RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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Although the Indiana Rules of Evidence (Rules) went into effect more than nine years ago, many aspects of those rules remain open to interpretation. Debate over the proper rule of evidence in a particular situation stems not only from interpreting the text of the Rules, but also from determining the proper influence of statutory and common law.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2001, and September 30, 2002. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. In General

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[1] In situations where the rules do not "cover a specific evidence issue, common or statutory law shall apply."[2] This leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.[3]

B. All Forms of Conveying Information Fall Under Rule 106

In *Desjardins v. State*,[4] Desjardins appealed a decision in which the Indiana Court of Appeals upheld the trial court's exclusion of portions of a videotape. The trial court had allowed portions of the tape to be shown, but refused to permit Desjardins to show the entire tape to the jury. Desjardins argued this was error under the doctrine of completeness. The court of appeals looked at Rule 106, which provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it."[5] The court of appeals then held that a videotape is not a writing or recording under Rule 106

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1. IND. R. EVID. 101(a)

2. *Id.*

3. *See* Williams v. State, 681 N.E.2d 195, 200 n.6 (Ind. 1997); Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996).

4. 759 N.E.2d 1036 (Ind. 2001).

5. *Id.* at 1036-37 (quoting IND. R. EVID. 106).

because a videotape is not included in the list of writings and recording set forth in Rule 1001(1), and the definition of photograph, contained at 1001(2), included motion pictures.[6]

The Indiana Supreme Court granted transfer "to make clear that all modes of conveying information, including videotapes, constitute writings or recordings for purposes of Rule 106, even if they are defined by Rule 1001 as 'photographs.'"[7] However, under the facts being considered in *Desjardines*, the appellant failed to show the relevance of the absent portions of the videotape, and the court upheld the alternative holding of the court of appeals.[8]

II. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

A. Admission of Bite Mark Evidence

In *Carter v. State*,[9] Carter appealed his convictions for murder, burglary, criminal confinement and battery. Carter argued that bite mark evidence used at his trial should have been excluded because the probative value of the bite mark evidence was outweighed by the danger of unfair prejudicial effect under Rule 403. Carter contended that the bite mark was simply evidence that he was present at the scene of the crime, but not evidence that he had participated in the beating or murder of the victim, and that the jury had based its finding of guilt on the bite mark evidence alone.[10]

The court stated that "all relevant evidence is 'inherently prejudicial' in a criminal prosecution, so the inquiry boils down to a balance of probative value against the likely unfair prejudicial impact the evidence may have on the jury,"[11] and that in determining likely unfair prejudicial impact, "courts will look for the dangers that the jury will substantially overestimate the value of evidence or that the evidence will arouse or inflame the passions or sympathies of the jury."[12] The court found the risk that the jury overly relied on the bite mark evidence to be minuscule, and that the evidence of the bite mark was highly probative to rebut Carter's contention that he was merely present, not a participant.[13] The court also stated that these matters (the Rule 403 balancing test) are within the sound discretion of the trial court.[14]

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6. Desjardines v. State, 751 N.E.2d 323, 326 (Ind. Ct. App.), *aff'd in part, vacated in part by* 759 N.E.2d 1036 (Ind. 2001).

7. *Desjardines*, 759 N.E.2d at 1037.

8. *Id.*

9. 766 N.E.2d 377 (Ind. 2002).

10. *See id.* at 381-82.

11. *Id.* at 382 (quoting Richmond v. State, 685 N.E.2d 54, 55-56 (Ind. 1997)).

12. *Id.* (quoting Evans v. State, 643 N.E.2d 877, 880 (Ind. 1994)).

13. *See id.* at 381.

14. *See id.* at 382.

B. Admission of Photographic Evidence

In *Corbett v. State*,[15] Corbett challenged the admissibility of twenty-six autopsy photographs introduced at trial. The court reiterated the rule that "[r]elevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice."[16]

In order to conduct its analysis, the court looked to existing case law, finding that "[a]utopsy photos often present a unique problem because the pathologist has manipulated the corpse in some way during the autopsy. Autopsy photographs are generally inadmissible if they show the body in an altered condition."[17] However, the court also noted that "there are some situations where some alteration of the body is necessary to demonstrate the testimony being given."[18]

Eleven of the photos showed the body before the autopsy and two additional photos showed the body after the head wounds had been cleaned and some hair shaved. These photos were found to have been properly admitted, due to the rule that photographs depicting a victim in a natural state after death are admissible.[19]

Other autopsy photos depicting the body in various stages of examination were found to be admissible where the pathologist was able to testify as to how the photos, with portion of skull and brain removed, showed actions he took to determine the extent and nature of the injuries. This was also true of a photo showing a portion of skull against the edge of a table, demonstrating how a hard surface could produce the fracture.[20]

The remaining photos were found to have been erroneously admitted. Photos which should not have been admitted included photos focusing on the hollow shell of the victim's body. The court held that these photos "greatly and unnecessarily enhance[d] the gruesomeness of the pictures" and "although relevant to the cause of death and the disputed issue of the number of blows, were so prejudicial that the trial court abused its discretion in allowing them to be admitted."[21]

Also excluded were other photos focusing on the ribs and hollow shell of the victim, as they had slight probative value (the broken ribs were not in issue), and their prejudicial effect was high due to the gruesome nature of the photos. The court also found in error admission of additional photos of the victim's brain removed from the skull. Although these photos also showed the extent and nature of the injuries, they were cumulative and their prejudicial effect

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15. 764 N.E.2d 622 (Ind. 2002).

16. *Id.* at 627 (citing IND. R. EVID. 403; Byers v. State, 709 N.E.2d 1024, 1028 (Ind. 1999)). This essentially means that photographs simply need to pass the test of Rule 403.

17. *Id.* (citing Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997), *cert. denied*, 525 U.S. 1073 (1999)).

18. *Id.* (quoting Swingley v. State, 739 N.E.2d 132, 133-34 (Ind. 2000)).

19. *Id.* (citing Loy v. State, 436 N.E.2d 1125, 1128 (Ind. 1982)).

20. *See id.* at 627-28.

21. *Id.* at 627.

outweighed their probative value.[22] However, the court determined that the erroneous admission of these photographs had not impacted the defendant's substantial rights, and thus the error was harmless.[23]

In *Price v. State*,[24] Price challenged the admission of two photos of himself found at the crime scene. The photos showed Price at a club with four other persons, gesturing in a manner that could be considered a gang sign. While the State admitted that identity and presence at the crime scene were not in issue, it argued that the "photographs were relevant 'to show the guilty knowledge of the defendant' by demonstrating that he had changed his hairstyle and had gold caps removed from his teeth."[25]

The court said that "[a] defendant does not open the door to otherwise inadmissible character evidence merely by dressing and grooming in a manner appropriate for court,"[26] and that "[p]hotographs showing how a defendant looked at the time of the crime are frequently probative. Here, however, they largely invited jurors to evaluate guilt based on whether the defendant looked like the type of person who would commit this sort of crime. This is what Rule 404(a) prohibits."[27] The court did find the admission of the photographs to be error, but it was considered to be harmless error.[28]

C. Admission of Hair Comparison Evidence

In *Wentz v. State*,[29] Wentz objected to the admission of hair comparison evidence by the State's witness. Wentz contended that since the State's witness could not say with certainty that the hair in evidence matched Wentz's, her testimony was so unreliable and speculative that it was prejudicial to allow its introduction, and that its prejudicial effect substantially outweighed its probative value.[30]

The court restated the existing rule, established in *McGrew v. State*,[31] that "trial courts are generally within their discretion to permit hair comparison analysis."[32] Because Wentz offered nothing to distinguish this testimony from that in *McGrew*, and the testimony was that the hair was consistent with and not necessarily a conclusive match for Wentz's hair, the proper remedy was "cross-

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22. *Id.* at 627-28.

23. *See id.* at 628; *see also* Dunlap v. State, 761 N.E.2d 837, 841-42 (Ind. 2002).

24. 765 N.E.2d 1245 (Ind. 2002).

25. *Id.* at 1248 (quoting Record at 5539-40).

26. *Id* at 1248-49.

27. *Id.* at 1249.

28. *See id.* at 1249.

29. 766 N.E.2d 351 (Ind. 2002).

30. *Id.* at 358. The State's witness had testified that the hair was "sufficiently similar to be of possible common origin." *Id.*

31. 682 N.E.2d 1289 (Ind. 1997).

32. *Wentz*, 766 N.E.2d at 358 (citing *McGrew*, 682 N.E.2d at 1292).

examination, not exclusion."[33] Therefore it was not abuse of discretion to admit the evidence under Rule 403.[34]

D. Similar Gun Evidence

In *Dunlap v. State*,[35] the evidence used to convict Dunlap of murder had included showing and demonstrating a 7.62 assault rifle at trial, despite the fact that no weapon had been discovered relating to the victim's wounds. The State had offered the rifle as a demonstrative exhibit during testimony from an expert tool marks and firearms examiner.[36] Dunlap objected on the basis of Rule 403, claiming any probative value of the similar weapon would be outweighed by its prejudicial effect.[37]

Because no murder weapon had been found, and the defendant claimed the shooting was an accident, the court found that the trial court had been within its discretion in allowing the State to utilize the similar weapon to demonstrate how such a weapon works in order to examine whether use of such a weapon was likely to have been accidental. The court also noted as significant the fact that the trial court had admonished the jury that "[t]here was no weapon found in this case. The weapon that may be displayed is a demonstrative exhibit that is going to be used by the State to demonstrate or show you what a similar type weapon could or should look like."[38]

E. Improper Admission of Character Evidence

In *Wertz v. State*,[39] Wertz claimed that the trial court had improperly allowed evidence concerning prior bad acts in violation of Rule 404(b).[40] Wertz had filed a motion in limine, requesting that evidence of prior bad acts be excluded at trial, and that motion had been granted by the trial court. However, at trial, the State had offered testimony concerning prior drug transactions involving Wertz.[41]

Although Wertz requested a continuing objection to this evidence, the trial court allowed the testimony and questions, ruling that the questions did not go to Wertz' character, but rather to help establish motive, intent, identity and/or mistake. The court agreed with Wertz' assertions that even if some evidence of

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33. *Id.*

34. *Id.* Wentz also raised Rule 702 issues regarding expert testimony, but the court determined these issues had not been raised by objection at trial and were therefore waived. *Id.*

35. 761 N.E.2d 837 (Ind. 2002).

36. *Id.* at 842.

37. *Id.*

38. *Id.* (quoting Record at 416).

39. 771 N.E.2d 677 (Ind. Ct. App. 2002).

40. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." IND. R. EVID. 404(b).

41. *Wertz*, 771 N.E.2d at 683-84.

this type was admissible, the continual and repetitive focus on it, at some point, begins to prove character rather than plan or motive. Although it agreed that the trial court had erred in continuously overruling these objections, the court of appeals found the error to be harmless and affirmed the conviction.[42]

In *Rhodes v. State*,[43] Rhodes appealed from a judgment finding him guilty of operating a vehicle while intoxicated and of operating a vehicle when his privileges were suspended as a habitual traffic offender. Rhodes contended that improper evidence had been introduced, in violation of Rule 404(b), concerning prior acts on his part.[44]

During the State's case in chief, the prosecution had introduced evidence that the arresting officer approached the defendant because he knew him to be a habitual traffic offender. The court held this evidence to be proper as it explained why the officer had investigated Rhodes after seeing him operate a vehicle. However, the prosecution also introduced evidence of the officer's "other run ins with Mr. Rhodes,"[45] testimony from the officer indicating that Rhodes had a history of public drinking, and Rhodes' entire negative driving history without redactions.

The State had also introduced evidence that there had been a domestic dispute between Rhodes and one of his witnesses, presented evidence that the witness was pregnant, and questioned the legitimacy of that witness' child.[46] The State also questioned Rhodes about his prior habitual traffic offender arrest, prior arrests, and probation, and questioned the credibility of Rhodes' witness.[47]

The court pointed out that Rhodes had failed to object to much of this character evidence at trial, and this would normally result in waiver of the issue. However, this waiver does not apply if "the admission of evidence constitutes fundamental error."[48] The court stated that the test for this error is that "[i]n order to qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible."[49]

In this case, the court held that "the introduction of improper character evidence was so blatant and so pervasive that it rendered a fair trial impossible."[50] The court supported this finding by restating that "[i]n its effort to prove guilt, the State may not 'flood the courtroom' with unnecessary and prejudicial details of prior criminal conduct merely because some of that evidence is relevant and admissible."[51] Under the facts of *Rhodes*, the court held that "the prosecution did not just flood the courtroom with unnecessary and

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42. *Id.* at 684.
43. 771 N.E.2d 1246 (Ind. Ct. App. 2002).
44. *See id.* at 1251.
45. *Id.* at 1252 (quoting Record at 91).
46. *See id.* at 1252-54.
47. *See id.* at 1254-56.
48. *Id.* at 1256 (citing Sauerheber v. State, 698 N.E.2d 796, 804 (Ind. 1998)).
49. *Id.* (citing *Sauerheber*, 698 N.E.2d at 804).
50. *Id.*
51. *Id.* (quoting Thompson v. State, 690 N.E.2d 224, 236 (Ind. 1997)).

prejudicial details of prior criminal conduct; its case in chief seemed to be a focused inquiry into Rhodes's and Ralston's prior misconduct" and "the introduction of improper character evidence constituted fundamental error."[52]

In *Greenboam v. State*,[53] Greenboam appealed his convictions for child molestation, arguing that evidence of his prior guilty pleas for molesting his stepdaughter and daughter (who was also the current victim) should have been excluded under Rule 404(b). At trial, the evidence of the prior guilty pleas was admitted with an admonishment to the jury that the evidence was to be used only for demonstrating a common plan or scheme.[54]

In considering whether this admission was proper, the appellate court stated that

> [o]ur adoption of Federal Rule of Evidence 404(b) in Lannan v. State (1992), Ind., 600 N.E.2d 1334, and our subsequent promulgation of Indiana Rule of Evidence 404(b), do not represent a mere continuation of that common law caselaw. Instead of the old "common scheme or plan" rule, our law now admits evidence of "plan" alone. It is a narrower exception than our old rule, which tended to degenerate into an all-purpose excuse for admitting pretty much any old prior misconduct.[55]

The court found that the State had offered no evidence to support the contention that Greenboam's previous bad acts were in any way part of a plan to molest his daughter regarding the charged crimes. The two incidents of molestation were not part of an uninterrupted transaction, and the prior bad acts could not be described as part of a plan to commit the crimes currently charged. The court of appeals found that because the prior bad acts could only serve to establish Greenboam's propensity to commit child molestation, the trial court had abused its discretion by admitting the evidence of those prior acts.[56]

F. Evidence of Contemporaneous Crimes Not Charged

In *Bocko v. State*,[57] Bocko appealed his convictions for possession of cocaine, possession of marijuana, and reckless possession of paraphernalia, in part based on his assertion that the trial court improperly allowed introduction of evidence that he also possessed heroin, but was not charged with possession of

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52. *Id.*

53. 766 N.E.2d 1247 (Ind. Ct. App. 2002).

54. *See id.* at 1249-54.

55. *Id.* at 1253-54 (quoting Lay v. State, 659 N.E.2d 1005, 1015 (Ind. 1995) (Shepard, C.J., dissenting)).

56. *See id.* at 1255; *see also* Turney v. State, 759 N.E.2d 671, 679-80 (Ind. Ct. App. 2001) (holding that allegations of conversations of a sexual nature with and requesting nude photos of other underage persons did not demonstrate a plan on the part of the defendant to perform oral sex on the victim).

57. 769 N.E.2d 658 (Ind. Ct. App. 2002).

heroin.[58]

Bocko argued that the heroin evidence was not relevant to the crimes charged and therefore should have been excluded under Rule 402 (which states that evidence that is not relevant is not admissible).[59] The court referenced Rule 401 for its proposition that "[e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence,"[60] and then quoted *Minnick v. State*,[61] for its proposition that "[e]vidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted."[62] Because the heroin evidence completed the story of Bocko's crime, the trial court was within its discretion to admit the evidence.[63]

Bocko then argued that even if the evidence was relevant, it should have been excluded under rule 404(b) because part of the 404(b) test of admissibility requires that an analysis under Rule 403 be performed, balancing the probative value with the prejudicial effect.[64] The court found that any error was harmless under the guideline set forth in *Cook v. State*,[65] which states that "improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood the questioned evidence contributed to the conviction."[66] The court found sufficient evidence of Bocko's guilt of the other charged crimes to find the present error, if any, harmless.[67]

The fact that the uncharged conduct in *Bocko* was contemporaneous was certainly a significant point. A recent example of a trial court allowing introduction of non-contemporaneous, non-charged bad acts led to a different result. In *Bald v. State*,[68] Bald appealed his convictions for arson and felony murder. The evidence introduced against Bald at trial included an assertion that he had threatened that the victims "would burn" prior to the occurrence of the

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58. *See id.* at 664-65. As a footnote, the court explained that the State did not receive the test results on the third substance until shortly before trial and was not allowed to add the new count for possession of heroin. *See id.* at 665 n.4.

59. *Id.* at 664 (citing IND. R. EVID. 402).

60. *Id.* (quoting IND. R. EVID. 401).

61. 544 N.E.2d 471 (Ind. 1989).

62. *Bocko*, 769 N.E.2d at 664-65 (citing *Minnick*, 544 N.E.2d at 480).

63. *Id.* at 665.

64. *Id.* (citing IND. R. EVID. 403, 404(b)).

65. 734 N.E.2d 563 (Ind. 2000).

66. *Bocko*, 769 N.E.2d at 665 (citing *Cook*, 734 N.E.2d at 569).

67. *Id.* The court did, however, overturn the conviction for reckless possession of paraphernalia on other grounds. *Id.* at 664; *see also* Scalissi v. State, 759 N.E.2d 618, 623 (Ind. 2001) (allowing evidence of uncharged rape which occurred immediately prior to the charged murder and holding that the proximity in time made the alleged rape probative as to the defendant's motive, intent, or absence of mistake).

68. 766 N.E.2d 1170 (Ind. 2002).

fatal fire, as well as evidence of an unrelated incident in which he had threatened an unidentified man and then later returned with a gun.[69]

The State argued that this evidence of the earlier, unrelated altercation was evidence of motive. The court, however, agreed with Bald that this evidence had been used to show Bald's propensity to carry out his threats, thus proving character. Because this type of evidence is precluded by Rule 404(b), the court found that this evidence should have been excluded.[70] However, the court found the error to be harmless and declined to reverse the convictions.[71]

Another variation on this theme can be found in *Wilson v. State*,[72] where Wilson appealed his conviction for murder. Wilson argued that the introduction of evidence that he carried on prostitution and drug dealing businesses at the same time as his trial for murder violated Rule 404(b)'s prohibition against evidence of other crimes or acts to prove guilt as well as Rule 403's prohibition on evidence having more prejudicial effect than probative value.[73]

The court found that Rule 404(b) was not violated because this evidence was necessary for the jury to understand the relationships between the victim, defendant and witnesses. In addition, the trial court had admonished the jury as to the evidence's allowed usage and evidence also existed that the defendant had admitted that he "'had to take her [the victim] out of it' to protect his business."[74] The court also found no violation of Rule 403 because the trial court had carefully documented its recognition and evaluation of the Rule 403 issues involved in the introduction of the evidence.[75]

In *Craun v. State*,[76] Craun argued that his conviction for child molestation should be reversed because the trial court had allowed evidence of prior bad acts in violation of Rule 404(b). Craun had been accused of molesting three girls, and although the accusations of the second and third girls were severed from the trial at issue, those girls were allowed to testify regarding their allegations against Craun on the basis that Craun had opened the door by claiming contrary intent.[77]

The court of appeals agreed with Craun that he had never claimed a contrary intent, but had insisted that he had never committed the relevant acts. Significantly, the court said that the testimony of the other two girls "'if relevant at all, shows a propensity for [child molesting], which is precisely what is prohibited by the Rules of Evidence,'"[78] and that even if Craun's motive was properly at issue, the court was "at a loss to determine how his alleged touching of [the other two girls] is relative to his motive for touching [the girl in

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69. *Id.* at 1173.
70. *Id.* (quoting IND. R. EVID. 404(b)).
71. *Id.*
72. 765 N.E.2d 1265 (Ind. 2002).
73. *See id.* at 1270.
74. *Id.*
75. *See id.* at 1271.
76. 762 N.E.2d 230 (Ind. Ct. App. 2002).
77. *See id.* at 232-35.
78. *Id.* at 237-38 (quoting Ortiz v. State, 741 N.E.2d 1203, 1208 (Ind. 2001)).

question]."[79] Because the probative value of the additional testimony from the other two girls was found to be substantially outweighed by the danger of unfair prejudice, the court of appeals found that the trial court had abused its discretion and remanded for a new trial.[80]

G. Introduction of Police Interview With Repeated Accusations of Guilt

In *Bostick v. State*,[81] Bostick argued that the introduction of a police interview, in which the jury was allowed to "hear [the defendant's] interrogators 'repeatedly assert their beliefs and opinions that there was absolutely no doubt that [the defendant] had set the fire that killed her children,'"[82] was a violation of Rule 403 because the probative value was substantially outweighed by the danger of unfair prejudice.[83]

Although the interrogators claimed multiple times to know of her guilt during the questioning, Bostick never admitted guilt and maintained that she did not remember committing the crimes.[84] The court determined that the repeated accusations and defendant's responses had little probative value, but also found they did not create a risk of unfair prejudice.[85] In determining that the trial court had not abused its discretion in allowing the admission of interrogation evidence, the court cited *Dunlap* for its proposition that "[t]he evaluation of whether the probative value of a particular item of evidence is substantially outweighed by the danger of unfair prejudice is a discretionary task best performed by the trial court."[86]

H. Use of Aliases and Mug Shots

In *Hyppolite v. State*,[87] Hyppolite argued that the trial court had improperly allowed evidence of use of alias identities as well as a mug shot in violation of Rule 404(b). At trial, the State introduced a driver's license with Hyppolite's photo, but bearing another name. Because Hyppolite denied committing the crime, the court found that the license was highly probative of identity as the police officer had used the photo to identify Hyppolite as the suspect.[88]

The State also questioned Hyppolite regarding five other aliases. Because Hyppolite spoke with an accent at trial, but the voice on audiotape evidence

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79. *Id.* at 237 (citing Sloan v. State, 654 N.E.2d 797, 802 (Ind. Ct. App. 1995)).

80. *See id.* at 238-40.

81. 773 N.E.2d 266 (Ind. 2002).

82. *Id.* at 269 (quoting Brief of Defendant-Appellant at 34).

83. *Id.*

84. *Id.* at 270-71.

85. *Id.* at 1271.

86. *Id.* (citing Dunlap v. State, 761 N.E.2d 837, 842 (Ind. 2002)). *But See* Mote v. State, 775 N.E.2d 687 (Ind. Ct. App. 2002) (finding introduction of redacted videotape containing multiple references to prior criminal history to be abuse of discretion).

87. 774 N.E.2d 584 (Ind. Ct. App. 2002).

88. *See id.* at 592.

submitted by the State did not betray an accent, the court found the fact that Hyppolite used aliases to support the State's contention that Hyppolite may use different accents according to the identity or alias currently in use. Therefore, the "use of an alias was not so far removed from the time of the alleged crime as to be irrelevant to this case."[89]

Hyppolite further challenged the use of a mug shot at trial because mug shots may imply that the individual has been previously arrested. However, the court stated that "mug shots are not per se inadmissible. They are admissible if (1) they are not unduly prejudicial and (2) they have substantial independent probative value."[90] Because the photo in this case was a head-on Polaroid picture with handwritten notations, and not a standard booking mug shot, the court felt that there was nothing unduly prejudicial about the photo. It also noted that the photo was highly probative in that it showed Hyppolite's photo and his real name, and was therefore a tool in resolving the identity of the individual charged with the crime. The court of appeals found that the trial court had not erred in admitting the evidence.[91]

I. Evidence of Behavior While Giving Statement to Police

In *Pierce v. State*,[92] Pierce filed a motion in limine to exclude evidence that Pierce had masturbated while giving statements to police. The motion was denied by the trial court, which stated that the evidence "'does have some tendency to impact upon the jury's consideration of his intent in entering that residence, the fact that in a discussion of the incident, he was engaged in a sexual act . . . .'"[93]

The court of appeals agreed with Pierce's contention that this testimony violated Rules 403 and 404(b). It stated that

> Frazier's testimony fails both prongs of the [404(b)] test. First, it does not fall under an exception to Rule 404(b). Unlike the State's claim, evidence that Pierce masturbated during his confession does not establish that he intended to rape the victim when he broke into her home. There appears to be no reason to admit this evidence other than to establish that Pierce has a propensity for bizarre behavior.[94]

The court also agreed with Pierce that this evidence was substantially more prejudicial than probative and the trial court had abused its discretion in allowing the testimony.[95]

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89. *Id.* at 593.
90. *Id.* (citing Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001)).
91. *See id.* at 593.
92. 761 N.E.2d 826 (Ind. 2002).
93. *Id.* at 829.
94. *Id.*
95. *Id.*

J. Notice Provision of 404(b)

In *Burgett v. State*,[96] Burgett claimed that prior bad act evidence was improperly admitted by the trial court because the State had not complied with the notice provision of Rule 404(b).[97] The notice provision of Rule 404(b) provides that such prior bad act evidence is not admissible to show action in conformity therewith, but that such bad act evidence may be admissible in some circumstances, "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown."[98]

At trial, the State had waited until the day of trial to file notice of its intent to use prior bad act evidence against Burgett. The court noted that "[t]he purpose of the notice provision, under Ind. R. Evid. 404(b), is to reduce surprise and promote the early resolution of questions of admissibility."[99] The court noted that the defense was aware of the prior bad acts and the likelihood that the State would attempt to use them, and that there had recently been an election and change of personnel in the Prosecutor's office. The court of appeals held that the trial court had not committed error in allowing the use of the prior bad act evidence.[100]

K. Evidence of Transferred Intent to Prove Motive

In *Pickens v. State*,[101] Pickens argued that evidence that he had robbed and shot another man two weeks before he shot the victim should have been excluded as evidence of a prior bad act. Pickens argued that this evidence merely showed he was capable of shooting someone else. The court found that the evidence of the earlier incident was relevant to show intent to shoot the victim because there was evidence that the victim had been wearing the coat of the man shot earlier when he was attacked by Pickens.[102] The court found that

> [t]he evidence of Pickens's dispute with [the earlier victim] was relevant to show Pickens's motive to shoot [the earlier victim]. The fact that Pickens mistakenly shot [the later victim] instead of [the earlier victim] does not eliminate the motive for the shooting. Thus, the evidence was relevant to a matter at issue other than Pickens's propensity to commit the murder.[103]

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96. 758 N.E.2d 571 (Ind. Ct. App. 2001).

97. *See id.* at 579.

98. IND. R. EVID. 404(b).

99. *Burgett*, 758 N.E.2d at 579 (citing Dixon v. State, 712 N.E.2d 1086, 1090 (Ind. Ct. App. 1999)).

100. *Id.*

101. 764 N.E.2d 295 (Ind. Ct. App. 2002).

102. *See id.* at 298.

103. *Id.* (citing Swanson v. State, 666 N.E.2d 397, 398 (Ind. 1996)).

L. Evidence of Access to the Same Type of Weapon Used in the Crime

Pickens also challenged the admission of statements from police officers stating that they had seen an assault rifle in Pickens' home two years before the charged crime occurred. Pickens argued that this evidence was inadmissible under Rule 404(b) as evidence of a prior bad act.[104]

In considering this argument, the court first noted that "it is by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior 'bad acts' for 404(b) purposes."[105] Assuming for argument that such evidence could be considered evidence of prior bad acts, the court reiterated that "[e]vidence that a defendant had access to a weapon of the type used in a crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act."[106]

The court also considered Pickens' contention that the length of time between the officers' observation and the charged offense made the probative value of the evidence low in relation to its prejudicial effect. The court held that the observation had high probative value on the issue of Pickens' access to the type of weapon used, and that the trial court had not abused its discretion in admitting the evidence.[107]

M. Use of the Rape Shield Statute as a Shield and a Sword

In *Turney v. State*,[108] previously mentioned for its Rule 404(b) implications, the victim had accused Turney of molesting her. Turney argued that he should have been allowed to introduce evidence that the victim had molested the younger children of her foster parents. The State invoked Rule 412(a) to prevent testimony on this subject.[109] Rule 412, the "rape shield" rule, provides:

> [I]n a prosecution for a sex crime, evidence of the past sexual conduct of the victim or witness may not be admitted, except: (1) evidence of the victim's or pf 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.[110]

The presence of evidence that sexual contact did occur, and the State's introduction of evidence of the victim's physical or psychological condition to prove that sexual conduct occurred implied that the defendant was the

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104. *See id.* at 299.
105. *Id.* (quoting Williams v. State, 690 N.E.2d 162, 174 (Ind. 1997)).
106. *Id.* (quoting Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000)).
107. *See id.* at 300.
108. 759 N.E.2d 671. *See supra* note 56.
109. *See Turney*, 759 N.E.2d at 675-76.
110. IND. R. EVID. 412(a).

perpetrator. The court found that allowing the State to make this inference of guilt, while preventing the defendant from offering an alternate explanation for that condition, was improper.[111]

The court held that

> the State cannot use the Rape Shield Statute both as a shield and as a sword. It is error to apply a rule "mechanistically to prohibit the defense from either offering its version of the facts or assuring through cross-examination that the trier of fact has a satisfactory basis for evaluating the truth of the witnesses' testimony."[112]

III. IMPEACHMENT

A. Inquiry Into Validity of Verdict

In *Davis v. State*,[113] Davis argued several issues on appeal, including that his constitutional rights were violated because some jurors saw him in handcuffs, and other jurors may have overheard rumors that Davis' family had called in bomb threats to the courthouse. The court held that these incidents did not warrant a mistrial because Davis could not show that the incidents caused him any actual harm.[114]

Davis claimed that the subsequent questioning of the jurors about viewing Davis in restraints and knowledge of the bomb threat violated Rule 606(b). However, the court noted that it did not. The court stated that "Rule 606(b) permits a juror to testify concerning 'whether extraneous prejudicial information was improperly brought to the jury's attention' or 'whether any outside influence was improperly brought to bear upon any juror.'"[115] The court found this questioning entirely proper as both the defense and prosecution had asked proper questions, and each juror denied that either item had any bearing on their verdict.[116]

In *Majors v. State*,[117] Majors appealed his conviction for murder, arguing several issues related to jury conduct. During the trial, the judge became aware that a particular juror was making improper facial expressions and passed a note through the bailiff, cautioning the juror. After announcement of the verdict, the juror signed an affidavit saying the note from the judge had upset and frightened her. Majors contended this was an improper and prejudicial ex-parte

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111. *See Turney*, 759 N.E.2d at 676-77.

112. *Id.* at 677 (quoting Saylor v. State, 559 N.E.2d 332, 335 (Ind. Ct. App. 1990)). The court also noted that the State's theory at trial was that the victim was innocent and sexually pure. *See id.*

113. 770 N.E.2d 319 (Ind. 2002).

114. *Id.* at 325-26.

115. *Id.* at 325 n.4 (quoting IND. R. EVID. 606(b)).

116. *Id.* (citing Record at 914-24).

117. 773 N.E.2d 231 (Ind. 2002).

communication requiring reversal.[118] The court found this note innocuous and within the proper discretion of the trial court to control and manage the jury.[119]

Majors also argued that the jury was improperly influenced during activities outside of deliberations and the court room. He first claimed that one juror ordered two beers after hours and drank them in his hotel room. To support his contention, he referred to *Schultz v. Valle*,[120] in which the verdict was found invalid because jurors had drank alcohol during deliberations. However, in this case the juror had only consumed alcohol after deliberations had ceased for the day, a full night before the next day's deliberations would resume. The court held that Majors had not demonstrated gross misconduct or probable harm.[121]

Majors next argued that the jury was improperly influenced by the presentation of a birthday cake from the judge, a few bottles of wine from the sheriff's wife, and transportation of the jurors to a cookout and fishing trip by bailiffs and local law enforcement. Majors argued that this fraternization with law enforcement personnel led the jury to improperly favor the State. The court found that the trial court had not abused its discretion in rejecting these arguments because nothing in the record showed that Majors suffered any prejudice as a result of the outings or gifts or that the jury's verdict was influenced by the events.[122]

Majors argued that the jury improperly discussed parts of the trial prior to deliberations, including a juror affidavit stating that jurors made comments during trial about physical characteristics of State and defense attorneys, and about how one defense attorney questioned witnesses. The court held that this claim was an attempt to impeach the verdict, which is not allowed under Rule 606(b).[123] In a footnote, the court restated Rule 606(b), which precludes juror testimony, except as "(1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror."[124] In regard to the totality of Majors' jury-related objections, the court found that Majors had not demonstrated an "interest sufficient to overcome the interests of finality of verdicts and avoidance of juror harassment."[125]

In *Hall v. State*,[126] Hall appealed the trial court's denial of his request to depose members of the jury that had found him guilty of murder and neglect of a dependent. During the course of the trial, a stepson of one of the jurors had

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118. *See id.* at 234.

119. *Id.*

120. 464 N.E.2d 354 (Ind. Ct. App. 1984).

121. *See Majors*, 773 N.E.2d at 235-36.

122. *See id.* at 236.

123. *See id.* at 236-37.

124. *Id.* at 237 n.5 (quoting IND. R. EVID. 606(b)).

125. *Id.* at 238. Majors also argued that the mention of polygraph evidence was error. The admission of such evidence was found to have had little effect and to be harmless. *Id.* at 238-39.

126. 760 N.E.2d 688 (Ind. 2002).

relayed to the juror that he believed Hall was innocent, but later relayed to the juror's wife that he now believed Hall was guilty. The juror had then relayed this information to the jury. Significantly, this appeal took place during the pendency of the motion to correct errors, which already contained affidavits from jurors relaying the alleged facts.[127]

Hall asserted that his constitutional right to confront witnesses against him extended to the right to depose members of a jury to determine if misconduct occurred during the trial or deliberations. In analyzing this case, the court looked to a recent decision of the Indiana Supreme Court, *Griffin v. State.*[128]

In *Griffin*, the Indiana Supreme Court recognized the importance of "protecting a defendant's right to confront witnesses, 'which may be violated if a jury considers information that was not in evidence.'"[129] However, the Indiana Supreme Court determined in *Griffin* that the common law prohibition against a juror testifying about how an outside influence affected him survived the adoption of Rule 606(b), meaning that the "defendant's right to confront witnesses was not violated if the jury could testify to the existence of a 606(b) exception, but not the effect that the influence had on them."[130]

The *Hall* court further cited *Griffin* to show that the State has a paramount interest in limiting discovery regarding juror misconduct. This interest is based on "concerns of post-verdict jury tampering, defeating the jury's solemn acts under oath, and the possibility that dissatisfied jurors would attempt to destroy a verdict after assenting."[131] The court did find, however, that the deposition of jurors may be used when appropriate, such as in situations where "the risk of prejudice is substantial, as opposed to imaginary or remote."[132] The court suggested that a more appropriate method in these circumstances would be *"in camera* interviews with jurors to determine the extent to which they were exposed to prohibited information and the potential prejudice that resulted."[133] In summation, the court held that

> following the previous interpretations of 606(b) and the common law views of jury impeachment, we find no basis for mandating that a party has the right to depose the jury. Rather, the appropriate method to be used for determining prejudice when there are allegations of jury misconduct is best left to the discretion of the trial court.[134]

In *South Bend Clinic v. Kistner*,[135] the issue on appeal was also jury misconduct. Certain members of the jury had consulted dictionaries for

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127. *See id.* at 689.
128. 754 N.E.2d 899 (Ind. 2001).
129. *Hall*, 760 N.E.2d at 690 (quoting *Griffin*, 754 N.E.2d at 902).
130. *Id.* (citing *Griffin*, 754 N.E.2d at 903).
131. *Id.* at 691 (citing *Griffin*, 754 N.E.2d at 902).
132. *Id.* at 692 (citing Agnew v. State, 677 N.E.2d 582, 584 (Ind. Ct. App. 1997)).
133. *Id.*
134. *Id.*
135. 769 N.E.2d 591 (Ind. Ct. App. 2002).

definitions of words after the trial judge had refused the request. The court noted that "a jury's verdict may not be impeached by the testimony of the jurors who returned it,"[136] and that an exception to that rule exists where "there is evidence demonstrating that the jury was exposed to improper, extrinsic material during its deliberations, and when a substantial possibility exists that the verdict was prejudiced by the improper material."[137] Using this criteria, the court determined that there was no evidence that consulting a dictionary affected the jury's deliberations or in any way resulted in prejudice to the defendants.[138]

B. Violation of Separation of Witnesses Order

In *Jiosa v. State*,[139] Jiosa appealed convictions for child molestation and for being a habitual offender. At trial, the judge had ordered separation of the witnesses. A non-testifying witness had been outside the courtroom and overheard Jiosa's father shouting details of the current testimony.[140] The witness in the hallway contacted the defense counsel, offering to testify as to an alternate explanation of the testimony previously offered. The trial court excluded this testimony based on the separation of witnesses order.[141]

In considering whether this exclusion was proper, the court looked to established case law regarding Rule 615. Rule 615 sets out the circumstances for use of a separation of witnesses order, but does not specifically address remedies for violations of such an order.[142] The court stated that it was not clear that a violation of the order had occurred, but assumed one for the purposes of discussion. Based on the facts that the proffered witness had inadvertently overheard the repeated testimony, the court relied upon the common law rule that "it is an abuse of discretion to exclude witnesses for violations of a separation order when the party seeking to call the witness had no part in the violation of the order."[143] The court found that the trial court had abused its discretion and reversed the convictions.[144]

In *Childs v. State*,[145] however, the court found that a witness had been properly prevented from testifying pursuant to a separation order. In *Childs*, a

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136. *Id.* at 593 (citing Ward v. Saint Mary Med. Ctr. of Gary, 658 N.E.2d 893, 894 (Ind. 1995)).

137. *Id.* (citing IND. R. EVID. 606(b)(2); Dawson v. Hummer, 649 N.E.2d 653, 664 (Ind. Ct. App. 1995)).

138. *See id.*

139. 755 N.E.2d 605 (Ind. 2001).

140. *See id.* at 606.

141. *See id.*

142. *See id.* at 607. Rule 615 provides that "[a]t the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony or discuss testimony with other witnesses . . . ." IND. R. EVID. 615.

143. *Id.* at 608.

144. *See id.* at 609.

145. 761 N.E.2d 892 (Ind. Ct. App. 2002).

person not on the witness list (Childs' fiancé) had been present for part of the trial proceedings, and then offered testimony contradicting evidence introduced in her presence. The witness had remained in the courtroom after discussing the possibility of testifying with Childs. The trial court declared her a tainted witness and excluded her testimony.[146]

Although the court of appeals considered the holding in *Jiosa*, it distinguished facts in the present case. The court held that once the defense became aware that the fiancé might testify, she became subject to the separation order, and that her testimony may have represented a shift in defense strategy that would have left the State at a disadvantage. Because the defense had a part in the violation of the separation order by not excluding the witness once it was discovered that she might testify, *Jiosa* did not apply and the remedy for violation of the separation order was within the discretion of the trial court.[147]

In *Kirby v. State*,[148] Kirby argued that the trial court had abused its discretion by allowing two police detectives to remain at the State's table during the trial in violation of Rule 615. The State was allowed to exclude one detective from the separation order as an officer or employee of a party that is not a natural person, and the other detective as an essential witness.[149] While Rule 615 requires separation of witnesses at the request of a party, the rule

> does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.[150]

Kirby argued that one detective would have been sufficient to aid the State in its case. However, the State had demonstrated that both detectives had participated in the investigation and had interviewed separate witnesses. In preparation for the four to six week trial, the detectives had interviewed approximately 220 witnesses. In finding that the trial court had not abused its discretion, the appellate court said "[n]otwithstanding the important purpose of Rule 615 to minimize prospective witnesses from exposure to the testimony of other witnesses . . . we decline to find that the trial court abused its discretion. . . ."[151]

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146. *Id.* at 895.

147. *Id.*

148. 774 N.E.2d 523 (Ind. Ct. App. 2002).

149. *See id.* at 537-38.

150. IND. R. EVID. 615.

151. *Kirby*, 774 N.E.2d at 538.

IV. OPINIONS AND EXPERT TESTIMONY

A. Appropriate Use of Expert Testimony

In *Miller v. State*,[152] Miller appealed convictions for murder and criminal deviate conduct. Miller was a mentally-retarded individual who had provided incriminating answers to police interrogation (after being presented with extensive fabricated evidence by the police, including a fake fingerprint card, a fake computer printout, and false claims of eyewitness accounts). After finding that the incriminatory statements were indeed voluntary, the court considered whether or not the trial court had committed error in excluding the testimony of a psychologist called by the defense as an expert in "'social psychology of police interrogation and false confessions.'"[153]

The proffered expert testimony would have discussed modern police interrogation techniques, how those techniques can lead to a false confession, and how to analyze the undisputed incriminating statements for indicia of whether or not they were true confessions.[154] Miller argued that, absent this expert testimony, he had no opportunity to demonstrate why a mentally retarded individual would admit to false accusations when presented with false evidence and police pressure. The State argued that the testimony was properly excluded because the facts of the confession were not in dispute, and alternatively that the exclusion of the proffered evidence was harmless.[155]

The court first observed that a determination by a trial court that a statement was admissible and voluntary does not preclude the defense from challenging its weight and credibility.[156] This finding was based on the fact that "[t]he jury . . . remains the final arbiter of all factual issues under Article 1, Section 19 of the Indiana Constitution."[157] The court stated that "[e]xpert testimony is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury."[158] The court also referred to *Carter v. State*[159] for its holding that Rule 704(b) prohibits experts from testifying to intent, guilt or innocence, truth or falsity of testimony, or to legal conclusions. In *Carter*, the court held that "a psychologist's testimony that autistic children find it difficult to deceive 'came close to, but did not cross the line into impermissible Rule 704(b) vouching.'"[160]

The court ultimately held that "the fact that the content of the interrogation

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152. 770 N.E.2d 763 (Ind. 2002).

153. *Id.* at 770 (quoting Brief of Appellant at 17).

154. *See id.*

155. *See id.* at 772.

156. *See id.*

157. *Miller*, 770 N.E.2d at 772-73 (citing Morgan v. State, 648 N.E.2d 1164, 1170 (Ind. Ct. App. 1995)).

158. *Id.* at 773 (citing IND. R. EVID. 702(a)).

159. 754 N.E.2d 877, 882-93 (Ind. 2001).

160. *Miller*, 770 N.E.2d at 773 (quoting *Carter*, 754 N.E.2d at 883).

was not in dispute is not a proper basis on which to exclude Dr. Ofshe's testimony,"[161] and that the trial court's determination of sufficient voluntariness for admissibility "did not preclude the defendant's challenge to its weight and credibility at trial."[162] The court ordered a new trial for the appellant, stating that the psychologist's testimony would have aided the jury in understanding relevant aspects of police interrogation and interrogation of mentally retarded individuals, "topics outside common knowledge and experience."[163] In the event that some of the witness testimony might exceed the limits imposed on opinion testimony by Rule 704(b), the trial court may uphold individual objections as opposed to excluding the whole of this type of testimony, which would prevent the defendant from presenting a defense.[164]

In *Cansler v. Mills*,[165] Cansler appealed from a summary judgment decision for the appellee. He had sued General Motors based on the allegation that his air bag had failed to open on impact, and that the air bag was defective. General Motors' motion for summary judgment was granted because it provided evidence that the vehicle complied with the 1994 Federal Motor Vehicle Standard, and that Cansler had failed to provide any expert witness testimony, which is required to rebut the presumption that the product was not defective. Cansler had submitted the deposition of an auto mechanic who examined the car after the accident, and concluded that the air bag should have deployed. However, the trial court ruled that the mechanic was not qualified to render an expert opinion, and his testimony was therefore inadmissible.[166]

On appeal, Cansler argued that the mechanic's testimony was admissible because it was based on his observation and skill rather than on scientific principles.[167] The court stated that, under Rule 702, a witness can "be qualified as an expert by virtue of 'knowledge, skill, experience, training, or education,'"[168] and that only one of these characteristics is necessary to qualify someone as an expert.[169] A witness can be qualified as an expert on the basis of practical experience alone, but "'expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.'"[170]

Because the mechanic had never consulted on a defective air bag, never had air bag training, never attended classes relevant to the particular model of car,

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161. *Id.*

162. *Id.*

163. *Id.* at 774.

164. *See id.*

165. 765 N.E.2d 698 (Ind. Ct. App. 2002).

166. *Id.* at 701.

167. *Id.* at 702.

168. *Id.* (quoting Creasy v. Rusk, 730 N.E.2d 659, 669 (Ind. 2000) (quoting IND. R. EVID. 702(a))).

169. *Id.* (citing *Creasy*, 730 N.E.2d at 669).

170. *Cansler*, 765 N.E.2d at 702 (quoting West v. State, 755 N.E.2d 173, 180 (Ind. 2001) (quoting IND. R. EVID. 702(b))).

and never worked designing, testing, or certifying air bag systems, the court determined that the mechanic did not have enough experience with air bag fundamentals to qualify as an expert. Although the court found that the trial court had not abused its discretion in failing to qualify the mechanic as an expert, it stated that "'qualification under Rule 702 (and hence designation as an expert) is only required if the witness's opinion is based on information received from others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question,'"[171] and that "[t]he testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony."[172]

The court went on to say that "[s]killed witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge,"[173] and that to be admissible under Rule 701, opinion testimony of such a witness must be "'(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.'"[174]

In this case, the mechanic's testimony was based on years of experience working with salvaged vehicles that had suffered similar frame damage and with deployed air bags. His testimony about the damage to Cansler's vehicle and comparisons to similarly damaged vehicles observed during his experience were merely a report of his personal observations. The court held that, while the mechanic was not qualified to testify as an expert, he could testify about observations from years of experience with damaged vehicles and from examining Cansler's vehicle, and therefore the trial court had abused its discretion.[175]

In *Haycraft v. State*,[176] Haycraft appealed his conviction for child molestation based in part on his claim that testimony by a state police investigator was improperly admitted because the detective had not qualified as an expert witness, and that the technique the detective discussed had not been established as a reliable scientific theory under Rule 702. The detective had testified that child molesters use a "grooming technique" to gradually introduce their intended victims to sexually explicit materials and acts before actually engaging in sex with them.[177]

The court found that, as in *Cansler*, the witness had testified as a skilled witness rather than an expert witness. Because the State had shown that the

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171. *Id.* at 703 (quoting 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 701.105, at 321 (2d ed. 1995)).

172. *Id.* (citing Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001)).

173. *Id.* (citing MILLER, *supra* note 171, at 319-20).

174. *Id.* (quoting Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (quoting IND. R. EVID. 701)).

175. *Id.* at 704.

176. 760 N.E.2d 203 (Ind. Ct. App. 2001).

177. *Id.* at 210.

detective had significant training on the methodology of sexual abuse and profile of offenders, had investigated other sexual abuse cases and consulted sexual abuse training manuals, had been a detective with the State Police since 1993, had training beyond the common person in this field, and that his testimony was based on his personal experience as an investigator, he was sufficiently qualified to testify as a skilled witness. The court found that the trial court had not abused its discretion in admitting the testimony.[178]

B. Reliability of Scientific Principles Utilized by Expert Witnesses

In the *Carter* case, discussed *supra*, the appellant also argued that bite mark evidence from a forensic odontologist should not have been admitted into evidence. Carter claimed that the bite mark evidence should not have been allowed because a proper foundation for this evidence's reliability was not laid pursuant to Rule 702. The odontologist had testified that the bite mark on the victim had been "more likely than not caused by the defendant."[179] Regarding testimony by expert witnesses, the court reiterated that Rule 702 provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.[180]

Although the Indiana Supreme Court, in the 1977 *Niehaus v. State* case, found "'no reason why [bite mark] evidence should be rejected as unreliable,'"[181] Carter argued that *Niehaus* did not control because it was decided before the landmark *Daubert v. Merrell Dow Pharmaceutical, Inc.*[182] decision (which construed Rule 702 of the Federal Rules of Evidence), before the *Kuhmo Tire Co. v. Carmichael*[183] decision (which applied *Daubert* analysis to all types of expert testimony) and before Indiana's adoption of the Indiana Rules of Evidence (including Rules 702 (a) and (b)).[184]

Carter argued that state standards cannot drop below the minimum standards guaranteed by the Federal Constitution, and that the *Kuhmo Tire* decision was binding on Indiana state court practice. However, the court pointed out that the U.S. Supreme Court had *not* held in *Kuhmo Tire* that Federal Rule of Evidence 702 was a constitutional requirement applicable to the states. The court therefore

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178. *Id.* at 211.
179. Carter v. State, 766 N.E.2d 377, 380 (Ind. 2002).
180. *Id.* at 380 n.5 (quoting IND. R. EVID. 702).
181. *Id.* at 380 (quoting Niehaus v. State, 359 N.E.2d 513, 516 (Ind. 1977)).
182. 509 U.S. 579 (1993).
183. 526 U.S. 137 (1999).
184. *See Carter*, 766 N.E.2d at 380-81.

held that *Kuhmo Tire* is not binding on Indiana practice, and continued the analysis using Indiana authority.[185] Relying on *Niehaus* and *McGrew v. State*,[186] a similar case involving hair comparison analysis, the court said that "the bite mark method of identification in Niehaus '[was] simply a matter of comparison of items of physical evidence to determine if they are reciprocal,'"[187] and therefore the trial court had not abused its discretion in finding the bite mark evidence sufficiently reliable.

Another case involving expert testimony, *Armstrong v. Cerestar USA, Inc.*,[188] examined Rule 702 issues. *Armstrong* involved determining responsibility for injuries to an employee (Armstrong) of an independent contractor. The employee had become light-headed and fallen off a sludge tanker, which was owned by the independent contractor, but located on the premises of the company which had hired the independent contractor. Armstrong argued that the trial court had abused its discretion by striking the testimony of his expert witness. The witness had testified that Armstrong had been exposed to a hazardous concentration of hydrogen sulfide gas, the exposure caused Armstrong to become disoriented and fall, and that the substance would be considered hazardous material under OSHA guidelines.[189]

The court noted that "Indiana Evidence Rule 702 requires that an expert be qualified as such by his knowledge, skill, experience, training, or education. Additionally, 'an expert must have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area,'"[190] and "'[m]oreover, questions of medical causation of a particular injury are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters.'"[191]

The court further noted that trial courts must assess the scientific validity of the reasoning or methodology underlying the testimony, whether such reasoning or methodology can properly be applied to the facts in issue, and that such knowledge admitted under Rule 702 is required to be more than unsupported speculation or a subjective belief.[192]

Although a review of the expert's credentials showed he had an MBA degree, a master's degree in Health and Safety Studies and had years of experience in various roles in Environmental and OSHA, the expert admitted that

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185. *Id.* at 381.

186. 682 N.E.2d 1289 (Ind. 1997).

187. *Carter*, 766 N.E.2d at 381 (quoting Niehaus v. State, 359 N.E.2d 513, 516 (Ind. 1977); *cf.* Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997) (observations of a witness with specialized knowledge, and the physical evidence related to it, are not "scientific principles" governed by Rule 702(b)).

188. 775 N.E.2d 360 (Ind. Ct. App. 2002).

189. *Id.* at 365-66.

190. *Id.* at 366 (quoting Hannan v. Pest Control Servs., Inc., 734 N.E.2d 674, 679 (Ind. Ct. App. 2000)).

191. *Id.*

192. *Id.*

he did not conduct any of his own tests (he relied on tests done by others not done on the day of the accident), he did not attempt to calculate the level of hydrogen sulfide Armstrong may have been exposed to (because no reliable method of testing was known), and that while factors such as temperature, wind, and humidity could affect such a test, he did not have any of this data for the day of the accident. He also did not know Armstrong's weight or height, had never examined the tanker, and had never been involved in a similar case.[193]

The expert's opinions had concluded that Armstrong had been exposed to a dangerous level of hydrogen sulfide, that he became ill from the exposure, and that the material he was working with was hazardous under OSHA regulations. However, the underlying data for these conclusions were tests done by others long before the accident or done a day or more after the accident under different weather conditions.[194]

The court conceded that one could suspect that exposure to this gas at certain levels could cause health problems, but noted that the expert was not a licensed physician with the requisite experience and knowledge to testify as to the proximate cause of Armstrong's fall being exposure to hydrogen sulfide. Armstrong also failed to offer evidence excluding other possible causes for his fall. Although the expert's credentials in other areas were impressive, the cause of the fall was a question of medical causation, and such testimony must be offered by a physician or surgeon with experience in the area.[195]

Finally, the court said that although the expert could be found by a court to be an expert on OSHA matters due to his current and previous employment, any determination under OSHA rules would be irrelevant because an OSHA standard cannot be used to expand an existing duty of care.[196]

In its holding as to this subject, the court said that "[f]or all of these reasons, we conclude that [the expert's] opinions were unreliable, no more than subjective belief or unsupported speculation,"[197] and that the trial court did not abuse its discretion in striking this testimony.[198]

C. Expert Opinions Regarding Criminal Intent, Guilt or Innocence

In *Moore v. State*,[199] the petitioner argued on appeal that the trial court had improperly excluded expert testimony regarding his awareness at the time of the crime. The proffered evidence consisted of testimony by a psychiatrist that, in his opinion, Moore had been unaware he was shooting at a police officer, and

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193. *Armstrong*, 775 N.E.2d at 367-68.

194. *Id.*

195. *Id.* at 368 (citing Hannan v. Pest Control Servs., Inc., 734 N.E.2d 674, 679 (Ind. Ct. App. 2000)).

196. *Id.*

197. *Id.* In other words, no matter how smart you are, you can't make stuff up.

198. *See id.*

199. 771 N.E.2d 46 (Ind. 2002).

that Moore was surprised it turned out to be a police officer.[200]

The court reiterated Rule 704(b), which states in part that "'[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case,'"[201] and concluded that the testimony "would have directly reflected on the defendant's intent, guilt, or innocence, and thus was an inadmissible conclusion regarding intent."[202] The court therefore found that the trial court had not abused its discretion, and affirmed the sentence of death.[203]

V. HEARSAY

A. State of Mind

In *Simmons v. State*,[204] Simmons was accused of the murder of his former fiancé. A portion of the evidence against him at trial was statements by Officer Powell and Elijah Bowman that the victim had been afraid of Simmons, and that Simmons had previously threatened her with a gun. The trial court ruled that Bowman could testify that the victim feared Simmons and that her intent was to call off the wedding, but that this evidence could not be used to prove Simmons' prior bad act of threatening the victim with a gun. The trial court also ruled that the police officer could testify that he responded to an earlier 911 call from the victim, and that the victim, while in an excited state, had claimed that Simmons had threatened her with a gun.[205]

The court found that Bowman's testimony was admitted pursuant to Rule 803(3), which provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)"[206] is not excluded by the hearsay rule, even though the declarant is available as a witness.[207] However, the court then examined whether or not this evidence met the requirement that only relevant evidence is admissible.[208] This analysis turned on the rule that a victim's state of mind is relevant when it has been put in issue by the defendant.[209] In this case, Simmons had not put the victim's state of mind at issue. Simmons' defense was that he was not at the scene of the crime. Because the victim's fear was not relevant to any issue and Simmons did not put the victim's state of mind at issue, the trial court abused its discretion by allowing Bowman to testify as to

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200. *Id.* at 55.

201. *Id.* (quoting IND. R. EVID. 704(b)).

202. *Id.* (citing Jackson v. State, 728 N.E.2d 147, 153 (Ind. 2000)).

203. *Id.*

204. 760 N.E.2d 1154 (Ind. Ct. App. 2002).

205. *See id.* at 1158.

206. *Id.* at 1159 (citing IND. R. EVID. 803(3)).

207. *Id.*

208. *Id.* at 1160 (citing IND. R. EVID. 402).

209. *Id.* (citing Angleton v. State, 686 N.E.2d 803, 809 (Ind. 1997) (citing Taylor v. State, 659 N.E.2d 535, 543 (Ind. 1995))).

Simmons' threats and the victim's fear of him. However, this was found to be a harmless error due to the strength of the remaining evidence.[210]

B. Startling Event or Condition

The court next considered the testimony of Officer Powell. Officer Powell testified that he had responded to a 911 call made by the victim, and that she had informed him that Simmons had threatened her with a gun. However, the trial court specifically noted that it was not admitting this evidence under Evidence Rule 404(b). The trial court did admit this evidence under the excited utterance exception to the hearsay rule.[211] Rule 803 provides that "the following are not excluded from the hearsay rule, even though the declarant is unavailable as a witness . . . (2) [A] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[212]

Although Officer Powell's testimony did fall under this exception, the court found that the admission of this testimony was also erroneous, because its only possible relevance was to show that Simmons was capable of committing the crime charged. The evidence was inadmissable because it violated Rule 404(b), which requires that "the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act."[213] However, the court found that this was also harmless error.[214]

C. Business Records

In *Greco v. KMA Auto Exchange, Inc.*,[215] Greco argued that the trial court had improperly admitted the relevant security agreement because a sufficient foundation had not been presented to establish that the document was made at or near the time of the transaction pursuant to Rule 803(6).[216] Rule 803(6) excepts certain business records from the hearsay rule if they meet the following criteria:

> [A] memorandum . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity, and if it was the regular practice of that business activity to make the memorandum, . . . all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation

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210. *Id.*
211. *See id.*
212. IND. R. EVID. 803(2).
213. IND. R. EVID. 404(b).
214. *Simmons*, 760 N.E.2d at 1161-62.
215. 765 N.E.2d 140 (Ind. Ct. App. 2002).
216. *Id.* at 145.

indicate a lack of trustworthiness.[217]

KMA's general manager testified at trial that he had been involved in the sale of the truck, he was the keeper of the records at KMA, and the document was signed and kept as a part of KMA's regular business activity. Even though the manager had not personally signed the document, his testimony that he had been involved in the sale created a sufficient foundation for the trial court to conclude that the security agreement was made at or near the time of the transaction.[218] The court found that the trial court had not abused its discretion in admitting the security agreement into evidence.[219]

D. Public Records

In *Baxter v. State*,[220] a victim had been lured into Baxter's home while Baxter was on in-home detention. The victim identified Baxter the following day, but was unable to positively identify Baxter at Baxter's revocation hearing.[221] The State then offered into evidence the Probable Cause Affidavit that Officer Wallace had prepared in association with the robbery case.[222] On appeal, Baxter argued that the State's exhibit was unreliable hearsay and thus inadmissible.[223]

An important element of this case is that it is an appeal from a probation revocation hearing. "'[P]robationers are not entitled to the full array of constitutional rights afforded defendants at trial,'"[224] and "in probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay."[225] Even with this lower standard for admissibility, the court found that the trial court erred in admitting the report into evidence because it bore no substantial indicia of reliability.[226]

In a previous probation revocation hearing case, *Pitman v. State*,[227] the court had found similar evidence admissible, but the State had introduced certified copies of the police report, the court docket, and charging information. That information was found to be relevant and the certification of the documents by the court provided substantial verification of their reliability.[228] However, in *Baxter*, the document called a "Probable Cause Affidavit" was actually a "Law Enforcement Incident Report," and it was uncertified, unverified and unsigned

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217. *Id.* (quoting IND. R. EVID. 803(6)).
218. *See id.* (citing Williams v. Hittle, 629 N.E.2d 944, 948 (Ind. Ct. App. 1994)).
219. *See id.*
220. 774 N.E.2d 1037 (Ind. Ct. App. 2002).
221. *See id.* at 1038-39.
222. *Id.* at 1041.
223. *Id.* at 1042.
224. *Id.* (quoting Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999)).
225. *Id.*
226. *Id.* at 1044.
227. 749 N.E.2d 557 (Ind. Ct. App. 2001).
228. *Id.*

by the arresting officer or the author of the report. The court disagreed with the State's contention that the report contained substantial indicia of reliability because it was prepared by a law enforcement officer during the course of his official investigation and corroborated the victim's testimony.[229]

In deciding that the document was not reliable, the court observed that "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case, do not fall within the public records exception to the hearsay rule, an indication that such reports are not considered inherently reliable."[230] The court stated that the document also did not corroborate the victim's testimony.[231]

In *Garling v. Indiana Department of Natural Resources*,[232] Garling questioned the admission of a public record under Rule 803(8), claiming that it lacked the required trustworthiness. Rule 803(8) provides in part that public records are admissible "unless the sources of information or other circumstances indicate a lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and recorded activities . . . ."[233]

Garling claimed that the evidence admitted lacked the required level of trustworthiness because the signatories of the document had also performed the notarization of the document. The court found it problematic that the notary was also a signatory in violation of Indiana statutory law, which provides that a "notary public shall not . . . acknowledge any instrument in which the notary's name appears as a party to the transaction."[234] However, the court ruled that a determination of this document's trustworthiness was unnecessary because same or similar evidence had been submitted without objection.[235]

E. Excited Utterance

In *Marcum v. State*,[236] Marcum appealed his conviction for domestic battery, alleging that hearsay evidence was improperly introduced against him at trial. When the State called Marcum's wife to testify against him, she recanted her earlier written allegations against Marcum. The trial court allowed introduction of the written statement, finding the statement to be either an excited utterance and/or a recorded recollection.[237]

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229. *Id.* at 1043.

230. *Id.* (citing IND. R. EVID. 803(8); *cf.* Hernandez v. State, 716 N.E.2d 601, 602-03 (Ind. Ct. App. 1999)).

231. *Id.*

232. 756 N.E.2d 1029 (Ind. Ct. App. 2001).

233. IND. R. EVID. 803(8).

234. *Garling*, 756 N.E.2d at 1033 (quoting IND. CODE § 33-16-2-2 (1998)).

235. *Id.* (citing R.R. Donnelley & Sons, Inc. v. North Texas Steel, Inc., 752 N.E.2d 112, 127 (Ind. Ct. App. 2001)).

236. 772 N.E.2d 998 (Ind. Ct. App. 2002).

237. *See id.* at 1000.

In order to consider whether the evidence was indeed an excited utterance, the court looked to Rule 803(2), which provides that in order for hearsay evidence to be admitted as an excited utterance, three elements must be found: "(1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event."[238] Because the statement in this case had been given two and a half days after the startling event, and the declarant had since gone to work, gone out with friends, and undertaken various other activities in the intervening days, the statement could not be admitted as an excited utterance. She had been capable of "thoughtful reflection and fabrication at the time she gave the statement."[239]

The court turned to the issue of recorded recollection. This exception under Rule 803(5) was quickly dismissed as it provides that it is to be used in situations where the declarant has insufficient recollection of the matter at trial.[240] Because Marcum's wife had testified at trial that she did have a complete and accurate recollection of the relevant events, this exception could not apply. The State's evidentiary focus was on this statement, and therefore the court found the admission of this evidence to be reversible error.[241]

A second case involving excited utterance, *Cox v. State*,[242] involved statements made by an alleged domestic battery victim to a Deputy Sheriff shortly after the battery occurred. Cox argued on appeal that these statements should not have been introduced at trial by the deputy because the victim did not testify and the testimony did not fit into any hearsay exception.[243]

The court began by restating the text of rule 803(2), which provides that "the following are not excluded from the hearsay rule, even though the declarant is available as a witness . . . . (2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[244] The court stated that the portion of Rule 803(2) that allows the excited utterance exception to be used "even though the declarant is available as a witness," means that "Rule 803 lists exceptions which are not hearsay regardless of whether the declarant is available."[245] Therefore, the court

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238. *Id.* at 1001 (citing Jenkins v. State, 725 N.E.2d 66, 68 (Ind. 2000); IND. R. EVID. 803(2)).

239. *Id.* at 1002. The court cited previous cases which held that the key to the excited utterance calculation is whether the declarant was still under the stress of the event and therefore unlikely to make deliberate falsifications and be incapable of thoughtful reflection. *See* Jenkins v. State, 725 N.E.2d 66, 68 (Ind. 2000); Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996).

240. Rule 803(5) provides a hearsay objection for "a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly . . . ." IND. R. EVID. 803(5).

241. *Marcum*, 772 N.E.2d at 1002.

242. 774 N.E.2d 1025 (Ind. Ct. App. 2002).

243. *Id.* at 1026.

244. *Id.* at 1027 (quoting IND. R. EVID. 803(2)).

245. *Id.*

found that this testimony fit squarely into the excited utterance exception.[246]

F. Prior Statement By a Witness

In *Flake v. State*,[247] Flake argued on appeal that the trial court erred when it allowed the State to rehabilitate its witness after impeachment on cross-examination. The facts in question were when the witness had informed Flake of her age, and how he had touched her. On cross-examination, the defense had elicited testimony from the witness favorable to the defendant. The trial court then allowed the State to rehabilitate the witness in both cases by introducing prior statements given in depositions and to the police that contained prior consistent statements.[248]

The court conceded that Rule 801(d)(1) provides that where "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose . . . ."[249] However, the court noted that "'because Rule 801(d) speaks only to the admission of prior consistent statements for their substance, we must look to pre-rule cases for the relevant common law on the rehabilitative use of these statements,'"[250] and that "[m]any pre-rules cases stated that prior consistent statements were admissible to rehabilitate witnesses."[251]

Because the was no recent fabrication, and the facts were similar to pre-evidentiary rules cases allowing such testimony for rehabilitative purposes, the court found that the trial court had not abused its discretion in allowing the rehabilitation of the witness, and that Rule 801(d)(1) need not have been applied.[252]

G. Statement of the Declarant's Then Existing State of Mind

In *Mull v. State*,[253] Mull contended that the trial court had erred in allowing penalty phase testimony by the victim's roommate and one of the victim's friends, who testified that the victim had believed the defendant to be weird, strange, and that he would watch her and talk to her and that the victim didn't want to talk to him. The trial court admitted this testimony under the exception to the hearsay rule found at Rule 803(3), which provides that a "statement of the

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246. *Id.*

247. 767 N.E.2d 1004 (Ind. Ct. App. 2002).

248. *See id.* at 1009-10.

249. *Id.* at 1009 (quoting IND. R. EVID. 801(d)(1)).

250. *Id.* (quoting Moreland v. State, 701 N.E.2d 288, 292 (Ind. Ct. App. 1998)).

251. *Id.*

252. *Id.* at 1011.

253. 770 N.E.2d 308 (Ind. 2002).

declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) . . . ."[254] is excepted from the hearsay rule.

Mull argued that these statements were irrelevant because the victim's state of mind was irrelevant, that the victim's state of mind had no relevance on the charged aggravated circumstances (that the defendant had intentionally killed in the course of burglary and attempted rape), and that Mull had not placed the victim's state of mind at issue. However, the court agreed with the trial court that the victim's statements were not offered to prove that he was strange or weird, or to prove that he watched her, but rather to show that the victim had not consented to Mull's entrance to her apartment or to consensual sex with him, and therefore the testimony was properly admitted. The court further found that Mull had placed the victim's state of mind at issue by cross-examining a detective as to the claim that the victim had admitted Mull to her apartment.[255]

H. Statement by a Co-Conspirator

In *Lander v. State*,[256] Lander challenged his convictions in part based on a claim that the State had inappropriately been allowed to question a co-conspirator regarding the co-conspirator's conversations with another regarding a robbery plan, and the co-conspirator's relaying of that plan to his girlfriend.[257]

The court noted that a co-conspirator's statement is not hearsay if the statement is given "'by a co-conspirator of a party during the course and in furtherance of the conspiracy.'"[258] The court also noted that the State is also required to prove that there is independent evidence of the conspiracy.[259] "This means that the State must show that (1) existence of a conspiracy between the declarant and the party against whom the statement is offered and (2) the statement was made in the course and in furtherance of this conspiracy."[260]

Because the State did not offer any first-hand independent evidence that a conspiracy existed between the defendant and the parties involved in the statements, the State failed to meet the minimum requirements of Rule 801(d)(2)(E) with respect to this testimony. However, the court found the improper admission of the statements to be harmless error.[261]

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254. IND. R. EVID. 803(3).

255. *See Mull*, 770 N.E.2d at 311.

256. 762 N.E.2d 1208 (Ind. 2002).

257. *See id.* at 1213.

258. *Id.* (quoting IND. R. EVID. 801(d)(2)(E)).

259. *Id.* (citing Lott v. State, 690 N.E.2d 204, 209 (Ind. 1997)).

260. *Id.* (citing Barber v. State, 715 N.E.2d 848, 852 (Ind. 1999)); *see also* Norton v. State, 772 N.E.2d 1028 (Ind. Ct. App. 2002) (discussing allowable uses of the doctrine of completeness in regards to statements by a co-conspirator), *trans. denied*, Norton v. State, 2002 Ind. LEXIS 833 (Ind. 2002).

261. *Lander*, 762 N.E.2d at 1213-14; *see also* Francis v. State, 758 N.E.2d 528 (Ind. 2001) (observing that "consistent with Federal Rule of Evidence 801(d)(2)(E), our own rule 'applies not

VI. AUTHENTICATION OF DOCUMENTS

A. Admission of Pictorial Depictions

In *Bone v. State*,[262] Bone challenged the admission of pictorial depictions (depictions of nude underage children, allegedly recovered from Bone's computer). Bone contended it was error to admit the depictions without authentication, which under Rule 901(a) is a showing that the exhibits depicted actual children or what appeared to be actual children, as alleged in the information. The State contended that the authentication requirement was satisfied by demonstrating that the images contained in the exhibits were recovered from Bone's computer.[263]

Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[264] The court also stated that "showing of authenticity is 'a finding that it is what its sponsor purports it to be.'"[265] The court determined that the testimony before the trial court had been sufficient to establish the authenticity of the exhibits as depicting the information contained in Bone's computer.[266]

VII. EVIDENCE OUTSIDE THE RULES

A. Opening the Door

In *Wales v. State*,[267] Wales was granted a petition for rehearing of *Wales v. State*,[268] in which the court had determined that the fact that the trial court had failed to conduct the balancing test of Rule 609(b) was moot, because Wales had opened the door to this evidence by testifying about it in his own defense.[269] On rehearing, the court considered Wales' alternate argument, that the trial court had failed to conduct the required balancing test of Rule 403, and that a defendant cannot open the door to evidence when Rule 403 is the basis of the objection. The court noted its previous decision regarding Rule 609(b) evidence, and reached the same result regarding the Rule 403 test: "Inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that

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only to conspiracies but also to joint ventures, and that a charge of criminal conspiracy is not required to invoke the evidentiary rule.'" *Id.* at 533 n.5 (quoting United States v. Kelley, 864 F.2d 569, 573 (7th Cir. 1989))).

262. 771 N.E.2d 710 (Ind. Ct. App. 2002).

263. *See id.* at 716.

264. IND. R. EVID. 901(a).

265. *Bone*, 771 N.E.2d at 716 (quoting MILLER, *supra* note 171, § 901.101).

266. *Id.* at 716-17.

267. 768 N.E.2d 513 (Ind. Ct. App. 2002).

268. 774 N.E.2d 116 (Ind. Ct. App. 2002).

269. *See id.*

evidence."[270]

B. Flight as Evidence of Guilt

In *Anderson v. State*,[271] Anderson appealed his convictions in part based on a claim that the trial court erred when it allowed the State to present evidence that law enforcement officials found the defendant in Birmingham, Alabama about one month after the victim was shot. Among his arguments, Anderson claimed that there was no evidence to demonstrate that his flight was immediate, and that there was no evidence to explain why he was in Alabama. He also tied these claims to Rule 403 by stating that the probative value of such evidence was outweighed by its prejudicial effect.[272]

While the court noted that "[a] jury may consider evidence of flight of the accused immediately after the commission of a crime as evidence of his consciousness of guilt,"[273] it noted that Anderson had fled the scene of the crime, could not be found at any of his known addresses in the days following the commission of the crime, and that Anderson had no known previous addresses in Alabama.[274]

As to Anderson's claim that no evidence had been offered as to why he would be in Alabama, the court held that "the jury in this case reasonably could have inferred that he had fled the scene of the crime and his community in an effort to avoid prosecution, which was sufficient to allow this evidence to be introduced."[275]

C. Voice Identification as Direct Evidence

In *Jackson v. State*,[276] Jackson argued that the trial court had improperly denied his request for a jury instruction regarding a finding of guilt when all of the evidence was circumstantial. The court found that this instruction was inappropriate. Even though no prior case had determined whether or not voice identification evidence is direct evidence, the court held that

> voice identification evidence that places the defendant at the crime scene

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270. *Wales*, 774 N.E.2d at 117 (citing Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000)). In fact, the court pointed out that Rule 403 is weighted toward admission of evidence, whereas Rule 609(b) is weighted against the admission of evidence. Thus, having already ruled on admissibility of evidence in this circumstance under Rule 609(b), it was a simple matter to rule that similarly-situated evidence is admissible under the more permissive Rule 403 analysis.

271. 774 N.E.2d 906 (Ind. Ct. App. 2002).

272. *See id.* at 910-11.

273. *Id.* at 910 (quoting Seeley v. State, 547 N.E.2d 1089, 1092 (Ind. 1989)).

274. *See id.* at 911.

275. *Id.* (citing Bruce v. State, 375 N.E.2d 1042, 1078 (Ind. 1978) for the proposition that where reasonable jurors could place either of two differing interpretations on a set of facts, and one of those interpretations is material to the case, evidence of those facts is admissible).

276. 758 N.E.2d 1030 (Ind. Ct. App. 2001).

> at the precise time and place of the crime's commission is direct evidence. It is an identification of the defendant as the perpetrator of the crime based on the use of the witness' personal senses, even if the sense involved is hearing, not sight.[277]

CONCLUSION

While the decisions described herein answer many questions regarding interpretation of the Indiana Rules, many more subjects remain open to interpretation. The cases discussed above represent only a very small fraction of the cases decided in a one-year period in the courts of Indiana.

The Rules have not yet reached their ten-year anniversary, and much remains open to interpretation. Because the Rules are still young in terms of their judicial interpretation, they are susceptible to rapid change due to court decision, statutory gap-filling and the advent of new technology (such as the application of the completeness doctrine to videocassette evidence).

As noted two years ago in this space, academians and practitioners should continue to keep a close watch on developments in interpretations of the Rules.

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277. *Id.* at 1036.