U.S. at 590-91.

73. 652 N.E.2d 490 (Ind. 1995).

74. *Id.* at 498. *Compare* McGrew v. State, No. 86S05-9705-CR-320, 1997 WL 370939, at *1 (Ind. July 8, 1997) ("[W]e find *Daubert* helpful, but not controlling.").

75. The supreme court did decide one case involving a defendant accused of child molesting in which, as in *Steward*, the prosecution sought to introduce expert testimony of the "common behavior characteristics" of sexually abused children to show that the alleged child victims had

extensively on *Daubert* and its progeny to address the admissibility of expert medical testimony. In *Hottinger v. Trugreen Corp.*,[76] the plaintiff claimed that she suffered serious neurological damage following exposure to a pesticide manufactured by the defendant. Over the defendant's objection, the plaintiff introduced expert testimony from a doctor that tended to show causation. Relying on *Daubert*, the court of appeals set forth three factors to be considered in assessing the reliability of proffered scientific expert testimony: whether the theory or technique used can be empirically tested, whether the theory or technique has been subject to peer review and publication, and the extent to which the theory has gained acceptance.[77] Examining these factors, the court determined that the expert doctor had used sound diagnostic practices and that his conclusions regarding causation were bolstered by a number of publications that had been subject to peer review.[78] The testimony therefore met Rule 702(b)'s requirement of reliability.

C. Relevance—the Question of "Fit"

Reliability of methodology is not the only requirement for the admission of expert testimony. The *Daubert* decision also emphasized that proffered evidence must "fit" the case—it must be relevant to an issue that is genuinely in dispute.[79] Cases in which the fit of expert testimony is challenged may raise one of two problems. The first problem is definitional: has the proffering party sufficiently set forth an explanation as to why the expert's testimony will be helpful to the trier of fact? The second problem is more substantive: is the purpose set forth by the proffering party one that the both the substantive law and the law of evidence regard as legitimate? Cases involving both of these problems arose in the past year in Indiana courts.

In *Vega v. State*,[80] the court excluded expert testimony that might have been permitted had the proffering party better explained the purpose of the proffered testimony. In that case, the defendant, Anita Vega, was charged with involuntary manslaughter arising out of the death of her three-year-old daughter. Although the death had occurred in 1969 or 1970, the chief witness, the deceased girl's sister, did not come forward until 1992. At trial, the defendant offered the testimony of

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indeed suffered sexual abuse. *See* Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995). The procedural posture of the case, however, meant that the court had little opportunity to expand on its previous work. In *Fleener*, the defendant had objected to the State's proffered expert testimony, and the trial court had allowed the State to proceed with its evidence without requiring the threshold showing of reliability called for by Rule 702(b). The supreme court concluded that this was error. *See id.* at 1141. Rather than reverse or remand for a new trial, however, the court held that the error was harmless. *See id* at 1141-42.

76. 665 N.E.2d 593 (Ind. Ct. App. 1996), *trans. denied.*

77. *Id.* at 596. These factors should not be regarded as exclusive. The *Hottinger* court emphasized that "the inquiry envisioned by Rule 702 is . . . a flexible one." *Id.* (quoting *Daubert*, 509 U.S. at 593).

78. *Id.* at 597.

79. *Daubert*, 509 U.S. at 591.

80. 656 N.E.2d 497 (Ind. Ct. App. 1995), *trans. denied.*

an expert psychologist, a specialist in human memory. During preliminary questioning, the trial judge asked the expert if he was able to predict whether a witness's memory was accurate. The doctor responded that he could not. Concluding that the doctor's testimony would not aid the jury in its consideration of any relevant factual issue, the trial court refused to allow the testimony.

On appeal, the defendant argued that the doctor's testimony would have aided the jury by challenging their assumptions about the accuracy of memories; in particular, she contended, the expert would have shown that memories of stressful or traumatic events tend, contrary to common belief, to be less accurate than memories of more pleasant occurrences. The court of appeals did not address the question of whether, given the defendant's new explanation of the expert testimony's import, the trial court should have permitted the jury to hear the testimony. It simply noted that the defendant had not offered that rationale to the trial court and concluded that the trial court had not abused its discretion in refusing to allow the testimony.[81]

Even if the defendant is able to explain in a comprehensible manner why expert testimony should be permitted, the court will not allow the testimony unless the purpose is a proper one under both the substantive law and the law of evidence. Two cases illustrate the pitfalls that lie in wait for unsuspecting counsel.

In *Buzzard v. State*,[82] the defendant was tried on five counts of child molesting. Over the defendant's objection, the prosecution presented the testimony of an expert psychologist who had examined neither the defendant nor any of the child victims. The expert testified, rather, about the personality profile of a typical child molester, who, according to the expert's testimony, could be expected to molest anywhere between five and eight hundred children over the course of his lifetime. In closing argument, the prosecutor argued that the defendant met the profile described by the expert and urged the jury to convict in order to prevent the defendant from molesting again.

On appeal from the defendant's conviction, the court of appeals concluded that the expert's testimony had been admitted for an improper purpose: "Whether based on a personality profile or not, expert testimony is generally not an appropriate way to prove defendant's character for a particular trait."[83] The attempt to prove the defendant's guilt by offering evidence of his character, the court suggested, would have said nothing about whether the acts of which the defendant was accused actually occurred, and would have run the risk of usurping the jury's role as factfinder.[84] That the expert had not examined the defendant

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81. *Id.* at 502-03. This case is really about a failure to give a proper offer of proof. *See* IND. R. EVID. 103(a)(2).

82. 669 N.E.2d 996 (Ind. Ct. App. 1996).

83. *Id.* at 999. Of course, the Indiana Rules of Evidence further restrict evidence of a defendant's character, of whatever kind, by prohibiting evidence of character to be used to show that the defendant acted in conformity therewith. *See* IND. R. EVID. 404(a); *see also* Shaffer v. State, 674 N.E.2d 1, 10 (Ind. Ct. App. 1996) (Robertson, J., dissenting), *trans. denied* (criticizing use of expert character evidence); *infra* notes 13-41 and accompanying text.

84. *Buzzard*, 669 N.E.2d at 1000 (citing State v. Clements, 770 P.2d 447, 454 (1989)).

simply reinforced the irrelevance of her testimony. The court of appeals therefore reversed and remanded for a new trial.

In *McClain v. State*,[85] the court faced a slightly different problem. There, the defendant, charged with aggravated battery, two counts of battery causing bodily injury, and two counts of resisting arrest, initially gave notice of an intent to present an insanity defense, as required by Indiana law,[86] but then withdrew the notice. The defendant nevertheless sought to present expert testimony suggesting that sleep deprivation had robbed him of the capacity to form the criminal intent necessary for guilt. On an interlocutory appeal, the court of appeals determined that the defendant's automatism defense was merely a form of insanity defense, which the defendant had withdrawn; therefore, even though the proffered testimony fit the issue as framed by the defendant, the evidence was inadmissible because the issue was one that, by statute, was not properly before the court.[87] The Indiana Supreme Court reversed, concluding that automatism did not fall within the statutory category of a "mental disease or defect" but rather was a transitory condition, similar to intoxication. Because that condition bore on the defendant's ability to form a criminal intent, the proffered testimony was relevant to an issue that was properly part of the case and thus was admissible.[88]

D. Basis of Opinion Testimony

An expert may base her opinion on facts or data that would themselves be inadmissible, provided that the facts or data are of a type upon which experts in the particular field reasonably rely.[89] In *Faulkner v. Markkay of Indiana, Inc.*,[90] the Indiana Court of Appeals cautioned that Rule 703 must not be used as a means to place inadmissible evidence before the jury.

Faulkner was a slip-and-fall case in which the plaintiff presented an expert chiropractor to render an opinion about the nature and extent of her injuries. During his testimony, the chiropractor attempted to restate the conclusions of a number of examining physicians, on whose reports he purportedly had relied in forming his opinion. The court of appeals upheld the trial court's exclusion of the testimony: "We cannot allow an expert's reliance on hearsay to be employed as a conduit for placing the physicians' statements before the jury. The expert witness must rely on his own expertise in reaching his opinion and may not simply repeat opinions of others."[91]

The refusal to allow an expert to restate the opinions of others, rather than presenting her own opinion, is consistent with both Indiana's pre-Rules common

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85. 670 N.E.2d 911 (Ind. Ct. App. 1996), *vacated and rev'd*, 678 N.E.2d 104 (Ind. 1997).
86. *See* IND. CODE § 35-36-2-1 (1993).
87. *McClain*, 670 N.E.2d at 915.
88. McClain v. State, 678 N.E.2d 104, 108-09 (Ind. 1997).
89. IND. R. EVID. 703.
90. 663 N.E.2d 798 (Ind. Ct. App. 1996), *trans. denied.*
91. *Id.* at 801 (footnote omitted).

law[92] and practice under the Federal Rules,[93] and thus is relatively uncontroversial. Two aspects of the opinion, however, deserve further comment. First, the court went beyond a straightforward application of the general rule; it further suggested that a chiropractor could not possibly form an opinion based on medical reports written by physicians, because chiropractors lack the education, training, and expertise of medical doctors.[94] Indeed, the court went so far as to opine that chiropractors generally should not be permitted to testify as experts in cases involving physicians.[95] As Judge Sullivan noted in his concurring opinion, this conclusion seems overbroad—although chiropractors have more limited education, training, and expertise than medical doctors, there may be cases falling within the particular expertise of chiropractors in which chiropractors may properly be qualified to rely on physicians' reports in forming their opinions.[96] Although the court was undoubtedly correct that there will be occasions in which a purported expert's education, training, and expertise are so clearly deficient that the purported expert should not be permitted to render an opinion based on materials prepared by properly qualified individuals, that concern may in some cases simply go to the weight that the factfinder may reasonably give the evidence.

Second, *Faulkner* cited a number of Indiana cases for the proposition that a doctor may explain how otherwise inadmissible medical reports formed the basis of the doctor's opinion.[97] The court of appeals noted that these cases involved physicians testifying about the reports of other physicians[98]—a proper distinction if one accepts the court's view of the differences between the education, training, and expertise of chiropractors and physicians. But the court also noted cryptically that the cases on which *Faulkner* relied were decided before Indiana adopted the Rules.[99] It is unclear what to make of this comment.[100] It should not, however, be read to foreclose all inquiry into the basis for an expert's opinion, particularly on cross-examination.[101] At this point, the extent to which an expert should be permitted to testify about how inadmissible reports assisted her in forming an opinion should be regarded as an open question.

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92. *See* Miller v. State, 575 N.E.2d 272, 274-75 (Ind. 1991).

93. *See, e.g.*, *In re* James Wilson Assoc., 965 F.2d 160, 172-73 (7th Cir. 1992).

94. *Faulkner*, 663 N.E.2d at 801.

95. *Id.* (citing Stackhouse v. Scanlon, 576 N.E.2d 635, 639 (Ind. Ct. App. 1991)).

96. *Id.* at 802 (Sullivan, J., concurring).

97. *See id.* at 801 n.5 (citing cases).

98. *Id.*

99. *Id.*

100. This is particularly so because the court's opinion itself is replete with citations to pre-Rules cases.

101. *See* IND. R. EVID. 612(c) (allowing party to introduce into evidence the materials which relate to expert's testimony on cross-examination).

V. HEARSAY

A. Purpose for Offering Out-of-Court Statement

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[102] The Rules create a three-tiered inquiry into whether an out-of-court statement is admissible. First, the court must ask whether the statement is being offered to prove the truth of the matter asserted. If it is not, then the statement is not hearsay and is admissible. Second, if the statement is being offered for the truth of the matter asserted, the court should ask whether the statement falls within the categories of statements that are defined as non-hearsay by Rule 801(d). Finally, if the statement is hearsay, the court must ask whether the statement is nevertheless admissible under Rule 803 or Rule 804.

In making the initial inquiry, the courts have proven quite willing to accept arguments that proffered out-of-court statements go to issues other than the truth of the matter asserted. In *Grund v. State*,[103] for example, the court allowed the defendant's sister, Darlene, to recount a statement by the defendant's daughter, Tanelle, about the defendant's whereabouts at the time that the prosecution contended she was stealing the eventual murder weapon.[104] Whereas the defendant asserted that she had taken Tanelle to an ice-cream parlor, Tanelle stated, according to Darlene, that they had first gone for a ride in the country. Darlene further testified that the defendant had repeatedly corrected Tanelle. Tanelle's statement clearly was logically relevant, because if the defendant had taken her daughter for a ride in the country she would have had an opportunity to steal the murder weapon, whereas if the defendant's version of the facts were true, no such opportunity would have existed. Tanelle's statement was not admissible for its truth, however, because it met none of the hearsay exceptions. The court nevertheless held that the statement was admissible. Rather than being admitted for its truth, the court concluded, Tanelle's statement was admissible to show that the defendant attempted to coerce her daughter into changing her story, thus revealing her consciousness of guilt.[105] Whether the jury would be likely to take Tanelle's statement as evidence that the defendant was trying to coerce her, rather than as evidence of the defendant's whereabouts, depends on the instructions given to the jury, if any, about the statement, a subject that the court did not address.

B. Rule 801(d)(1)(B): Prior Consistent Statements to Rebut a Charge of Recent Fabrication

Under Rule 801(d)(1)(B), a prior statement by a witness is not hearsay if it is consistent with the witness's testimony and is presented to refute a charge of

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102. IND. R. EVID. 801(c).

103. 671 N.E.2d 411 (Ind. 1996).

104. *Id.* at 415.

105. *Id.*

recent fabrication, improper influence, or improper motive.[106]

One of the bases for allowing evidence of a prior consistent statement is that the declarant is a witness and can be cross-examined about the statement. If the declarant denies making the prior statement, or cannot remember making the prior statement, cross-examination is impossible and the prior statement is inadmissible. In *Brown v. State*,[107] the Indiana Supreme Court addressed the problem that arises when a witness recalls making a prior statement but does not recall the content of the prior statement (which is introduced through another witness).

Brown and his co-defendant, Ohm, were charged with multiple counts of robbery and murder. Brown's first trial, at which Ohm testified under a cooperation agreement, ended in a mistrial. Ohm then refused to testify at the second trial; because Ohm was unavailable, the trial court permitted his testimony from the first trial to be introduced.[108] At the first trial, Brown had challenged Ohm's credibility by suggesting that he had not admitted his involvement in the crime until the time at which he sought a plea agreement. To rehabilitate Ohm's credibility, the State offered the testimony of Mike Collins, who repeated statements that Ohm had made to him concerning Ohm's role.[109] Brown objected, citing Ohm's testimony that he did not recall what he had told Collins.[110]

On appeal, the supreme court acknowledged the general rule that where a witness denies making or cannot recall making the purported prior statement, the prior statement is inadmissible.[111] The court concluded, however, that where the witness acknowledges making the statement but testifies that he cannot recall exactly what he said, the witness is available for cross-examination, and the prior statement is admissible.[112]

C. Rule 801(d)(2)(E): Statements by a Co-Conspirator

A statement by a co-conspirator of a party, made during the course of and in

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106. IND. R. EVID. 801(d)(1)(B).

107. 671 N.E.2d 401 (Ind. 1996).

108. *Id.* at 404.

109. *Id.* at 405. At the second trial, Collins' testimony, like Ohm's, was presented through the transcript of the first trial, because Collins was unavailable at the second trial. *Id.* at 405-06.

110. Ohm testified that he remembered telling Collins he was involved, but did not recall what he had said about his role in the crime. *Id.* at 406.

111. *See id.* (citing Watkins v. State, 446 N.E.2d 949, 960 (Ind. 1983)).

112. *Id.* at 407. In *Brown*, the state offered evidence of a second prior statement by Ohm, through the testimony of Angie Miller. Brown contended that Ohm's statement to Miller, denying any role in killing the two murder victims, was not consistent with his trial testimony, in which he stated that he and Brown had done the killings. The supreme court did not address the question of whether Ohm's prior statement was sufficiently inconsistent with his trial testimony to render the prior statement inadmissible. *Id.* at 408. In a case decided earlier in the year, the supreme court had held that a prior statement need not be entirely consistent with a witness's trial testimony to be admissible under Rule 801(d)(1)(B), provided that there was sufficient consistency in the essentials of the two statements to rebut a charge of recent fabrication. *See* Willoughby v. State, 660 N.E.2d 570, 579-80 (Ind. 1996).

furtherance of the conspiracy, is not hearsay and is admissible.[113] The rule contains both a temporal requirement—the statement must be made during the pendency of the conspiracy—and a content-based requirement—the statement must be in furtherance of the conspiracy.

As to the first issue, the supreme court has emphasized that completion of the offense underlying a conspiracy charge does not necessarily mean that the conspirators have met their goals and that the conspiracy has come to an end, barring the admission of all subsequent co-conspirator statements under Rule 801(d)(2)(E). In *Willoughby v. State*,[114] the defendant was charged with murder and conspiracy to commit murder in the shooting death of her husband. At trial, the state introduced, over the defendant's objection, a statement by the hit man allegedly hired by the defendant regarding the payment of proceeds from the deceased husband's life insurance. On appeal, the supreme court reasoned that because one of the aims of the conspiracy had been to obtain the insurance proceeds, the conspiracy had not terminated with the husband's death, and statements subsequent to the murder relating to the conspiracy's other goals were made during the conspiracy for the purposes of Rule 801(d)(2)(E).[115]

Whether a statement is made "in furtherance of" a conspiracy presents more difficult questions, which have not yet come before the supreme court. In *Leslie v. State*,[116] the court of appeals addressed the issue. With no Indiana precedent upon which to rely, the court drew on a decision interpreting the analogous federal rule for an appropriate standard:

> [T]he statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy, as by, for example, providing reassurance to a coconspirator, seeking to induce a coconspirator's assistance, serving to foster trust and cohesiveness, or informing coconspirators as to the progress or status of the conspiracy, or by prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity. Mere "idle chatter" does not satisfy the in-furtherance requirement.[117]

Idle chatter may, of course, be difficult to distinguish from statements among coconspirators regarding the status of the conspiracy. *Leslie* involved a charge of conspiracy to deal cocaine in an amount of over three grams. Leslie objected, on the grounds of hearsay, to several statements by his alleged co-conspirator, Hillsamer, as recounted by Hillsamer's roommate, Sperling.[118] Leslie first

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113. IND. R. EVID. 801(d)(2)(E).

114. 660 N.E.2d 570 (Ind. 1996).

115. *Id.* at 581. In reaching this decision, the court applied to the Rules the reasoning on which it had relied under the common law. *See* Wallace v. State, 426 N.E.2d 34, 42-43 (Ind. 1981).

116. 670 N.E.2d 898 (Ind. Ct. App. 1996), *trans. denied.*

117. *Id.* at 901 (citations omitted) (quoting United States v. Tracy, 12 F.3d 1186, 1196 (2d Cir. 1993)).

118. Hillsamer died well before the trial. Indeed, it appears that Hillsamer's death led to the authorities' discovery of Leslie's activities and to Leslie's subsequent arrest. *See id.* at 900-01.

objected to Hillsamer's statement, overheard by Sperling, to an apparent drug courier: "Tell Bobbie I don't have all of the money. I'll get it to him soon." This statement, the court concluded, easily fell within the co-conspirator rule, because it manifested a clear intent to further the conspiracy.

Second, Leslie contested the introductions of two statements to Sperling, "Bobbie's quality was always better," and "Bobbie delivers." The court reasoned that because Hillsamer made statements describing aspects of his collaboration with Leslie while that collaboration was ongoing, the statements were in furtherance of the conspiracy. The issue is, however, at least arguably more complicated than the court of appeals made it seem. Much would seem to depend on the roles in the conspiracy of Sperling, the individual to whom Hillsamer made the statements. If Sperling did play a role in the conspiracy—which is by no means clear from the court's opinion—then the statements easily could be interpreted as being in furtherance of the conspiracy. In that situation, the statements would amount to one co-conspirator explaining to another a decision or a course of action directly related to the conspiracy. But if Sperling, though aware of the existence of the conspiracy, did not himself participate, then the possibility arises that the statements represented no more than "idle chatter" between roommates.

Indeed, the court's ruling on Leslie's third objection recognized the importance of a statement's context to a Rule 801(d)(2)(E) ruling. The last of Hillsamer's statements to which Leslie objected responded to a question about whether Leslie ever dealt in quantities over one kilogram. Hillsamer answered, "Bobbie was close to being busted or raided . . . they just walked away from a, uh, large amount on a ship." This statement seems more like the recounting of a story than a discussion of a drug conspiracy's strategy or operations, and the court, in the absence of additional information about the context in which Hillsamer made the statement, was unwilling to conclude that the statement was more than idle chatter. Its admission therefore was error.[119] Like the statements that the court deemed admissible, however, this statement does convey information about the nature and extent of the conspiracy's dealings. If, as the court states, context is vital to a determination of whether the final statement falls within the boundaries of Rule 801(d)(2)(E), it is difficult to see why additional context is not also needed before it can be determined that the statements "Bobbie delivers" and "Bobbie's quality was always better" can be deemed admissible.[120]

D. Rule 803(4): Statements for Purposes of Medical Diagnosis or Treatment

Rule 803(4) provides that a patient's statements to a medical provider, made for the purpose of obtaining medical treatment or diagnosis, are admissible

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119. *Id.* at 901. The court further concluded that, in light of the "ample" evidence against Leslie, the admission of this hearsay was harmless error. *Id.*

120. The court also did not discuss whether Rule 104(a) or Rule 104(b) governed the determination of whether there was a conspiracy and whether the statements were in furtherance of it. *See* Bourjaily v. United States, 483 U.S. 171, 175-81 (1987) (Rule 104(a) governs.).

"insofar as reasonably pertinent to diagnosis or treatment." According to the Indiana Supreme Court's decision in *McClain v. State*,[121] application of Rule 803(4) requires a two-part inquiry: "1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[122]

The *McClain* decision addressed the first part of this inquiry. In *McClain*, the defendant was convicted of child molestation. Among the evidence the prosecution presented was the testimony of a family therapist, who recounted the child victim's description of what had happened.[123] The supreme court held that the introduction of this evidence was error, concluding that for a statement to be admissible under 803(4), the declarant must subjectively believe that the statement is being made for the purpose of obtaining a diagnosis and/or treatment. Although such subjective belief may often be inferred from the circumstances in which the statement is made, in cases where the declarant is a young child "there must be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information."[124] The court found no such evidence in the record, and therefore concluded that the statement did not fall within Rule 803(4).[125]

The Indiana Supreme Court has not yet spoken on the second factor under Rule 803(4), the inquiry into whether the statement consisted of information on which an expert in the field would rely in making a diagnosis or rendering treatment. That issue has arisen before the Indiana Court of Appeals, however, and in deciding the issue the court has, perhaps unthinkingly, read Rule 803(4) far more broadly than the federal courts have interpreted the parallel federal rule.

In *Thomas v. State*,[126] the defendant was charged with aggravated battery and assault after he beat his wife and bit her on the face and arms.[127] At trial, the doctor who had treated the victim testified on behalf of the state. The doctor recounted, over the defendant's objections, the victim's description of how she had received her wounds, including the identity of her attacker.[128] The court of appeals concluded that this testimony was properly admitted under Rule 803(4), because the statements "were made for the purpose of diagnosing and treating her injuries."[129] In so concluding, the court credited the doctor's testimony that "the treatment of the patient really depends upon what you're told by the patient" and

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121. 675 N.E.2d 329 (Ind. 1996).

122. *Id.* at 331.

123. *Id.* at 330.

124. *Id.* at 331.

125. Having found error, the court nevertheless affirmed the defendant's conviction on the grounds that the error was harmless.

126. 656 N.E.2d 819 (Ind. Ct. App. 1995).

127. The victim's bite wounds were so severe that one eye had to be surgically removed. *See id.* at 821.

128. *Id.* at 823. *But see McClain*, 675 N.E.2d at 331.

129. *Thomas*, 656 N.E.2d at 823.

that, in this victim's case, it was particularly important for treatment to know that the bite wounds had been inflicted by a human.[130]

The *Thomas* decision may appear to be a straightforward application of Rule 803(4), but in fact it represents a significant expansion from the traditional application of the parallel federal rule. Under Federal Rule 803(4), the courts typically distinguish between statements relating to cause, which are deemed relevant to diagnosis and treatment and are therefore admissible, and statements relating to fault, which, though they may be of interest to the declarant, typically are irrelevant to the doctor's work and are therefore inadmissible hearsay.[131] A statement identifying the individual who inflicted the victim's injuries falls within the latter category of statements and is therefore barred by the hearsay rule.[132] The *Thomas* court, by permitting the doctor to testify about the victim's identification of her attacker, ignored the federal rule's distinction between cause and fault and admitted evidence that would have been inadmissible in federal court.[133]

The federal courts have recognized a narrow exception to the general distinction between cause and fault: where a victim of sexual abuse (particularly a child victim) identifies the perpetrator as a member of the victim's family, the perpetrator's identity is generally held relevant to diagnosis and treatment on the grounds that the victim will have suffered a distinct psychological injury from having been so treated by a family member.[134] A similar rationale might justify admitting the identification of violent family members in instances of non-sexual assault, although the federal courts, to date, have not extended the exception in that way. But the doctor in *Thomas* did not testify about, and the *Thomas* court did not base its decision on, any psychological harm to the victim or any treatment of such harm. At its broadest, *Thomas* could be read to hold that virtually anything a patient tells a doctor while seeking medical treatment is relevant to that treatment and therefore admissible under Rule 803(4). Whether the Indiana courts continue to adhere to the expansive interpretation of Rule 803(4) suggested in *Thomas* remains to be seen.

CONCLUSION

Indiana's transition to the Rules of Evidence, although formally complete when the Rules took effect on January 1, 1994, is an ongoing process, as the courts

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130. *Id.*

131. *See, e.g.*, United States v. Pollard, 790 F.2d 1309, 1313 (7th Cir. 1986), *overruled on other grounds by* United States v. Sblendorio, 830 F.2d 1382, 1393 (7th Cir. 1987); United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979).

132. *Pollard*, 790 F.2d at 1314; *Nick*, 604 F.2d at 1202.

133. The fact that the bite wound was inflicted by a human would be relevant to cause, and therefore would be admissible pursuant to Federal Rule 803(4). The identity of the biter, however, would not.

134. *See, e.g.*, United States v. Tome, 61 F.3d 1446, 1450 (10th Cir. 1995); United States v. Yazzie, 59 F.3d 807, 812 (9th Cir. 1994); United States v. Longie, 984 F.2d 955, 959 (8th Cir. 1993). *See also* L. Timothy Perrin, *Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff*, 72 IND. L.J. 939, 962-63 (1997).

continue the work of applying the dry text of the Rules to real-world situations. In doing so, the courts have hit the occasional bump in the road, and a few of the courts' decisions have been idiosyncratic. It is therefore difficult to predict how the courts will respond when confronted with new situations under the Rules. In light of this uncertainty, practitioners would do well to draw the court's attention not merely to the text of the Rules themselves but also to the policies underlying the Rules, as they have been enunciated by the federal courts and by the courts of other states.