RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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INTRODUCTION

The Indiana Rules of Evidence (Rules) have now been in place for a decade. Ten years of interpretation and clarification now assist the Indiana legal community in applying the Rules and also in understanding the similarities and differences between these Rules and the Federal Rules. Some areas of the Rules are still being refined in terms of surviving aspects of common law and ongoing legislative changes.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2002, and September 30, 2003. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES: 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]

II. JUDICIAL NOTICE

A. Judicial Notice of Items in Court's Own Files

In *Sanders v. State*,[4] Sanders appealed his convictions for forgery and theft. As part of his defense for passing and spending the proceeds of a false check, Sanders alleged that a co-worker at Red Lobster had given the check to him. However, in a letter Sanders wrote to the trial judge, he claimed he had been working at O'Charley's for two-and-a-half years.[5]

In determining guilt during a bench trial, the trial judge noted that the case

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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. 782 N.E.2d 1036 (Ind. Ct. App. 2003).

5. *Id.* at 1037.

turned on the defendant's credibility. The judge took judicial notice of the letter that Sanders had written to him, and compared it to the information regarding employment that Sanders presented at trial. Noting this inconsistency and several others, the court found Sanders guilty.[6]

Sanders argued on appeal that it was improper under Rule 201(a) for a court to take judicial notice of a letter in its file.[7] However, the cases cited by Sanders referred to courts which had improperly noticed letters from the files of *other* persons.[8] The applicable law is that "[a] trial judge may take judicial notice of the pleadings and filings in the very case that is being tried,"[9] and that the "court may take judicial notice of a fact, or of the contents of the pleadings and filings in the case before it . . . ."[10]

The court held that a court may take judicial notice of a letter in its file if the requirements of Rule 201(a) are met, and noted that a court may take judicial notice of a fact whether requested by a party or not.[11] The court noted that the contention that Sanders worked for O'Charley's for two-and-a-half years was not a proper subject for judicial notice, but the fact that Sanders had written a letter claiming to have done so was proper. The fact that he had written the letter was a fact capable of ready and accurate determination by simply asking Sanders if he wrote the letter.[12]

B. Failure to Give Instruction on Judicial Notice

In *French v. State*,[13] French appealed his conviction in part due to the trial court's failure to instruct the jury on judicially-noticed exhibits as required by Rule 201(g).[14] The trial court did not give this instruction, nor was it requested.

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6. *Id.* at 1037-38.

7. *Id.* at 1038. Rule 201(a) states that

> [a] court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

IND. R. EVID. 201(a).

8. *Sanders*, 782 N.E.2d at 1038 n.3 (citing State v. Hicks, 525 N.E.2d 316, 317 (Ind. 1988); Hutchinson v. State, 477 N.E.2d 850, 854 (Ind. 1985); Szymenski v. State, 500 N.E.2d 213, 215 (Ind. Ct. App. 1986)).

9. *Id.* at 1038 (citing Owen v. State, 396 N.E.2d 376, 381 (Ind. 1979)).

10. *Id.* (citing Sumpter v. State, 340 N.E.2d 764, 769 (Ind. 1976)).

11. *Id.* Rule 201(c) provides that "[a] court may take judicial notice, whether requested or not." IND. R. EVID. 201(c).

12. *Sanders*, 782 N.E.2d at 1038-39.

13. 778 N.E.2d 816 (Ind. 2002).

14. *Id.* at 822. Rule 201(g) provides that "[i]n a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." IND. R. EVID. 201(g).

French argued that this constituted fundamental error, despite his failure to request the instruction at trial.[15] The court noted that the instruction would have been required if requested, but since there was no indication in this case that the judicially noticed facts were incorrect, there was no fundamental error.[16]

III. Relevance and Probative Versus Prejudicial

A. Admission of Character Evidence Used for Other Purposes

In *Malinski v. State*,[17] Malinski appealed his convictions for murder and related crimes. Malinski had been found guilty of abducting and murdering a woman whose body had not been found. Although sexually-explicit photographs of the victim in bondage were found in Malinski's possession, he argued that he and the victim had been engaged in a consensual affair, that she had been very unhappy with her life and planned to disappear, and that he did not know what had eventually become of her.[18]

In part, Malinski argued that his convictions were improper because the State had been allowed to introduce evidence at trial of the victim's church activities, her close relationship with family and friends, her good work ethic and ability, her supportive nature and her love for animals. Malinski argued that this evidence was character evidence prohibited by Rule 404(a)(2),[19] but the State claimed that the evidence had been offered to rebut Malinski's claim that the victim had been unhappy in her marriage.[20]

The court agreed with the State and held that the evidence was not prohibited character evidence, but rather that it had been offered to prove that the victim was happy in her marriage and her relationship with her family and to demonstrate her ties to the community and the types of activities she engaged in with her husband. This evidence simply countered Malinski's assertion that the victim was engaged in an affair with him and that she was planning to disappear.[21] In fact, in a footnote, the court pointed out that it would be contradictory to hold that Malinski's claim that the victim was *unhappy* did not raise character issues, while at the same time holding that the State offering evidence that she was *happy* would raise such issues.[22]

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15. *French*, 778 N.E.2d at 822.
16. *Id.* at 822-23.
17. 794 N.E.2d 1071 (Ind. 2003).
18. *See id.* at 1073-77.
19. Rule 404(a)(2) in relevant part prohibits evidence of a victim's character or character trait from being used by the State to show action in conformity with that evidence on a particular occasion unless the State is rebutting a claim of character made by the accused. Ind. R. Evid. 404(a)(2).
20. *Malinski*, 794 N.E.2d at 1082-83.
21. *See id.* at 1083.
22. *See id.* at 1083 n.6.

B. Exclusion of Prior False Confession

In *Swann v. State*,[23] Swann appealed his conviction for murder. He claimed that he had falsely confessed to the crime in return for food and cigarettes offered by the police, and that the trial court had improperly excluded evidence of a prior false murder confession given by Swann.[24]

The court determined that the trial court had properly excluded this evidence under Rule 404(b), because "Swann's attempt to introduce evidence of his prior false confession improperly sought to use proof of that prior extrinsic act to bolster his statement that he lied when giving his confession in this case."[25] The court noted that Swann was free to testify that he lied, free to present his alibi defense, and that Swann had known specific details regarding the murder scene.[26]

C. Evidence of Prior Bad Acts Intrinsic to the Crime Charged

In *Cowan v. State*,[27] Cowan had been convicted for receiving stolen property due to his involvement in a scheme in which he received items purchased by a friend with a stolen checkbook in exchange for drugs. He argued that evidence of his drug use and drugs-for-merchandise plan was highly prejudicial and not relevant to the charge of receiving stolen property and that evidence of prior bad acts by other persons was irrelevant and prejudicial.[28]

In reviewing relevant law, the court stated that the rationale of Rule 404(b) is that the "jury is precluded from making the forbidden inference that the defendant had a criminal propensity and therefore engaged in the charged conduct"[29] and that 404(b) rulings are examined to determine whether evidence of a prior bad act is relevant to some issue other than propensity to commit the act and to balance the probative value of such evidence against its prejudicial effect.[30] Also significant was the supreme court's holding that "provisions of Evid. R. 404(b) do not bar the admission of evidence of uncharged criminal acts that are 'intrinsic' to the charged offense."[31]

Using this analysis, the court determined that the other acts and drug usage were the basis for the crimes that followed and were necessary to understand and explain the incidents. The drug usage and other uncharged criminal acts were inextricably bound up with the forgery spree, and the evidence of other bad acts by the forgers were necessary to show that Cowan knew the property had been stolen—an essential element of the crime Cowan had been charged with.[32]

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23. 789 N.E.2d 1020 (Ind. Ct. App. 2003).
24. *Id.* at 1024.
25. *Id.*
26. *Id.* at 1025.
27. 783 N.E.2d 1270 (Ind. Ct. App. 2003).
28. *Id.* at 1274.
29. *Id.* 1275 (citing Monegan v. State, 721 N.E.2d 243, 248 (Ind. 1999)).
30. *Id.*
31. *Id.* (citing Lee v. State, 689 N.E.2d 435, 439 (Ind. 1999)).
32. *Id.*

Similarly, in *Willingham v. State*,[33] Willingham argued that during his trial for dealing in cocaine, the State was improperly allowed to introduce evidence that, subsequent to a search of his house, Willingham had admitted selling cocaine the week before. Prior to trial, the State had agreed to a motion in limine barring evidence of other crimes, wrongs, or acts. Willingham argued that the testimony about the prior sale was forbidden by the motion in limine.[34]

The court first noted that a motion in limine is not a determination on ultimate admissibility but a bar on presenting such evidence to a jury until the court has ruled on its admissibility.[35] The court agreed with the State that the evidence of the prior act was evidence of Willingham's motive to sell drugs and therefore inextricably bound with the crime charged. The court also found that the evidence was not unfairly prejudicial because it was not evidence of other wrongs, but of the charged offense.[36]

However, in *Vertner v. State*,[37] the court reached a different conclusion. Vertner had been convicted for fleeing law enforcement and reckless possession of paraphernalia. An anonymous victim/witness had flagged down a police car and told the officers he had just been robbed by the vehicle that was speeding away. The officers eventually caught the fleeing suspect and found him in possession of drug paraphernalia. At trial, the officer testified about the statements made by the alleged victim regarding the robbery.[38]

On appeal, Vertner argued that this was inadmissible hearsay, and the State responded that it was merely describing the course of the police investigation. Because the fact that a robbery may have occurred was irrelevant to any of the issues at trial, the reason that the police pursued Vertner was not contested, and the risk of unfair prejudice was high, the court found the trial court was in error when it failed to grant a motion in limine prohibiting this specific testimony. However, the error was held to be harmless.[39]

In *Manuel v. State*,[40] Manuel appealed his convictions for child molesting in part because the child victim had been allowed to testify as to prior, uncharged molestations. The State argued that this testimony was admissible to show a relationship between the parties and to prove identity.[41]

The court stated that the victim's testimony was too vague to provide a basis for admitting the testimony as evidence of "signature crimes" and was therefore inadmissible under Rule 404(b).[42] The only purpose for the testimony was to demonstrate that Manuel had a propensity to molest children. However, the court

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33. 794 N.E.2d 1110 (Ind. Ct. App. 2003).
34. *Id.* at 1115.
35. *Id.* at 1116. (citing Herrera v. State, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999)).
36. *Id.* at 1116-17.
37. 793 N.E.2d 1148 (Ind. Ct. App. 2003).
38. *Id.* at 1152.
39. *Id.*
40. 793 N.E.2d 1215 (Ind. Ct. App. 2003).
41. *Id.* at 1219.
42. *Id.*

determined that it was not fundamental error to allow the testimony as other, properly admitted evidence was sufficient to sustain the convictions.[43]

D. Prior Bad Acts Used to Prove Identity

In *Browning v. State*,[44] Browning appealed his convictions for attempted rape and related crimes. At trial, the State had introduced evidence that other young women had selected Browning's photo from arrays as someone who had approached them and exposed himself or made aggressive sexual requests as they walked or ran on the Anderson University campus. The victim Browning attacked had testified that he had attacked her while running, attempted to remove her clothes, made aggressive sexual requests, and placed his fingers into her rectum.[45]

On appeal, Browning argued that the trial court had improperly admitted the evidence of prior bad acts. The trial court had taken into consideration Rule 404(b)'s ban on admission of evidence of other misconduct to prove action in conformity with a character trait, but also noted that evidence of other bad acts can be used for other purposes, such as proof of identity.[46]

The court noted that "the identity exception in Rule 404(b) was crafted primarily for crimes so nearly identical that the modus operandi is virtually a 'signature.'"[47] While all of the other incidents were very similar, the court found they all differed from the incident in question in several ways. The incident for which Browning was convicted was the only one which involved physical contact, the only one in which the victim was approached on foot, and the only one in which the assailant did not expose himself or include sexual comments in his approach. Because these differences made the similarities only general in nature, the evidence was not admissible under Rule 404(b). The court therefore ordered a new trial for Browning.[48]

E. Prior Bad Acts Used to Prove Motive

In *Bassett v. State*,[49] Bassett appealed his convictions for murder. At trial, the State had presented testimony from two witnesses who twelve and sixteen years earlier claimed Bassett had raped them and threatened to kill them if they told anyone. The State had successfully argued that these previous incidents were proof of identity or motive, and that Bassett had committed the murders in question (and made the threats twelve and sixteen years ago) in order to avoid probation revocation.[50]

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43. *Id.*
44. 775 N.E.2d 1222 (Ind. Ct. App. 2002).
45. *Id.* at 1223-24.
46. *Id.* at 1224.
47. *Id.* (quoting Allen v. State, 720 N.E.2d 707, 711 (Ind. 1999)).
48. *Id.* at 1225.
49. Bassett v. State, 795 N.E.2d 1050 (Ind. 2003).
50. *Id.* at 1053.

The court found this evidence was admitted in error as the previous incidents did not qualify as "signature crimes," and that the defendant's motive to threaten two women more than ten years ago is not proof of his motive to commit the present murders. In the court's view, this would be little more than convicting the defendant for committing other crimes in the past.[51]

In *Ziebell v. State*,[52] Ziebell appealed his convictions for murder and related crimes. Ziebell argued that the trial court had abused its discretion by admitting evidence of Ziebell's prior uncharged drug dealings.[53]

The court first examined whether the evidence of drug dealing was relevant to any issue other than Ziebell's propensity to commit murder. The court found that the testimony regarding drugs had been introduced to demonstrate motive and was therefore relevant to the issue of motive, as the State's theory was that Ziebell had murdered the victim because he believed the victim was a confidential drug informant whose information had led to charges against Ziebell.[54]

Once the court found this hurdle of Rule 404(b) had been overcome, it then looked to see if the testimony's probative value outweighed its prejudicial effect under Rule 403. The court determined that it could not say that the probative value was substantially outweighed by the prejudicial effect, and held that the trial court had not abused its discretion in admitting the testimony.[55]

F. Bifurcated Trial Where Evidence Allowed Under One Charge Is Prejudicial in Another

In *Hines v. State*,[56] Hines was charged with Robbery and with Unlawful Possession of a Firearm by a Serious Violent Felon. Hines requested a bifurcated trial on the basis that evidence necessary to prove his status as a Serious Violent Felon would subject him to unfair prejudice on the charge of Robbery.[57]

The court agreed with Hines that under Rule 403 the prejudice associated with the prior conviction evidence substantially outweighed its probative value on the Robbery charge. The court reversed and remanded for a bifurcated trial.[58]

G. Testimony of Previous Sexual Partners

In *Johnson v. State*,[59] Johnson appealed his convictions for failure of carriers

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51. *Id.*
52. 788 N.E.2d 902 (Ind. Ct. App. 2003).
53. *Id.* at 908.
54. *Id.* at 909.
55. *Id.*
56. 794 N.E.2d 469 (Ind. Ct. App. 2003).
57. *Id.* at 473.
58. *Id.* at 474. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." IND. R. EVID. 403.
59. 785 N.E.2d 1134 (Ind. Ct. App. 2003).

of dangerous communicable diseases to warn persons at risk. Johnson had been convicted for infecting his partners with HIV without informing them that he was a carrier of the disease. At trial, several women (not the victims at issue) had testified that they had been his sexual partners in the past and later tested positive for HIV.[60]

On appeal, Johnson argued that the testimony of the non-victim previous partners was inadmissible evidence of prior bad acts, and that it was introduced only to show that Johnson had a propensity to have sex with people. The court agreed that the evidence would have been admissible if used to show that he must have engaged in the relationships in question because he had engaged in several similar relationships in the past. However, the court found that the testimony was proper under Rule 404(b) both to establish Johnson's status as HIV-positive and to establish his knowledge of that fact.[61]

H. Prejudicial Effects of Photographs of Deceased Victim

In *Martin v. State*,[62] Martin appealed his conviction for battery. In part, he argued that photographs of the deceased victim should not have been admitted. Martin contended that the value of the photographs was minimal because there was no dispute that the defendant had died, and the photographs were extremely prejudicial because they showed extreme swelling, blood, and an intubation tube.[63]

However, Martin had defended the charge of battery by claiming that he had acted in self-defense. The court found that even though the photographs were prejudicial, they showed the victim in an unaltered state, and they were highly relevant as the State had responded to Martin's defense with the counter-argument that Martin had used excessive force. Because the court could not conclude that this probative value was substantially outweighed by the potential prejudicial effects, it concluded that the trial court had abused its discretion in allowing the photographs.[64]

In *Ketcham v. State*,[65] Ketcham appealed his conviction for voluntary manslaughter, claiming that a photograph of the victim's heart removed from his body was unfairly prejudicial. The photograph in question showed the heart and the bullet hole in the heart as well as a ruler showing the relative measurements.[66]

The pathologist testified about how he had removed the heart as a standard procedure and used the photo to show trajectory of the bullet through the heart and into other areas and that this was one of several fatal wounds due to the

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60. *Id.* at 1139.
61. *Id.* at 1140 (citing Fuller v. State, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996)).
62. 784 N.E.2d 997 (Ind. Ct. App. 2003).
63. *Id.* at 1008.
64. *Id.*
65. 780 N.E.2d 1171 (Ind. Ct. App. 2003).
66. *Id.* at 1179.

bullet.[67] Because the doctor clearly testified that he (as opposed to Ketcham) had removed the heart and the heart was separated from other body parts without the presence of blood, the photo did not unfairly prejudice the trier of fact against Ketcham. Also, the probative value of the photo was strong because it demonstrated that Ketcham likely intentionally, rather than recklessly, killed the victim.[68]

I. To Whom Does Rule 404(b) Apply?

In *Garland v. State*,[69] Garland appealed her convictions for murder and conspiracy to commit murder. She had watched while her therapist shot her husband in the head.[70]

At trial, Garland attempted to present evidence of the shooter's motive that would show he was acting alone for his own reasons. Garland wished to offer the testimony of a third party that the shooter had offered to get him a clean driving license for $1200, failed to deliver the license, and then threatened to shoot the third party if he continued to demand the return of his money. Garland offered this evidence as "signature crime" evidence to show that the shooter had offered to clean Mr. Garland's criminal record for $1200, and when the Garland's asked for their money back, the shooter killed Mr. Garland.[71]

The trial court granted the State's motion in limine excluding this evidence based on a Rule 404(b) determination that it was evidence of prior bad acts. Garland appealed, contending that the evidence was admissible as proof of identity or motive under Rule 404(b). In order to determine the appropriate outcome, the court looked to recent rulings applying Rule 404(b) to evidence about bad acts of non-parties[72] and held that "the admissibility of evidence about prior bad acts by persons other than defendants is subject to Rule 404(b)."[73]

Under this holding, the court stated that if the offered testimony was probative on either identity or motive it would be admissible. In analyzing this issue the court decided that the two acts were not similar enough to constitute a "signature crime" (one person was murdered, the other was a victim of intimidation in some other place and time) and that the victim simply asking for his money back would not have given the shooter a motive to kill him.[74]

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67. *Id.*

68. *Id.*

69. 788 N.E.2d 425 (Ind. 2003).

70. *Id.* at 428.

71. *Id.*

72. *Id.* at 430. The court noted that courts have begun to allow the use of a "reverse 404(b)" procedure, allowing the introduction evidence of someone else's conduct if it tends to negate the defendant's guilt. Traditionally, 404(b) had been used by the defendant to exclude evidence about his own prior bad acts. *Id.*

73. *Id.*

74. *Id.* at 430-31.

J. Erroneous Admission of Character and Prior Bad Acts as Fundamental Error

In *Oldham v. State*,[75] the State had been allowed to introduce several items found in Oldham's room, including business cards and a novelty photograph containing phrases such as "Considered armed and dangerous," "America's Most Wanted," "Approach with extreme caution," and "Wanted for: robbery, assault, arson, jaywalking."[76] Oldham both failed to object to the use of these items at trial and stipulated to admission of the evidence. Because he had invited the error, Oldham claimed fundamental error on appeal.[77]

The State argued that the items were merely gag items, and that they were used to establish ownership of another nearby item of evidence, Oldham's shirt. Oldham argued that this did not defeat Rule 404(a)'s ban on use of character evidence or Rule 404(b)'s ban on use of prior bad acts to show action in conformity therewith.[78] Because the ownership of the shirt did not appear to be in question and because the State had clearly questioned Oldham as to the dangerous implications of his business cards and novelty photograph, the court found use of this evidence was fundamental error. The court seemed further influenced by the lack of a witness to the murder and the fact that the jury deadlocked for several hours, increasing the likelihood that the verdict was narrowly reached and may have been improperly influenced by the improper character evidence.[79]

K. Evidence of Guns Unrelated to the Crime Inadmissible

Oldham further argued that the admission of photographs of two guns found in his garage was also error. Oldham had also stipulated to introduction of this evidence and appealed based on fundamental error.[80]

The guns in question were not used in the crime charged, Oldham's fingerprints were not found on the guns, several other people had access to the garage, and there was no evidence that Oldham even knew the guns were present in the garage. The court found this to be fundamental error as the evidence was irrelevant and, when combined with the erroneous character evidence discussed above, was likely to lead to the prejudicial inference that Oldham was dangerous

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75. 779 N.E.2d 1162 (Ind. Ct. App. 2002).

76. *Id.* at 1171.

77. *Id.* at 1171-72.

78. *Id.* Rule 404(a)(1) provides that

> evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

IND. R. EVID. 404(a)(1).

79. *Oldham*, 779 N.E.2d at 1174.

80. *Id.*

and had a store of guns at his disposal.[81]

L. Trial Court's Failure to Comment on Violation of Motion in Limine

In *Lehman v. State*,[82] Lehman appealed his convictions for child molestation. At trial, a motion in limine had been granted, prohibiting reference to other investigations of Lehman. Prior to testifying, an investigating officer had been asked to approach the bench and was cautioned about the motion in limine and advised not to refer to polygraphs or prior incidences of molestation involving Lehman. During his testimony the officer referred to the fact that there were nine other investigations of Lehman for child molestation. The defense moved for a mistrial, and the motion was denied. The trial court ordered the comment stricken from the record without further comment.[83]

While the reviewing court would normally give great deference to a trial court's determination of the appropriateness of a mistrial, in this case the trial court made no observations of the effect the testimony may have had on the jury and did not make any record of considering this factor. Because the statement regarding the other victims was extremely prejudicial and inflammatory, the court determined that Lehman was entitled to a new trial.[84]

M. Multiple Photographs of Child Seduction Victim to Show Victim's Age at Time of Crime

In *Asher v. State*,[85] the trial court had allowed a series of photographs of the victim to be introduced into evidence. The photographs depicted the victim at the ages of ten, eleven, twelve, and sixteen. The victim was twenty-four years old at the time of trial and the State contended that the photographs were necessary to bridge the jury's perception between the victim's age at time of trial and at the time of the incidents.[86]

The court found that the photographs offered little in the way of probative value, especially in light of the remaining testimony. However, the court noted that Asher failed to demonstrate any prejudice stemming from the photographs and held that the admission of the photographs had not been reversible error.[87]

IV. RAPE SHIELD APPLIED TO OTHER SEX CRIMES

In *Williams v. State*,[88] Williams appealed his conviction for sexual misconduct with a minor. He argued on appeal that the trial court had improperly

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81. *Id.* at 1174-75.
82. 777 N.E.2d 69 (Ind. Ct. App. 2002).
83. *Id.* at 71.
84. *Id.* at 73.
85. 790 N.E.2d 567 (Ind. Ct. App. 2003).
86. *Id.* at 569.
87. *Id.* at 570.
88. 779 N.E.2d 610 (Ind. Ct. App. 2002).

excluded evidence of a prior false accusation by the witness. Importantly, although in a footnote, the court noted that, while the accusation was that of sexual misconduct with a minor and not rape, Rule 412 applies to all prior false accusations of sex crimes. This is because Indiana Rule 412 applies to "sex crimes" and not just the crime of rape, and therefore, the common law exception to prior false accusations of rape also applies to prior false accusations of sex crimes.[89]

Although the court found that this exception would apply, it found no evidence of a prior false accusation in this case. The victim had not admitted to a prior false accusation, and there was merely an inference that a prior accusation was false. Therefore, the court found that the exclusion of this evidence by the trial court had been proper.[90]

V. PROPER MEDICAL EXPENSES

A. Estimates of Future Medical Expenses

In *Cook v. Whitsell-Sherman*,[91] a couple was caring for another person's dog. During the time the dog was in the couple's care, it bit a mail carrier. The case centered on which party would bear responsibility for the bite under a new statute holding dog owners strictly liable when their dog bites a public servant.[92] However, a second issue was whether the mail carrier's estimates of future medical charges were properly admitted by the trial court and upheld by the Indiana Court of Appeals.[93]

The court stated that

> the text of Rule 413 does not support the result reached . . . . The rule does not use the terms "past" or "future" to qualify the types of "statements" to which it applies. But it is limited to "statements." We think the rule uses "statements" not to mean "assertions of fact," but rather as equivalent to "bills" or "charges."[94]

The court went on to say that the "purpose of the Rule also limits its application to statements of past medical charges. In order to recover an award of damages for medical expenses, the party seeking to recover these damages must prove that the expenses were both reasonable and necessary."[95]

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89. *Id.* at 613 n.1.

90. *Id.* at 613.

91. 796 N.E.2d 271 (Ind. 2003).

92. IND. CODE § 15-5-12-1 (Supp. 1997).

93. *See Cook*, 796 N.E.2d at 273-75.

94. *Id.* at 277. Rule 413 states that "[s]tatements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable." IND. R. EVID. 413.

95. *Cook*, 796 N.E.2d at 277 (citing Smith v. Syd's Inc., 598 N.E.2d 1065, 1066 (Ind. 1992)).

The reasoning behind this conclusion is that, while the rules of evidence concerning hearsay generally prohibit out-of-court statements introduced to prove the truth of the matter asserted, "[m]edical bills already charged can usually be admitted over any hearsay objection either through testimony of the supplier as business records under Indiana Rule of Evidence 803(6) or through testimony of the patient to refresh memory under Rule 803(5)."[96] Therefore, since estimates of future medical expenses are not records of an event that has occurred or helpful in refreshing a person's memory, they fail to meet these hearsay objections. The court added "[i]ndeed they relate to an event that has not yet occurred and may never occur"[97] and held that Rule "413 does not permit the introduction into evidence of written estimates of future medical costs. Rather, these costs must be established by admissible testimony from competent witnesses."[98]

B. Failure to Link Medical Bills to the Relevant Incident

In *Sikora v. Fromm*,[99] Fromm had received a jury award of $275,000 against Sikora stemming from his injuries related to a car accident. On appeal, Sikora noted that some of the medical bills submitted at trial had not been specifically substantiated as stemming from the car accident in question by expert medical testimony.[100] The court agreed and further stated that the particular injuries treated in those bills were not "objective" injuries.[101] This left only the lay testimony of Fromm to tie the bills in question to the car accident, and the admission of these bills was therefore error.[102]

Although it found error, the court refused to disturb the jury award because the award was a single amount for general damages and it could not determine which, if any, portion of the award was due to the particular bills in question. Also, because the jury found Fromm and his expert witnesses to be credible and the expenses were not inconsistent with the injuries described by Fromm and his experts, the court determined that substantial justice was reached and Sikora was not denied a fair trial.[103]

VI. UNDUE INFLUENCE ON THE JURY

In *Sanchez v. State*,[104] an alternate juror was given instruction not to participate in the deliberations. During the jury's discussions, the foreman asked

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96. *Id.* at 278 (citing Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1161 (Ind. Ct. App. 1990)).

97. *Id.*

98. *Cook*, 796 N.E.2d at 278.

99. 782 N.E.2d 355 (Ind. Ct. App. 2002).

100. *Id.* at 361.

101. *Id.* (citing Daub v. Daub, 629 N.E.2d 873, 877 (Ind. Ct. App. 1994)).

102. *Id.*

103. *Id.*

104. 794 N.E.2d 488 (Ind. Ct. App. 2003).

the alternate to clarify a point, which he did. The foreman immediately stopped deliberation and the judge admonished the jury. The point in question had been written down in the notes of three of the regular jurors.[105]

Although Rule 606(b) provides that an alternate juror is considered an outside influence and may not testify to the jury, alternate jurors have been through voir dire and have heard exactly the same evidence.[106] The court found that the comment by the alternate juror did not place Sanchez in any grave peril because he did not express any opinion on Sanchez's guilt or innocence. He merely confirmed a fact that three regular jurors had written down, the foreman immediately stopped deliberation, the jury was admonished by the judge, and there was sufficient evidence to convict Sanchez.[107]

VII. IMPEACHMENT

A. Impeachment of Own Witness

In *Martin v. State*,[108] Martin appealed in part because the State had been allowed to use prior statements of several of its witness as impeachment evidence during its case-in-chief. The court began its analysis by noting that Rule 613(b) allows a party to impeach a witness by extrinsic evidence of a prior inconsistent statement, but also noted that parties are prohibited from placing witnesses on the stand for the sole purpose of introducing otherwise inadmissible evidence as impeachment and that, once a party has admitted a prior inconsistent statement, further impeachment evidence is unnecessary.[109]

Over Martin's objection, the trial court had allowed the State to refer to its own witness' prior statement on direct examination under the guise of

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105. *Id.* at 490.

106. *Id.* at 491. (citing Griffin v. State, 754 N.E.2d 899, 902 (Ind. 2001)). Rule 606 provides that:

> (a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called to so testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
> (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify . . . (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 . . . .

IND. R. EVID. 606.

107. *Sanchez*, 794 N.E.2d at 491.

108. 779 N.E.2d 1235 (Ind. Ct. App. 2002).

109. *Id.* at 1243 (citing IND. R. EVID. 613(b); Appleton v. State, 740 N.E.2d 122 (Ind. 2001); Pruitt v. State, 622 N.E.2d 469, 473 (Ind. 1993)).

impeachment. The State read through each of the assertions in the prior statement and essentially asked the witness if he had made each of those statements. Martin objected to the leading nature of the questions, but the State was allowed to proceed and treat the witness as a hostile witness.[110]

The court found this to be error because the State had not shown the need to use the document as a recorded recollection (the witness did not show he had no memory of the events) and because the State led the witness through his prior statement as if it were substantive evidence rather than impeachment evidence.[111] However, because the State had provided other sufficient evidence including an eyewitness, the error was found harmless.[112]

B. Family as "Community"

In *Norton v. State*,[113] Norton appealed his convictions for child molesting. At trial, Norton had attempted to have the brother of one of the State's witnesses give impeachment testimony under Rule 608(a) that the witness had a reputation for being untruthful.[114] The reputation that the witness's brother offered to testify to was his reputation within the family. The State objected, claiming that reputation for evidence purposes could not be based on the "community" of a family. The trial court did not allow the impeachment testimony.[115]

The court noted that Indiana requires that an impeaching witness may only speak about the impeachee's reputation within the community.[116] The court noted that the term community is not limited to the greater community at large. Some groups may be large enough, while others are not. In some cases, a family may be large enough to compromise a "community." However, in this case, Norton had presented no evidence on the size of the impeachment witness's family, and the court declined to find error.[117]

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110. *Id.* at 1245.

111. *Id.*

112. *Id.*

113. 785 N.E.2d 625 (Ind. Ct. App. 2003).

114. *Id.* at 629. Rule 608(a) provides that the

> credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

IND. R. EVID. 608(a).

115. *Norton*, 785 N.E.2d at 629.

116. *Id.* (citing 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 608.103 (2d ed. 1995)).

117. *Id.* at 632.

VIII. Opinions and Expert Testimony

A. Witness Testimony Regarding Demeanor

In *Malinski v. State*,[118] the State called several witnesses to testify that the victim had been genuinely upset by an earlier burglary, which Malinski claimed the victim had helped plan. Malinski claimed that this testimony violated Rule 704(b), which prohibits testimony about the truthfulness of a witness.[119] The court, however, held that Rule 704(b) did not apply because the victim was not a witness and because the witnesses were testifying about the victim's demeanor, not whether any claim she made regarding the burglary was truthful or credible.[120]

B. Expert Testimony of Pathologist Regarding Photograph Subject's Willing Participation

During Malinski's trial, a forensic pathologist (Dr. Prahlow) testified as to his opinions drawn from a series of photographs taken from Malinski of the victim in various stages of bondage and sexual activity. Dr. Prahlow made conclusions that the victim was an unwilling participant, that she was resisting in some photos, and that she was either unconscious or otherwise unresponsive in other photos. Dr. Prahlow noted contusions and bruises, marks indicative of an effort to escape the handcuffs, hands moved to protect private areas from assault, and wet marks on the sheets in photos where the victim appears to be unresponsive (indicating a loss of bladder control). Dr. Prahlow concluded that the victim was struggling to escape and was an unwilling participant.[121]

Malinski argued that Dr. Prahlow's testimony was inadmissible under Indiana Evidence Rule 702 because the State had failed to lay a scientific foundation for expert scientific testimony as required by Rule 702(b).[122] However, the court stated that this evidence was not a matter of scientific principles controlled by Rule 702(b) but that it was instead expert testimony based on Dr. Prahlow's specialized knowledge. The testimony fell into Dr. Prahlow's specialized knowledge of anatomy and physiology and examining and evaluating wounds such as those found in the photos. The court found that, because Dr. Prahlow had served as a forensic pathologist for four years, he was qualified to make such observations.[123]

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118. 794 N.E.2d 1071 (Ind. 2003). For further discussion of this case, see *supra* text accompanying notes 17-18.

119. Rule 704(b) in part provides that witnesses may not testify to opinions concerning whether a witness has testified truthfully. Ind. R. Evid. 704(b).

120. *Malinski*, 794 N.E.2d at 1083.

121. *Id.* at 1084-85.

122. Rule 702(b) provides that "expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Ind. R. Evid. 702(b).

123. *Malinski*, 794 N.E.2d at 1085-86.

C. Opinion Testimony Regarding Significance of Covering Victim's Face

In *Kubsch v. State*,[124] Kubsch was convicted of murdering his wife, stepson, and his stepson's father. His wife's body was found with her face covered with duct tape. At trial, a police detective had testified that the victim's face is often covered to disassociate the victim from the perpetrator, and it is more associated with cases in which the killer knows or has a relationship with the victim.[125]

Kubsch argued that this testimony was improper because the State failed to lay a foundation that it was scientifically reliable. The court agreed and stated that the State failed to demonstrate that the general subject of victim/suspect relationships is based on any reliable scientific methodology. It further stated that "testimony that Detective Richmond received instruction on victim/suspect relationships and possesses library books on this area of study is not sufficient to show that it has been generally accepted within the study of social or behavioral sciences."[126] The court noted that certain behaviors may be helpful for investigators to develop clues or prevent crimes, but that those behaviors may not be reliable enough to introduce at trial.[127]

On appeal, however, the State argued that the detective was testifying as a skilled lay observer. The court first noted that this was not the basis on which the testimony was allowed at trial (expert witness) and then analyzed the skilled lay observer claim. Even had this been the basis for testimony at trial, the evidence would have been improper. The court said that there was not anything the detective saw or heard at the scene, or became aware of through his other senses, that supported his opinion. "Rather, the detective's opinion was based on his understanding of a phenomenon which the State in this case has not shown to be scientifically reliable. In sum, his testimony did not qualify as skilled witness testimony under Indiana Evidence Rule 701."[128]

D. Admission of STR (Short Tandem Repeat) DNA Evidence

In *Overstreet v. State*,[129] Overstreet appealed his convictions for abducting, raping and murdering a young woman. At trial, the State had introduced DNA evidence from the victim's underwear consistent with Overstreet's DNA profile. This evidence was derived from a relatively new process called short tandem repeat (STR) as well as from the more common polymerase chain reaction (PCR) method. Overstreet did not appeal the use of the PCR evidence, but challenged the introduction of the STR evidence.[130]

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124. 784 N.E.2d 905 (Ind. 2003).
125. *Id.* at 920.
126. *Id.* at 921.
127. *Id.* at 922.
128. *Id.* at 922-23. In other words, no matter how street-wise you are, you can't make stuff up.
129. 783 N.E.2d 1140 (Ind. 2003).
130. *Id.* at 1150.

Overstreet did not directly question the validity of the STR procedure, he did not argue that the State's witnesses were unqualified to testify to the test results, and he did not argue that this evidence was unfairly prejudicial. He did argue that the only basis the trial court had to judge the scientific reliability of STR was the testimony of two experts who testified for the State. Overstreet claims that one of those experts was not qualified to testify about the procedure's reliability and that the other witness did not testify on the matter.[131]

In reviewing this claim, the court noted that the State might have done more to establish the reliability of the STR method but did not find reversible error in the admission of this evidence. Overstreet made no argument at trial that STR was unreliable. Two DNA experts testified for the State, and Overstreet did not challenge the qualifications of these experts. The court conducted its own review of STR as well as the qualifications of the State's experts and concluded that the trial court had been within its discretion to admit the evidence.[132]

E. Ability of Expert's Testimony to Overcome Error in Evidence Handling

Overstreet also argued that his conviction for rape should be overturned because that crime requires sexual (vaginal) intercourse, and the State's expert had mislabeled the relevant physical evidence. The State had taken both vaginal and anal swabs of the victim for examination. Although the slide marked "anal" showed the presence of Overstreet's DNA and the slide marked "vaginal" did not, the State's expert testified that the slides had somehow been switched and that the slide positive for Overstreet's DNA was actually a vaginal sample. He testified that the composition of the anal sample was actually consistent with a vaginal sample and vice-versa.[133] Overstreet argued that the State's expert should have been qualified as a cytologist in order to testify on this point.[134]

The court, however, found the expert's explanation of the discrepancy plausible and found him qualified to offer the testimony.[135] The expert had a Bachelor of Science degree in biology, several years of experience, and had tested several thousand vaginal samples. A forensic pathologist had also tested a second set of slides that were properly marked and testified to the same conclusion—that DNA consistent with Overstreet's profile had been found in the victim's vagina.[136]

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131. *Id.*

132. *Id.* at 1150-51. The Indiana Supreme Court had previously noted that the clear weight of scientific opinion held that STR was refined and reliable technology. Troxell v. State, 778 N.E.2d 811, 816 (Ind. 2002).

133. *Overstreet*, 783 N.E.2d at 1152.

134. *Id.* at 1151-52.

135. *Id.* at 1152.

136. *Id.* at 1151-53.

F. Expert Versus Skilled Witnesses

In *Davis v. State*,[137] Davis was convicted of possession of cocaine with intent to deliver. The evidence against Davis included two bags of cocaine he dropped at the time of arrest. The arresting officer provided testimony that the manner of packaging and amount of cocaine indicated that Davis intended to sell, rather than use, the cocaine.[138]

Davis argued that the police officer was not a qualified expert witness under Rule 702[139] and therefore should not have been allowed to testify as to his opinion of Davis' intent. The court found instead that the officer was a skilled witness who was allowed to testify under Rule 701.[140] A skilled witness is "a person with a degree of knowledge short of that sufficient to be declared an expert under Indiana Rule of Evidence 702, but somewhat beyond that possessed by the ordinary jurors."[141]

The police officer testified that he had been with the police force for sixteen years, over six of which was spent specifically on narcotics crimes. He had received specialized narcotics training and been involved with between 600 to 700 narcotics investigations. The court found that his opinions were rationally based on his perception and personal experience as an investigator and that the testimony had been helpful in determining Davis' intent because it differentiated behavior between drug users and drug dealers. The court determined that the trial court had not abused its discretion in admitting this testimony.[142]

In *Farrell v. Littell*,[143] a custody and visitation dispute, Littell argued that the opinion testimony of a police detective and child welfare agent were improperly excluded. Both individuals offered testimony that they believed Farrell was responsible for the child's sexualized behavior.[144]

Littell contended that the testimony was admissible as testimony of a skilled witness. The court acknowledged that qualification as an expert is only required if the witness's opinion is based on information received from others pursuant to Rule 703 or based on a hypothetical question.[145] However, it noted that to qualify as a skilled witness "not only must the skilled witness have specialized

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137. 791 N.E.2d 266 (Ind. Ct. App. 2003).

138. *Id.* at 267.

139. Rule 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify therto in the form of an opinion or otherwise." *Id.* at 267 n.1 (quoting Haycraft v. State, 760 N.E.2d 203, 210 (Ind. Ct. App. 2001)).

140. Rule 701 allows a skilled witness to testify to an opinion or inference that is rationally based on the witness's perception and is helpful to understanding the witness's testimony or determination of a fact in issue. IND. R. EVID. 701.

141. *Davis*, 791 N.E.2d at 267 (quoting O'Neal v. State, 716 N.E.2d 82, 88-89 (Ind. Ct. App. 1999)).

142. *Id.* at 268.

143. 790 N.E.2d 612 (Ind. Ct. App. 2003).

144. *Id.* at 617.

145. *Id.* (citing Cansler v. Mills, 765 N.E.2d 698, 703 (Ind. Ct. App. 2002)).

knowledge beyond the ken of a lay juror, but he must also give testimony that is rationally based on the perception and testimony that is helpful to the factfinder."[146] In this case the opinion testimony was not helpful as the trier of fact was just as capable of reviewing the evidence and determining guilt or innocence.[147]

G. Portions of Expert Testimony Outside Expert's Field

In *Suell v. Dewees*,[148] an orthopedic surgeon had testified for the defense regarding the injuries Suell claimed to have suffered during a vehicle accident. During part of his testimony, the surgeon had testified as to his belief regarding the likely speed of the automobiles. Suell appealed, arguing that the trial court should have granted her motion in limine to prevent the testimony regarding speed as this was outside the expert's field of expertise.[149]

The court found that this portion of the expert's testimony had indeed been allowed in error. However, the error was rendered harmless by the balance of the expert's testimony regarding Suell's physical injuries (including testimony that the injuries were either pre-existing and/or not consistent with automobile injuries) and by Suell's vigorous cross-examination on his basis for the conclusions regarding speed.[150]

In reaching this decision, the court stated:

> If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the general principles involved in the subject matter of the testimony, but it does not require the trial court to re-evaluate and micromanage each subsidiary element of an expert's testimony within the subject. Once the trial court is satisfied that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.[151]

The court found that the trial court had not abused its discretion in allowing the medical expert to give his testimony regarding the speed of the vehicles at the time of the impact.[152]

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146. *Id.*
147. *Id.* at 617-18.
148. 780 N.E.2d 870 (Ind. Ct. App. 2002).
149. *Id.* at 874.
150. *Id.* at 875.
151. *Id.* at 876 (quoting Sears v. Manvilov, 742 N.E.2d 453, 461 (Ind. 2001)).
152. *Id.*

H. Use of Hypothetical Question in Expert Testimony

In *Fulton County Commissioners v. Miller*,[153] the appellant County argued that a portion of testimony by Miller's expert witness was improperly admitted because it was improperly tied to the facts of the case and the expert did not conduct testing to determine the exact amount of dust present at the time of the accident in question. Because the expert did not determine the exact levels of dust and other conditions, the State contended that the theories he testified to were pure speculation and did not comply with Rule 702 and supporting case law.[154]

The court noted that while "an expert witness must have observed facts sufficient to enable him to form a valid opinion, those facts may be supplied in the form of a hypothetical question which incorporates facts previously adduced at trial."[155] The expert testified that he did not know how much dust Miller may have encountered, but instead testified to the principles of light attenuation associated with a certain quantity of dust. The court held that the testimony was properly admitted because the lack of factual foundation as to the exact amount of dust did not render speculative the expert's opinion regarding the effect of certain hypothetical amounts of dust on Miller's vision.[156]

I. Expert Testimony Regarding Legal Conclusions

In *Vaughn v. Daniels Co.*,[157] Daniels Co. appealed a judgment in part because it alleged that Vaughn's expert had testified without a sufficient foundation and that the expert had improperly offered legal conclusions. The court found that the first portion of this claim failed because Rule 705 allows experts to rely on hearsay or other normally inadmissible types of evidence if those items are normally relied upon by experts in that field.[158]

However, the court did agree with Daniels Co.'s contention that the expert had improperly testified as to legal conclusions. The court noted that there was a "'trend . . . to allow expert opinion testimony even on the ultimate issue of the case, so long as the testimony concerns matters which are not within the common knowledge and experience of ordinary persons and will aid' the trier of fact."[159]

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153. 788 N.E.2d 1284 (Ind. Ct. App. 2003).

154. *Id.* at 1291.

155. *Id.* (quoting Hughes v. State, 508 N.E.2d 1289, 1305 (Ind. Ct. App. 1987)).

156. *Id.* at 1291-92.

157. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified by* 782 N.E.2d 1062 (Ind. Ct. App. 2003).

158. *Id.* at 1122. Rule 705 provides that the "expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination." IND. R. EVID. 705.

159. *Id.* (quoting in part Major v. OEC-Diasonics, Inc., 743 N.E.2d 276, 285 (Ind. Ct. App. 2001)).

However, the court concluded that experts should not be allowed to offer legal conclusions as part of their testimony because it would violate the spirit of Rule 704(b). The court held that a judge, not an expert witness, should instruct on the law.[160]

J. Opinion Testimony of Non-Expert

In *Meyer v. Marine Builders, Inc.*,[161] Meyer appealed the decision in part because the President of Marine Builders, Inc. had submitted an affidavit in which he professed his belief as to certain issues. Meyer argued on appeal, that since this evidence was from neither an expert witness nor a land surveyor, it should not have been permitted to introduce opinion testimony.[162]

However, the court looked to Rule 701 and found that the testimony was proper because it was an opinion that a reasonable person could form from the perceived facts.[163] The affiant had stated that he had walked the property and reviewed the maps prior to the sale and that after reviewing additional information he now believed the property lines were incorrectly described.[164]

K. Medical Expert Relying on the Work of Others to Develop His Opinion

In *Hall v. State*,[165] the trial court had excluded the expert testimony of a doctor concerning cause of death because the doctor "(1) did not see [the victim]'s computerized tomography scan ('CT scan'), (2) neither attended nor saw [the victim]'s autopsy, (3) does not conduct autopsies himself, and (4) failed to consider, or at least adequately explain, why other factors were not the cause of [the victim]'s death."[166] However, the court noted that "with the increased division in modern medicine, the physician making the diagnosis must necessarily rely on many observations and tests performed by others; records sufficient for diagnosis in a hospital ought be enough for opinion testimony in the courtroom."[167]

As to the factor criticizing the doctor for not providing alternate reasons for the death, the purpose of his testimony was to provide a theory of death other than that offered by the State. The court held that the testimony was improperly excluded and that the factors enumerated by the trial court would have been

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160. *Id.* at 1123. Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." IND. R. EVID. 704(b).

161. 797 N.E.2d 760 (Ind. Ct. App. 2003).

162. *Id.* at 769.

163. *Id.* (citing Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (finding that an opinion under Indiana Evidence Rule 701 is rationally based, for purposes of the rule, if it is one that a reasonable person normally could form from the perceived facts)).

164. *Id.* at 770.

165. 796 N.E.2d 388 (Ind. Ct. App. 2003).

166. *Id.* at 399.

167. *Id.* at 400 (quoting Birdsell v. United States, 346 F.2d 775, 779-80 (5th Cir. 1965)).

appropriate lines of cross-examination.[168]

L. Expert's Opinion Must be Based on More Than Coincidence

In *Clark v. Sporre*,[169] Clark argued that the trial court erred when it excluded the testimony of a doctor that it was more probable than not that the surgery and hospitalization caused her injuries. The parties did not dispute the doctor's qualifications to testify as to the nature and extent of Clark's impairment, but they did dispute whether he was qualified to state his opinion on whether the surgery and hospitalization caused the injuries.[170]

The court stated that "[t]o be admissible, an expert's opinion that an event caused a particular injury must be based on something more than coincidence."[171] While the doctor's opinion was based on the assumption that a hypoxic event had caused the injuries, nothing in Clark's hospital record indicated that such an event took place. The doctor also had not reviewed any of the records of Clark's hospitalization. His opinion testimony was therefore simple speculation without any factual basis.[172]

IX. HEARSAY

A. Victim's State of Mind Not Relevant Where Defendant Claims He Was Elsewhere

In *Kubsch*,[173] discussed above, a witness testified that one of the victims had said he was "frightened" of Kubsch. A second witness said that the same victim had said "[Kubsch] still wants to kill me."[174] Kubsch argued that this evidence was inadmissible hearsay and should have been excluded. The trial court had admitted the statements under Rule 803(3), which allows testimony related to the declarant's then-existing state of mind, emotion, sensation, or physical condition.[175]

However, the Indiana Rules of Evidence also state that only relevant evidence is admissible[176] and that evidence 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 be without the evidence."[177] Because Malinski claimed that he was in another state at the time of the murders,

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168. *Id.*

169. 777 N.E.2d 1166 (Ind. Ct. App. 2002).

170. *Id.* at 1171.

171. *Id.* at 1170-71 (citing Hannan v. Pest Control Servs., Inc., 734 N.E.2d 674, 682 (Ind. Ct. App. 2000)).

172. *Id.* at 1171.

173. 784 N.E.2d 905 (Ind. 2003).

174. *Id.* at 919.

175. *Id.* (citing IND. R. EVID. 803(3)).

176. IND. R. EVID. 402.

177. *Kubsch*, 784 N.E.2d at 919 (quoting IND. R. EVID. 401).

the victim's state of mind had not been put at issue, and therefore, the testimony was not relevant.[178]

B. Police Officer's Statement as Party Opponent Non-Hearsay

In *Allen v. State*,[179] Allen argued that the trial court improperly excluded testimony that a police officer threatened to arrest everyone if someone didn't claim guns and drugs found in the house where the arrest later took place. The trial court excluded the testimony as Hearsay, over Allen's objection that it was admissible as the statement of a party opponent under Rule 801.[180] The court stated that rulings regarding excluding or admitting evidence are normally reviewed for an abuse of discretion but that "a ruling is reviewed de novo when it turns on a misunderstanding of a rule of evidence, specifically the hearsay rule."[181]

The court noted that existing case law held that statements made by police officers are not hearsay when used in wrongful death cases against police officers and the municipality,[182] but no Indiana cases had previously addressed the issue in the context of a criminal case.[183] After a review of federal circuit court decisions, the court held that "the party-opponent provision in the Indiana Rules of Evidence applies in criminal cases to statements by government employees concerning matters within the scope of their agency or employment."[184] In reaching this decision, the court noted that the Indiana rule uses the sub-heading "Statement by Party-Opponent" rather than "admission by party-opponent" as found in the federal rules.[185] The court also noted that application of the party-opponent provision against the government also advanced the concept of general fairness.[186]

C. Victim's State of Mind Where Prosecution Raises the Issue

In *Bassett*,[187] discussed above, the State was also allowed to introduce testimony of the victim's aunt and husband that she had been afraid of the defendant and that he threatened to kill her. Bassett argued that these statements

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178. *Id.*

179. 787 N.E.2d 473 (Ind. Ct. App. 2003).

180. *Id.* at 478. Rule 801 provides that a statement is not hearsay if the statement is offered against a party and is a party's own statement in either an individual or representative capacity or a statement by a party's agent concerning a matter within the scope of employment. IND. R. EVID. 801(d)(2).

181. *Allen*, 787 N.E.2d at 477 (citing Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998)).

182. *Id.* at 478 (citing City of Indianapolis v. Taylor, 707 N.E.2d 1047, 1057 (Ind. Ct. App. 1999)).

183. *Id.*

184. *Id.* at 479.

185. *Id.*

186. *Id.*

187. Bassett v. State, 795 N.E.2d 1050 (Ind. 2003).

were inadmissible hearsay and should have been excluded. The State contended that the statements were properly admitted under the state of mind exception of 803(3) as evidence of motive and the relationship between the parties.[188]

The court noted that it had previously determined that "evidence under the Rule 803(3) state of mind exception must be relevant to the issues in the case, Evid. R. 402, and that a victim's state of mind may be relevant where it has been put in issue by the defendant."[189] The use of this evidence was raised by the State in its opening statement and in its case in chief. The defendant also took the stand and denied having a sexual relationship. Because the defendant had not put the victim's state of mind at issue, the statements were not admissible under the state of mind exception.[190]

The State further argued that the statements were admissible because the defendant was subject to parole violation for engaging in a romantic relationship without permission from his parole officer. Because the State contended that Bassett committed the murders to avoid probation revocation, it argued that the victim's state of mind regarding her relationship with the defendant was relevant to motive. However, the court determined that the state of mind at issue in the statements was her fear of the defendant, which is not logically related to the defendant's motive, and that her thoughts regarding their sexual relationship are not mental or physical conditions contemplated by the state of mind exception.[191] The court reversed the convictions and ordered a new trial.[192]

D. Evidence Used for Other Purposes Is Not Hearsay

In *Johnson*,[193] discussed above, the State was allowed to introduce a letter from the Social Security Administration which denied Johnson's claim that he was disabled on the basis of testing positive for HIV. The court pointed out that had the letter been offered to prove that Johnson was HIV positive it would have been inadmissible hearsay as it contained information from several doctors who were not available at trial for cross-examination.[194]

However, the letter was used to show why one of the victims confronted Johnson. The trial court had admonished the jury to consider the letter only for the purposes of explaining what led to the confrontation between the victim and Johnson, not for the actual contents of the letter. The letter contained information purporting that Johnson was HIV positive, and the victim testifying about the letter stated that Johnson admitted his HIV positive status after being confronted with the letter.[195] However, because the letter was not offered to

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188. *Id.* at 1051.
189. *Id.* at 1051-52.
190. *Id.* at 1052.
191. *Id.*
192. *Id.* at 1054.
193. Johnson v. State, 785 N.E.2d 1134 (Ind. Ct. App. 2003).
194. *Id.* at 1138.
195. *Id.* at 1137.

prove the truth of the information contained in the letter, it was not hearsay.[196]

However, in *Winbush v. State*,[197] a police officer testified at trial that he received a tip a week before the arrest that the defendants were at a certain apartment selling cocaine. The defense objected that this was evidence of prior bad acts prohibited by Rule 404(b), but the trial court allowed the testimony because it was being used to explain the officer's conduct in pursuing the investigation.[198]

The testimony regarding the tip had little relevance to any fact at issue. The defense had offered to stipulate that there was no problem with the quality of the officer's work or the investigation, and the acts mentioned in the tip occurred at a location different from the events for which the defendants were charged. Because it determined the probative value was substantially outweighed by unfair prejudice, the court ruled that the statement should not have been admitted.[199]

E. Excited Utterance

In *Williams v. State*,[200] Williams appealed his convictions for murder, attempted robbery, and related crimes. The trial court allowed testimony from the victim's wife and a police officer about statements the victim made about the incident before he died. Williams argued on appeal that these statements were inadmissible hearsay.[201]

The State argued that the statements were allowed under Rule 803(2) as excited utterances.[202] Williams claimed the statements were not reliable because the victim could have fabricated them in the time between the incident and the time the statements were made in the hospital. However, the court found that the statements were made while the victim was in the emergency room and still in pain from being shot. The court also noted that he had been subject to a startling event and had made the statements soon after being found unconscious and while undergoing treatment to save his life. The court found that, although some time had passed, the statements were excited utterances and were properly admitted.[203]

Williams further questioned the statements because they were made in response to questions posed by the police officer and the victim's wife. However, the court noted that statements made in response to inquiries are not

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196. *Id.* at 1138-39.

197. 776 N.E.2d 1219 (Ind. Ct. App. 2002).

198. *Id.* at 1221-22.

199. *Id.* at 1222.

200. 782 N.E.2d 1039 (Ind. Ct. App. 2003).

201. *Id.* at 1046.

202. *Id.* Rule 803(2) provides that statements are not precluded as hearsay if they are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." IND. R. EVID. 803(2).

203. *Williams*, 782 N.E.2d at 1046 (citing Yamobi v. State, 672 N.E.2d 1344, 1347 (Ind. 1996)).

inherently unreliable.[204] Because the victim was still under the excitement of being shot, the statements were excited utterances.[205]

F. Child Welfare Worker's Notes as Business Records

In *In Re Termination of Parent-Child Relationship of E.T and B.T.*,[206] the Taylor family had their children permanently removed from their care, based in part on the contents of regular home-visit reports submitted by case workers as part of their in-home visitations. These reports are made in the regular course of the visits, based on first-hand observations. The reports are routinely submitted and initialed by a supervisor and then submitted to the county Office of Family and Children.[207]

The Taylors argued that these records were hearsay and should not have been admitted under the Business Records exception because they were more like investigative police reports than business records.[208] The court disagreed and found that the business records exception to the hearsay rule did apply.[209] The court noted that the records contain firsthand impressions of events which they had a duty to observe and a duty to report, the reports were made contemporaneously or soon after the events took place, and the records were kept in the regular course of business.[210] While the court did find this type of record admissible under Rule 803(6), it noted its preference that case workers be called as witnesses, rather than relying on their written reports to permanently terminate a parent-child relationship.[211]

G. The Agent as Custodian of Business Records

In *J.L. v. State*,[212] a juvenile appealed his adjudication as a juvenile

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204. *Id.*
205. *Id.*
206. 787 N.E.2d 483 (In. Ct. App. 2003).
207. *Id.* at 485.
208. *Id.* at 486. Rule 803(6) provides that a

> memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, 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 indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

IND. R. EVID. 803(6).
209. 787 N.E.2d at 486.
210. *Id.*
211. *Id.* at 486-87.
212. 789 N.E.2d 961 (Ind. Ct. App. 2003).

delinquent. In part, he argued that attendance records had been improperly admitted under the business records rule because the witness who testified regarding the records admitted she was not the actual custodian of the records and that she did not work at the school that J.L. sometimes attended.[213]

The court noted that Rule 803(6) permits the proponent of an exhibit to be the custodian of the records or another qualified witness, and "the proponent of an exhibit may authenticate it by calling a witness who has a functional understanding of the record keeping process of the business with respect to the specific entry, transaction or declaration contained in the document."[214] The witness was an appointed attendance officer for the school system and demonstrated her understanding of the school system's record-keeping process, and even though she did not have physical custody of the original records, she qualified as an "other qualified witness."[215] The court ruled that the records had been properly admitted under the business records exception to the hearsay rule.[216]

H. Unavailable May Mean More Than a Vacation

In *Garner v. State*,[217] Garner appealed his convictions for child molestation, in part because the State had been allowed to introduce prior videotaped statements of two witnesses after declaring the witnesses "unavailable." Garner claimed that this violated his right of confrontation under the U.S. and Indiana Constitutions.[218]

The State claimed the witnesses were unavailable and that their testimony was properly admitted under Rule 804, which contains several hearsay exceptions if the witness is unavailable, including an exception allowing former testimony.[219] Although the court found that the deposition was sufficiently reliable because the defendant and his lawyer had aggressively cross-examined the witnesses, the issue of whether the witnesses were truly "unavailable" as contemplated by Rule 804 remained.[220] The court noted that it had previously determined that a witness going on vacation was an acceptable excuse for using deposition testimony.[221] However, the issue of right-of-confrontation was not raised in the previous case law associated with this issue.[222]

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213. *Id.* at 963.

214. *Id.* at 964 (citing Shepherd v. State, 690 N.E.2d 318, 329 (Ind. Ct. App. 1997)).

215. *Id.*

216. *Id.*

217. 777 N.E.2d 721 (Ind. 2002).

218. *Id.* at 723-24.

219. *Id.* at 724. Rule 804 defines unavailability as including: "situations in which the declarant . . . (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. IND. R. EVID. 804(a).

220. *Id.*

221. *Id.* at 725 n.7 (citing Kidd v. State, 738 N.E.2d 1039, 1042-43 (Ind. 2000)).

222. *Id.* at 725.

In this case, Garner had offered to hear other issues to allow time for the witnesses to return and the State refused. The court thus held that "a mere vacation is not sufficient to circumvent the right of confrontation."[223] The court noted that as long as the vacation is not "of such a length as to circumvent the defendant's right to a speedy trial and grind the wheels of justice to a halt, a postponement of the proceedings would have constituted a good faith effort to procure attendance."[224]

I. Self-Deposition when Incarcerated

In *Tillotson v. Clay County Department of Family and Children*,[225] parents of a child were convicted of felony neglect and incarcerated. Eight months later, the parents filed a motion to transport to be present at the parental termination proceedings.[226] The parents took no further action until the second day of proceedings, when they requested permission to attend by phone, which was also denied.[227]

The court noted that the parents never requested a hearing in their motions to transport and did not suggest an alternate means of communication until the second day of the hearing. In considering the risk created by not allowing the parents to participate, the court noted that the parents had been represented by counsel and given every opportunity to cross-examine witnesses. Furthermore, as unavailable witnesses, the parents could have deposed themselves and entered their testimony into evidence at the hearing pursuant to Rule 804(b)(1).[228] The court did state that this is not the equivalent of allowing testimony at trial and cautioned that "in future cases, trial courts would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present."[229]

J. Incompetent at Trial but Prior Testimony Admitted

In *Carpenter v. State*,[230] Carpenter appealed his convictions for child

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223. *Id.*

224. *Id.*

225. 777 N.E.2d 741 (Ind. Ct. App. 2002).

226. *Id.* at 742.

227. *Id.* at 743.

228. *Id.* at 746. Rule 804(b)(1) provides that

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

IND. R. EVID. 804(b)(1).

229. *Tillotson*, 777 N.E.2d at 746.

230. 786 N.E.2d 696 (Ind. 2003).

molestation. While the child victim had been found incompetent to testify at trial, the trial court allowed a videotaped interview to be admitted as well as the victim's statements made to her mother and grandfather. The video interview and the statements had been made shortly after the incident occurred.

The trial court had allowed these items to be admitted, even though the child had been found incompetent as a witness for failure to demonstrate knowledge of the difference between the truth and a lie in the Child Hearsay Hearing.[231] This evidence was admitted pursuant to the "protected person statute," which in relevant part provides that the statements and videotape of a child or disabled person that are not otherwise admissible can be found admissible if "(1) the trial court found, in a hearing attended by the child, that the time, content, and circumstances of the statement or videotape provided sufficient indications of reliability and (2) the child was available for cross-examination at the hearing."[232]

The court found that the testimony from the family members and the video interview lacked sufficient reliability as to the protected persons statute because there was no indication that the statements were made close in time to the incident, the statements were not sufficiently close in time to each other to preclude implantation or cleansing, and the child was unable to distinguish between truth and falsity. The court found that, without the improperly admitted evidence, there was not sufficient evidence to uphold the conviction and remanded the case for a new trial.[233]

The court noted that

> while it is certainly true that the protected person statute provides that a statement or videotape made by a child incapable of understanding the nature and obligation of an oath is nevertheless admissible if the statute's requirements are met, there is a degree of logical inconsistency in deeming reliable the statements of a person who cannot distinguish truth from falsehood.[234]

X. PRODUCTION OF ORIGINAL EVIDENCE

A. Computer-Generated Evidence

In *Sutherlin v. State*,[235] Sutherlin appealed his conviction for robbery. Sutherlin had been identified by the victim from a computer-generated photo array. At trial, the State was unable to produce the actual array that the victim had viewed and instead submitted a second computer-generated array using the same six photographs as the original.

Sutherlin argued that this evidence should not have been allowed because

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231. *Id.* at 701-04.

232. *Id.* at 699 (citing IND. CODE § 35-37-4-6).

233. *Id.* at 704.

234. *Id.*

235. 784 N.E.2d 971 (Ind. Ct. App. 2003).

Rule 1002 provides that "to prove the content of a writing, recording, or photograph, the original . . . is required, except as otherwise provided in these rules or by statute."[236] The court disagreed, observing that Rule 1001(3) provides that if "data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.'"[237] The court determined that the trial court had not abused its discretion in admitting the second array because the second array accurately reflected the original data.[238]

B. Witness Testimony Regarding Movie Scene

In *Jones v. State*,[239] a police detective testified at trial about how a scene from the movie *Curdled* was strikingly similar to the murder that Jones had been charged with. The detective also testified that Jones had a movie poster for *Curdled* in his living room, and a video store owner testified that her records showed that Jones had rented this movie approximately one week prior to the murder.

Jones argued on appeal that it was error under Rule 1002 to allow the detective to testify regarding the contents of the movie scene rather than showing the scene directly to the jury.[240] However, Jones did not challenge the accuracy of the detective's description of the scene either at trial or on appeal. The court noted that for reversal due to improper use of secondary evidence the objection must identify an actual dispute over the accuracy of the secondary evidence.[241] Because there was no dispute over the detective's description of the scene, any error was harmless.[242]

XI. COMMON LAW SURVIVING THE ADOPTION OF THE RULES

In *Kien v. State*,[243] Kien appealed his convictions in part based on a contention that the State had impeached him on collateral matters. At trial, the State had asked Kien if he had ever been suicidal, and Kien answered that he had not. The State made no attempt to link this mental state to the crime charged, child molestation, but offered into evidence two suicide notes written by Kien.

The court pointed out that, because the State had made no attempt to link Kien's mental state to the crimes, this was impeachment on a collateral issue. The court reiterated the supreme court's holding in *Jackson v. State* that the common law rule preventing impeachment on collateral matters was still valid

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236. *Id.* at 973 (quoting IND. R. EVID. 1002).
237. *Id.* (quoting IND. R. EVID. 1001(3)).
238. *Id.*
239. 780 N.E.2d 373 (Ind. 2002).
240. *Id.* at 378.
241. *Id.*
242. *Id.*
243. 782 N.E.2d 398 (Ind. Ct. App. 2003).

after the adoption of the Indiana Rules of Evidence.[244] Because it was a collateral matter, once Kien testified that he had not been suicidal, the State was bound by that answer, unless it could present evidence that was independently admissible for some reason other than solely to discredit the witness.[245]

In *Finney v. State*,[246] Finney appealed his conviction for resisting (fleeing) law enforcement. A state trooper had attempted to stop Finney on a traffic violation, and Finney fled. After Finney escaped, the State filed charges against him. Finney's Sixth Amendment right to counsel attached upon the filing of charges. Finney eventually turned himself in, and prior to receiving access to counsel, the trooper asked him why he fled. Finney answered that "it was a dumb mistake or a stupid mistake."[247] The trooper was allowed to testify regarding this statement at trial, and the court denied Finney's motion to strike the testimony.[248]

Because Finney's counsel did not immediately object to the trooper's testimony, but only moved to strike the testimony shortly thereafter, case law prior to adoption of the Rules would have held that the objection was waived.[249] The court noted that Rule 103(a) allows preservation of claims of errors when "a timely objection or motion to strike appears of record . . . ."[250] Finney's counsel had also claimed to be unaware of the statement until after the testimony had been given, and the court further noted that there was a common law exception to the waiver rule for failure to object where the objectionable answer could not have been anticipated.[251]

The court decided that the trial court had abused its discretion by not striking the trooper's testimony regarding Finney's statement. However, it did so based on the presence of other, overwhelming evidence of Finney's guilt. The court said that although

> the facts here lead us to the conclusion that in this particular instance the conviction will be upheld, we think it appropriate to clearly and plainly say to all arms of law enforcement that a defendant's Sixth Amendment right to counsel, which had plainly attached in this case, is an important and inviolable right . . . . Absent other overwhelming evidence of Finney's guilt, we would not have hesitated to reverse this conviction.[252]

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244. *Id.* at 409 (citing Jackson v. State, 728 N.E.2d 147, 153 (Ind. 2000)).

245. *Id.* (citing Highley v. State, 535 N.E.2d 1241, 1243 (Ind. Ct. App. 1989)).

246. 786 N.E.2d 764 (Ind. Ct. App. 2003).

247. *Id.* at 766.

248. *Id.*

249. *Id.* (citing N. Ind. Pub. Serv. Co. v. Otis, 250 N.E.2d 378, 406 (Ind. App. 1969) (holding that a "party who is not examining a witness cannot use a motion to strike as a means of objection to a question after it has been answered")).

250. *Id.* (quoting IND. R. EVID. 103(a)).

251. *Id.* (citing Wagner v. State, 474 N.E.2d 476, 491-92 (Ind. 1985)).

252. *Id.* at 769.

In *Aldridge v. State*,[253] Aldridge appealed his conviction for child molesting. At trial, a six-year old and the five-year old victim had been allowed to testify. Aldridge argued that neither witness was competent to testify due to the ages of the children at the time of trial. Formerly, a child under ten years old was presumed incompetent to testify. The statute creating this limitation was repealed in 1990.[254]

In place of the repealed statute, Rule 601 now applies: "every person competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly."[255] The court noted that it had previously held that Rule 601's failure to exclude children did not prevent inquiry into competency where raised by the defendant,[256] and when read with the repeal of the prior statute, the rule assumed competency until otherwise demonstrated.[257]

In a footnote, however, the court noted decisions holding that trial courts are required to conduct their own inquiry,[258] that the enactment of Indiana Evidence Rule 601 did not affect previous Indiana decisions regarding the competence of children to testify,[259] and holding that Rule 601 requires a trial court to make an inquiry into competency of a child witness.[260]

In the present case, the court held that Aldridge had not demonstrated that the victim had been incompetent to testify. The trial court had conducted extensive questioning of the witnesses regarding truth, falsity, and the differences between right and wrong. The conviction was affirmed.[261]

CONCLUSION

The Indiana Rules of Evidence have now been in force for a full decade. While the cases discussed above represent only a small fraction of the cases decided each year involving Evidence questions, they demonstrate that even after ten years of interpretation much remains open to debate.

Differences between the Indiana Rules of Evidence and their federal counterparts, statutory changes, and judicial decisions must all be considered in order to understand how the Rules apply in any given situation. Students of the Indiana Rules are likely to be provided with ample new material as the Rules continue to develop over their second decade of post-adoption development.

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253. 779 N.E.2d 607 (Ind. Ct. App. 2002).
254. *Id.* at 609.
255. *Id.* (quoting IND. R. EVID. 601).
256. *Id.* (quoting Burrell v. State, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998)).
257. *Id.* (citing Newsome v. State, 686 N.E.2d 868, 877-78 (Ind. Ct. App. 1997)).
258. *Id.* at 609 n.1 (citing Haycraft v. State, 760 N.E.2d 203, 209 (Ind. Ct. App. 2001)).
259. *Id.* (citing Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001)).
260. *Id.* (citing Newsome v. State, 686 N.E.2d 868, 872 (Ind. Ct. App. 1997)).
261. *Id.* at 610.