

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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INTRODUCTION

The Indiana Rules of Evidence (“Rules”) have now entered a second decade of implementation and interpretation. Much progress has been made in the intervening period in terms of defining and clarifying the Rules, as well as distinguishing them from the Federal Rules of Evidence.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2003, and September 30, 2004. 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 in many circumstances.

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. *Applicability in Penalty Phase of Trial*

In *Dumas v. State*,⁴ Dumas had characterized the penalty phase of his trial as a sentencing hearing where the Rules should not apply. The trial judge allowed Dumas to present hearsay testimony, and the State followed with hearsay testimony of its own.⁵ Rule 101(c)(2) provides that the Rules do not apply in “[p]roceedings relating to extradition, sentencing, probation, or parole.”⁶

On appeal, Dumas argued that the State’s hearsay evidence should not have been allowed during the penalty phase. The court generally agreed with this contention, stating that “Indiana Evidence Rule 101(c) makes clear that with the

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

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (citing *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996); *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)).

4. 803 N.E.2d 1113 (Ind. 2004).

5. *Id.* at 1120.

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

exception of grand jury proceedings, the proceedings in which the [R]ules of [E]vidence do not apply involve those where evidence is presented to a trial judge alone without the intervention of a jury."⁷ The rationale here is that the judge will be aware of the law and capable of basing a decision on appropriate factors, while a jury may be improperly influenced by hearsay.⁸ The court found that the Rules are applicable in the penalty phase of a capital trial, and that the trial court had erred by allowing the hearsay,⁹ but found no reversible error because the use of hearsay testimony in the penalty phase had been invited by Dumas.¹⁰

C. *In Relation to the Common Law*

In *Lasater v. House*,¹¹ a decedent had executed a will leaving most of her property to the Lasaters. After a nephew gained power of attorney, the decedent executed a new will which reduced bequests to the Lasaters and increased those to the family. The Lasaters sought to introduce statements made by the decedent which were not made concurrently with the new will.¹²

House argued that the statements could not be used as common law held that such statements must have been made contemporaneously with the act or crime in question. The court held that since Rule 803(3) was applicable, reference to the common law was improper.¹³ In summary, the court said that if the Rules "provide an answer, all other sources, whether statutory or earlier case law, are to be disregarded."¹⁴

D. *Offer of Proof*

In *King v. State*,¹⁵ King argued on appeal that the trial court erred in preventing him from opposing the testimony of a witness as a product of coaching. However, at trial, King had not offered to prove this point at the time of the objection.¹⁶ The court held that this issue had been waived on appeal, relying on Rule 103(a)(2), which states that an "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the

7. *Dumas*, 803 N.E.2d at 1120-21. The court reached this decision based on the presence of a jury, even though Indiana Code section 35-50-2-9 characterizes the penalty phase as a sentencing hearing. *Id.* (citing IND. CODE § 35-50-2-9).

8. *Id.*

9. *Id.* at 1121.

10. *Id.*

11. 805 N.E.2d 824 (Ind. Ct. App.), *trans. granted, opinion vacated*, 822 N.E.2d 977 (Ind. 2004).

12. *Id.* at 827.

13. *Id.* at 832.

14. *Id.* (quoting 12 ROBERT LOWELL, JR., INDIANA PRACTICE § 102.101 (2d ed. 1995)).

15. 799 N.E.2d 42 (Ind. Ct. App. 2003).

16. *Id.* at 48.

court by a proper offer of proof, or was apparent from the context within which questions were asked.”¹⁷

This conclusion in *King* is consistent with the Indiana Supreme Court’s interpretation of this issue. In *Stroud v. State*,¹⁸ the court stated that in order to “reverse a trial court’s decision to exclude evidence, which we review for an abuse of discretion, there must be (1) error by the court, (2) that affects Defendant’s substantial rights, and (3) the defense must have made an offer of proof or the evidence must have been clear from the context.”¹⁹

E. Subsequent Bad Acts Not Related to Plaintiff

In *Wohlwend v. Edwards*,²⁰ Wohlwend appealed a judgment of negligence based on injuries caused while driving intoxicated. Wohlwend appealed in part based on the contention that the trial court should not have allowed Edwards to introduce evidence of two drunk driving arrests (not involving the plaintiff) occurring subsequent to the incident which caused harm to the plaintiff.²¹

Edwards argued that any error was harmless under Rule 103(a), which states that “[e]rror [cannot] be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party [has been] affected.”²² The court held that a substantial right had been affected as the jury had clearly been asked to punish Wohlwend, at least in part, for unrelated actions occurring after the incident in which the plaintiff had been injured.²³

F. Redaction and Sources of Injuries

In *Walker v. Cuppett*,²⁴ Walker appealed the trial court’s refusal to allow unredacted copies of Cuppett’s medical records. Walker argued that Rule 106 requires the complete document to be introduced where otherwise admissible.²⁵ Cuppett countered that much of the redacted information contained medical opinions and was therefore inadmissible. The court pointed out that while opinions and diagnoses in medical records are an exception to the hearsay rule under Rule 803(6), they must still meet the requirements for expert testimony set forth in Rule 702. Cuppett argued that because Walker did not prove the experts’

17. *Id.* (quoting IND. EVID. R. 103(a)(2)).

18. 809 N.E.2d 274 (Ind. 2004).

19. *Id.* at 283 (citing IND. EVID. R. 103(a); *McCarthy v. State*, 749 N.E.2d 528, 536 (Ind. 2001); *Hauk v. State*, 729 N.E.2d 994, 1002 (Ind. 2000)).

20. 796 N.E.2d 781, 782 (Ind. Ct. App. 2003).

21. *Id.* at 784.

22. *Id.* at 789 (citing IND. EVID. R. 103(a)).

23. *Id.* at 789-90.

24. 808 N.E.2d 85 (Ind. Ct. App. 2004).

25. *Id.* at 97. The embodiment of the completeness doctrine, Rule 106 requires that where 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.” IND. EVID. R. 106.

qualifications, the redactions must remain.²⁶

However, the redactions in this case were clearly not performed to separate admissible from inadmissible evidence. The court found that the use of some of the information by Cuppett to demonstrate injuries caused by Walker opened the door to other similar information in the records.²⁷ Citing Rule 705, the court stated that an expert can be forced to disclose the underlying facts or data related to his or her opinion.²⁸ In this case of first impression, the court held that a plaintiff in a personal injury action may not claim entitlement to medical expenses as an element of damages without disclosing to the fact finder that some of the medical treatment received was actually related to ailments unrelated to plaintiff's actions.²⁹

II. JUDICIAL NOTICE OF FACTS GOING TO ULTIMATE ISSUE

In *Brown v. Jones*,³⁰ Jones had been granted a corporate dissolution and appointment of receivership against the company run by Brown. In granting the dissolution, the trial court took judicial notice of bad acts by Brown. In a bifurcated counterclaim proceeding before a jury regarding fraud and conversion claims against Jones, the trial court allowed the judicially-noticed facts to be presented to the jury.³¹ The appellate court reversed the judgment for Jones, based on a finding that the trial court had exceeded the allowable bounds for judicial notice and invaded the purview of the jury by taking judicial notice of facts which were ultimately questions for the jury.³²

Under Rule 201, the trial court was limited to taking judicial notice of the fact that a dissolution and receivership order had been entered. Taking judicial notice of claims made in the earlier proceeding was improperly determinative of facts underlying the basis of the fraud and conversion claims.³³

26. *Id.* at 97-98; *see also In re E.T.*, 808 N.E.2d 639, 644 (Ind. 2004) (holding that while opinions may be contained in business records admissible under Rule 803(6), "the expertise of the opinion giver must be established").

27. *Walker*, 808 N.E.2d at 98.

28. *Id.* at 99. Rule 705 provides that the "expert may testify in terms of opinion or inference and give reasons therefor 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. EVID. R. 705.

29. *Walker*, 808 N.E.2d at 100.

30. 804 N.E.2d 1197 (Ind. Ct. App. 2004).

31. *Id.* at 1201.

32. *Id.* at 1202.

33. *Id.* Rule 201(a) provides 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. EVID. R. 201(a).

III. RELEVANCE AND PROBATIVE VALUE VERSUS PREJUDICIAL

A. *Subsequent Bad Acts*

In *Wohlwend*,³⁴ discussed *supra*, Wohlwend argued on appeal that the issue of subsequent arrests for driving under the influence were irrelevant to the issue of punitive damages for Edwards. Edwards argued that the evidence is relevant for the very purpose of punitive damages—to deter similar bad conduct. The court found the evidence inadmissible under Rule 403, which states that relevant evidence may be excluded where the danger of unfair prejudice substantially outweighed the probative value.³⁵ The danger that such evidence would unfairly prejudice Wohlwend in the consideration of punitive damages substantially outweighed the probative value of the subsequent arrests.³⁶

B. *Lyrics Similar to Crime, Written by Defendant*

In *Bryant v. State*,³⁷ Bryant had composed rap lyrics which discussed placing a dead body in the trunk of a car. His stepmother's body was found in the trunk of her car, along with evidence that Bryant had been driving the car and showing it to friends. Bryant challenged the relevancy of this evidence.³⁸ The court found that the evidence was relevant because the similarity of the crime to the lyrics made it more probable that Bryant committed the crime.³⁹

Bryant further argued that the evidence was impermissible under Rule 404(b) because they were used to show he was of bad character and to improperly imply that he had committed the crime.⁴⁰ While prior bad acts cannot be used to demonstrate propensity to commit the charged crime, such evidence is admissible if it bears on some other issue and its probative value is not substantially outweighed by its prejudicial effect. The court noted that such evidence would be admissible as to the issue of intent where the defendant goes beyond a denial of guilt and presents a claim of contrary intent. In this case, Bryant had accused his father of the crime, and therefore the lyric evidence was relevant to show

34. 796 N.E.2d 781 (Ind. Ct. App. 2003).

35. *Id.* at 785. Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” IND. EVID. R. 403.

36. *Wohlwend*, 796 N.E.2d at 785.

37. 802 N.E.2d 486 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004).

38. *Id.* at 498. The lyrics included the phrase “Cuz the 5-0 won’t even know who you are when they pull yo ugly ass out the trunk of my car.” *Id.* (quoting Tr. Ex. 104-05).

39. *Id.*

40. *Id.* Rule 404(b) provides that evidence “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. EVID. R. 404(b).

Bryant's hostile attitude toward the victim.⁴¹

C. Evidence of Remedial Measures—Employee Discipline

In *Strack & VanTil, Inc. v. Carter*,⁴² a Strack employee had been notified of a spill and had gone to retrieve a mop, leaving the spill unguarded. By the time he returned, a customer had fallen on the spill and been injured. Strack had issued a written reprimand to the employee for improperly dealing with a dangerous spill, and Carter had been allowed to use this evidence at trial. Strack appealed, saying that Rule 407 prohibits the use of evidence regarding remedial measures.⁴³

The court on appeal agreed that Rule 407 prohibits the use of evidence of remedial measures, and that employee corrective actions qualify as remedial measures. However, in this case, the description of the incident contained in the employee reprimand contradicted the account given by Strack at trial and was therefore admissible for impeachment purposes.⁴⁴

D. Evidence of Bad Acts Allowed

In *Iqbal v. State*,⁴⁵ Iqbal argued that the trial court should not have allowed evidence of his prior bad acts (a violent relationship with the victim) because he never went beyond a mere denial of murder to establish a claim of contrary intent. The trial court allowed use of bad acts occurring within one year of the victim's death to be introduced, although the State had evidence dating back several years.⁴⁶

Evidence of a bad relationship between two parties is generally not admissible under Rule 404(b).⁴⁷ However, if the evidence is relevant to a matter other than propensity to commit the crime, it may be admissible. In this case, "the evidence was relevant to show motive, relationship between the parties, and

41. *Bryant*, 802 N.E.2d at 499.

42. 803 N.E.2d 666 (Ind. Ct. App. 2004).

43. *Id.* at 670. Rule 407 provides:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

IND. EVID. R. 407.

44. *Strack*, 803 N.E.2d at 671-72.

45. 805 N.E.2d 401 (Ind. Ct. App. 2004).

46. *Id.*

47. *Id.* at 407. Rule 404(b) states 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. EVID. R. 404(b).

absence of mistake.”⁴⁸ The court found that the trial court had properly balanced the prejudicial effect of the prior acts against the probative value by limiting the prior bad acts which could be introduced to those occurring within one year of the murder.⁴⁹

In a similar case, *Reynolds v. State*,⁵⁰ Reynolds appealed his conviction for attempted murder. The trial court allowed evidence of his arrest a few days prior to the crime for residential entry and battery in the same home where the attempted murder occurred. Reynolds argued that this was a violation of Rule 404(b) in that it was impermissible evidence of a prior bad act. He argued that this evidence was more prejudicial than probative because it forced him to choose between invoking the Fifth Amendment and appearing guilty or answering the evidence and prejudicing himself in the current case.⁵¹

The court held that the evidence of the prior act was relevant to prove identity and motive, which were at issue. The prejudicial effect was outweighed by the probative value because it demonstrated why Reynolds would have appeared at that home with a weapon four days after the earlier arrest. The trial court had also admonished the jury on proper use of the testimony⁵²

E. Evidence of Extramarital Affairs Where Spouse is Murdered

In *Camm v. State*,⁵³ Camm appealed his murder conviction, arguing that the State was improperly allowed to introduce extensive evidence of his extramarital affairs and flirtations in violation of Rule 404(b).⁵⁴ In this case of first impression, the State argued that the evidence was relevant to demonstrate motive.⁵⁵

The court held that

evidence of a defendant's marital infidelity is not automatically admissible as proof of motive in a trial for murder or attempted murder of the defendant's spouse. . . . [T]he State must do more than argue that the defendant must have been unhappily married or was a poor husband or wife, ergo he or she had a motive to murder his or her spouse.⁵⁶

In order to be admissible as to motive, such evidence would need to show that these activities had precipitated violence or threats within the marriage, or that

48. *Iqbal*, 805 N.E.2d at 408.

49. *Id.* at 408-09.

50. 797 N.E.2d 864 (Ind. Ct. App. 2003).

51. *Id.* at 867.

52. *Id.* at 868. Reynolds's convictions were, however, reversed and remanded for new trial because the prosecutor told the jury that invoking the Fifth Amendment necessarily means that the defendant has done something to incriminate himself. *Id.* at 868-70.

53. 812 N.E.2d 1127 (Ind. Ct. App. 2004).

54. *Id.* at 1130-31.

55. *Id.* at 1131.

56. *Id.* at 1133.

the defendant had been involved in an extramarital affair at the time of the crime. Even this evidence could be limited in its admissibility by remoteness in time, insufficient proof, or general concern over unfair prejudice.⁵⁷ Camm's murder convictions were reversed.⁵⁸

F. Evidence of Searching a Victim's Wallet

In *State v. Seabrooks*,⁵⁹ Seabrooks argued that the trial court should not have admitted testimony that he had been going through the wallet of a victim after the murder occurred because such testimony violated Rules 403 and 404(b).⁶⁰

The court found that the testimony was relevant because it showed that Seabrooks was a willing participant, rather than a bystander. The court had also given a limiting instruction to the jury, prohibiting that testimony's use to show Seabrooks was generally a bad guy. Therefore the court found that Seabrooks had failed to show that the probative value had been substantially outweighed by any prejudicial effect.⁶¹ The court likewise rejected the 404(b) claim as this rule applies to evidence of a crime or act committed on another day, in another place, and whose purpose is to show the person is someone who commits crimes.⁶²

G. Evidence of Prior Citation in Civil Case

In *Lepucki v. Lake County Sheriff's Department*,⁶³ Lepucki appealed a civil verdict in favor of defendant sheriff's department. Lepucki had sued the sheriff's department after a collision with a police vehicle in which Lepucki had been cited for failure to yield to an emergency vehicle. In the civil suit, evidence of the infraction was allowed and the verdict was found for the sheriff's department.⁶⁴

Both Indiana statute and Rule 803(22) allow the introduction of prior convictions or admissions, but only where the event was a crime punishable by more than one year, but the citation issued to Lepucki was an infraction rather than a crime.⁶⁵ The court also considered whether the prejudicial effect of

57. *Id.*

58. *Id.* at 1142.

59. 803 N.E.2d 1190 (Ind. Ct. App. 2004).

60. *Id.* at 1193.

61. *Id.* at 1194.

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

63. 801 N.E.2d 636 (Ind. Ct. App. 2003).

64. *Id.* at 638.

65. *Id.* at 639. Indiana Code section 34-39-3-1 states that evidence of a final judgment that "(1) is entered after a trial or upon a plea of guilty; and (2) adjudges a person guilty of a crime punishable by death or imprisonment of more than one (1) year; shall be admissible in a civil action." IND. CODE § 34-39-3-1(a)(1) (2004). Rule 803(22) provides that evidence "of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment is not excluded by the hearsay rule." IND. EVID.

allowing proof of the citation outweighed the probative value. Because the citation did not consider whether the officer breached his statutory duty of care, and where any degree of fault attributed to Lepucki would decide the case, the introduction of the infraction evidence improperly invaded the province of the jury to decide the matter.⁶⁶

H. Partially Inaudible 911 Call Recording

In *Benavides v. State*,⁶⁷ Benavides had been convicted of burglary, robbery and criminal confinement. At the time the home was broken into, the victim had been calling 911 for assistance. On appeal, Benavides argued that portions of the call were unintelligible and lead the jury to speculate as to the missing content.⁶⁸

The court stated the general rule that recordings be intelligible enough for the offered purpose, and that the probative value is not outweighed by the danger of confusion or unfair prejudice. In this case, the tape was offered not for the purpose of proving the meaning of the words on the tape, but for the purpose of showing that a forcible entry had occurred, and to contradict Benevides's version of the events, in which he claimed he had been invited into the home.⁶⁹

I. Photographs of Victim as Altered by Autopsy

In *Helsley v. State*,⁷⁰ Helsley argued that photographs of the victims showing them with heads shaved by the pathologist were cumulative of the pre-shaving photos and were prejudicial in that the shaving made the wounds appear more gruesome.⁷¹

The court stated that photographs may only be excluded where their probative value is substantially outweighed by the danger of unfair prejudice. In this case, the jury had viewed photos of the victims before and after the shaving, so it was clear that the pathologist had done the shaving (not Helsley) and the shaving allowed the jury to better understand the nature of the wounds.⁷²

J. Exceptions to Non-admissibility of Evidence Discovered During Offers to Compromise

In *Bridges v. Metromedia Steakhouse Co.*,⁷³ Bridges sued Metromedia for

R. 803(22).

66. 801 N.E.2d at 639. The court noted, however, that had Lepucki admitted guilt in the traffic citation action, that fact would have been admissible as a statement by a party opponent under Rule 801(d)(2). *Id.*

67. 808 N.E.2d 708 (Ind. Ct. App. 2004).

68. *Id.* at 710-11.

69. *Id.* at 711-12.

70. 809 N.E.2d 292 (Ind. 2004).

71. *Id.* at 296.

72. *Id.*

73. 807 N.E.2d 162 (Ind. Ct. App. 2004).

injury to her hand at a restaurant. Bridges claimed she had redness and swelling for several years after the incident. Testimony at trial included a witness who observed Bridges's hand at a settlement conference during that time and had observed neither swelling nor redness.⁷⁴

In a case of first impression, Bridges contended that Rule 408 prohibits testimony regarding knowledge gained solely during the mediation process.⁷⁵ The court held that the observation was not of conduct or statements in offer of compromise, but an observation of physical condition and therefore, Rule 408 did not prohibit testimony on this point.⁷⁶

K. Admissibility of Preliminary Agreement on Individual Terms of Overall Agreement

In *Worman Enterprises, Inc. v. Boone County Solid Waste Management District*,⁷⁷ the waste district claimed that Worman needed a permit to continue operations and set forth several items and conditions. In responding to certain portions of the permit preconditions, Worman stated that certain provisions were acceptable. Worman sued the district without completing the process, claiming the district was not allowed to regulate its business. The district claimed that Worman was precluded from arguing on points where Worman found the district's demands agreeable.⁷⁸

The court found that the statements of agreeability had been made by Worman as part of the overall process of settling the permit dispute, and were therefore subject to Rule 408 and not admissible to demonstrate that Worman had waived these issues.⁷⁹

74. *Id.* at 164.

75. *Id.* Rule 408 states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

IND. EVID. R. 408.

76. *Bridges*, 807 N.E.2d at 166-67.

77. 805 N.E.2d 369 (Ind. 2004).

78. *Id.* at 376.

79. *Id.* at 376-77.

IV. WITNESSES

A. Hypnosis

In *King v. State*,⁸⁰ King appealed his convictions in part based on the assertion that a key witness had testified after hypnosis in violation of Rule 602.⁸¹ This contention was based on an entry in the witness's medical record which stated that:

[Patient] states once she calmed down, she was able to breath. [Discussed] possibility of panic attacks & educated her as to what happens [with] a panic attack. Told her to also mention her symptoms to her M.D. [Patient] was responsive to clinical hypnosis & was able to obtain good level of relaxation. Offered reassurances [regarding] her safety, discussed son's situation & his return to school.⁸²

The court found no error in this witness's testimony.⁸³ The witness had unequivocally identified the defendant before giving the questioned testimony to police and the witness denied having been hypnotized.⁸⁴

B. Juror Misconduct

In *Evans v. Buffington Harbor River Boats*,⁸⁵ an alternate juror signed an affidavit claiming that the jury had improperly: refused damages for the victim's husband as he had not been present or injured, refused to award damages for future surgeries because a juror with nursing experience stated that Medicare or Medicaid would pay for them, refused a large award because a portion would go to Evans's lawyer who needed no more money, and refused to grant a substantial award to the victim because she had a casino player's card and would likely gamble away any amount awarded by the jury.⁸⁶

On appeal, Evans argued that these actions were violative of Rule 606(b).⁸⁷

80. 799 N.E.2d 42 (Ind. Ct. App. 2003).

81. *Id.* at 47. Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis." IND. EVID. R. 602.

82. *King*, 799 N.E.2d at 47 (quoting Appellant's App. at 192-93).

83. *Id.*

84. *Id.*

85. 799 N.E.2d 1103 (Ind. Ct. App. 2003).

86. *Id.* at 1108.

87. *Id.* Rule 606(b) provides:

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 (1) to drug or

The court noted that the allegation that the jury decided to award zero to the husband and considered the player's card did not fit into any of the three exceptions to Rule 606(b) and was therefore not subject to inquiry.⁸⁸ In examining the remaining two allegations, the court noted that they neither involved drug or alcohol use or outside influence improperly brought on the jury. This left only the category of extraneous prejudicial information, and since none of the information in these two allegations had originated outside the jury, they could not be examined for improper conduct.⁸⁹

In *McManus v. State*,⁹⁰ McManus attempted to offer a newspaper article into evidence at his sentencing hearing. The article purported to relate jurors' perceptions of McManus during the trial. The court refused to allow this article to be presented at the sentencing hearing.⁹¹

The only issue that McManus claimed the article raised was defense counsel's inability to explain his cool demeanor at trial as counsel was unaware of the medication prescribed for McManus. The court held that this was not a listed exception under Rule 606(b), and therefore had been correctly excluded from evidence.⁹²

C. Use of Document to Refresh Recollection Not Prepared by Witness

In *Mroz v. Harrison*,⁹³ Mroz appealed the judgment of the trial court in part because Mroz had been prevented from using a document prepared by Harrison's employer to refresh Harrison's recollection during testimony because it had not been prepared by the witness. The trial court had instructed Mroz that he could use the document to impeach Harrison.⁹⁴

Mroz claimed this violated Rule 612.⁹⁵ The court held that Rule 612 does not require the document to have been made by the witness, and pre-Rules law held that a document need not be prepared by the witness.⁹⁶ The trial court erred by

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. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

IND. EVID. R. 606(b).

88. 799 N.E.2d at 1109.

89. *Id.* at 1110.

90. 814 N.E.2d 253 (Ind. 2004), *petition for cert. filed* (Apr. 28, 2005) (No. 04-9935).

91. *Id.* at 264.

92. *Id.* at 264-65.

93. 815 N.E.2d 551 (Ind. Ct. App. 2004).

94. *Id.* at 553.

95. *Id.* Rule 612(a) provides that "[i]f, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." IND. EVID. R. 612(a).

96. *Mroz*, 815 N.E.2d at 553-54.

refusing to allow the document to be used for recollection. However, the error was found harmless because all of the contents of the document could have been raised through impeachment.⁹⁷

D. Jury Questions to Witnesses

In *Ashba v. State*,⁹⁸ Ashba claimed that the trial court had erred by not asking the jury if it had questions at the end of testimony by each witness. Ashba argued that this was required by new Jury Rule 20, which became effective on January 1, 2003. Jury Rule 20 states that the “court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following: . . . (7) that jurors may seek to ask questions of the witnesses by submission of questions in writing.”⁹⁹

The court noted that Jury Rule 20 does not set forth an exact procedure, and that the supreme court has also promulgated Rule 614(d) which sets forth a procedure for the jury to submit questions to a witness. Therefore, juror questions should be written and submitted to the court, and subject to objections, the trial court may then ask the questions of the witness if it so desires.¹⁰⁰

V. OPINIONS AND EXPERT TESTIMONY

A. Testimony on the Ultimate Question of Law

In *Lasater*,¹⁰¹ introduced *supra*, the Lasaters appealed the trial judge’s decision to exclude the expert testimony of an attorney and a psychologist. The issue about which these individuals offered testimony was whether or not undue influence had been exerted in the creation of a second will. Both individuals made statements indicating that undue influence existed.¹⁰²

The court found that the Lasaters waived this argument on appeal by not including relevant memorandas or transcripts.¹⁰³ However, the court went on to say that the testimony would be excludable under Rule 704 in any case, because the testimony would have offered an opinion on the ultimate question of law at

97. *Id.* at 554.

98. 816 N.E.2d 862 (Ind. Ct. App. 2004).

99. *Id.* at 865.

100. *Id.* Rule 614(d) provides that a member of the jury

may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

IND. EVID. R. 614(d).

101. *Lasater v. House*, 805 N.E.2d 824 (Ind. Ct. App. 2004).

102. *Id.* at 833-34.

103. *Id.*

issue: whether or not undue influence had been exerted.¹⁰⁴

B. *Laying the Foundation for Lay Witness*

In *Stroud*,¹⁰⁵ discussed *supra*, a police officer was allowed to testify that two pairs of shoes approximately one half size different from each other likely belonged to the same person based on his opinion that Reebok shoes run smaller than Nike shoes. The State failed to lay a foundation for the officer's opinion, which would have allowed the opinion under Rule 701.¹⁰⁶

Unfortunately for Stroud's appeal, the court found the error harmless. At trial, after the trial judge overruled the objection from Stroud regarding this testimony, defense counsel asked the officer how many times he had purchased each type of shoe. The officer stated that he had purchased each type of shoe approximately twenty times. Because the question from defense counsel laid a foundation for the immediately preceding testimony, any error in allowing the testimony was rendered harmless.¹⁰⁷

C. *Admissibility of Scientific Evidence Versus Weight Given to Evidence*

In *Burnett v. State*,¹⁰⁸ Burnett appealed his conviction, arguing that testimony from a witness regarding fingerprint evidence had not been properly established. Burnett claimed the trial court erred in allowing the testimony as the witness was not a certified latent fingerprint expert, the witness's previous trial testimony had not required fingerprint identification, and the witness was unable to answer some technical questions regarding the specific identification method used.¹⁰⁹ The court found no error in qualifying the witness as an expert based on his experience and training.¹¹⁰ The factors cited by Burnett were not sufficient to disqualify the witness, but instead go to the weight the trier of fact gave to the testimony itself.¹¹¹

104. *Id.* at 834-35. Rule 704 provides that "(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. (b) Witnesses 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. EVID. R. 704.

105. 809 N.E.2d 274 (Ind. 2004).

106. *Id.* at 284. Rule 701 states that a lay witness may testify to opinions or inferences if they are "(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." IND. EVID. R. 701.

107. 809 N.E.2d at 284.

108. 815 N.E.2d 201 (Ind. Ct. App. 2004), *reh'g denied*, (Dec. 20, 2004).

109. *Id.* at 205.

110. *Id.* at 206.

111. *Id.* at 206-07. The court noted that while Rule 702(b) requires the court to be satisfied with the reliability of the underlying scientific principles, the trial court determines these preliminary questions under Rule 104(a), which imposes a burden of proof by preponderance of the evidence. This simply means the court must find that it is more likely than not that the scientific

D. Expert Testifying to Intent, Guilt, or Innocence

In *Julian v. State*,¹¹² Julian appealed his conviction for arson in part by arguing that the State should not have been allowed to introduce testimony of an expert witness who concluded that the fire was intentionally set to cover up a burglary. Julian contended that this violated Rule 704(b), which states 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.”¹¹³

The court found that the witness merely testified that the fire was set intentionally, not that Julian had been the cause of the fire. Therefore, there was no error in allowing the testimony.¹¹⁴

E. Utilizing Daubert Under the Rules

In *West v. State*,¹¹⁵ West appealed his conviction for possession of anhydrous ammonia in part based on his contention that the Draeger Test conducted by a deputy should not have been admitted at trial because the scientific reliability of the test had not been established. At trial, the deputy had testified about how the test works, his training in using the test, that the DEA utilizes the test and trained him, and that an environmental cleanup agency trained him and uses the test in its work.¹¹⁶

The court held that, in the absence of judicial notice of reliability, the State must establish a sufficient foundation for reliability of the method used.¹¹⁷ While affirming that *Daubert* factors are not controlling, the court stated that they do have utility in deciding whether scientific evidence is reliable under Rule 702(b). Because the State had failed to present sufficient evidence regarding the testing of the Draeger test, whether the Draeger test has been subjected to peer review and publication, the known potential error rate of the Draeger test, the existence and maintenance of standards controlling operation of the test, or its general acceptance in the scientific community, the trial court erred in allowing the evidence. However, because other evidence supported the conviction, the error was harmless.¹¹⁸

principles underlying the testimony are reliable. *Id.* (citing 13 LOWELL, *supra* note 14, §702.207).

112. 811 N.E.2d 392 (Ind. Ct. App. 2004).

113. *Id.* at 399 (quoting IND. EVID. R. 704(b)).

114. *Id.* at 400.

115. 805 N.E.2d 909 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

116. *Id.* at 912-13.

117. *Id.* at 912.

118. *Id.* at 913-14.

F. Police Officer's Opinion on Potential Penalty

In *Blanchard v. State*,¹¹⁹ Blanchard argued on appeal that he received ineffective assistance of counsel because his attorney failed to enter into evidence testimony that a police detective told him at the time of his arrest that it would be “up to the Prosecutor’s Office, but [Blanchard] could be looking at something less than murder.”¹²⁰ The court stated that although Rules 701 and 702 allow opinion testimony by lay witnesses and experts, Rule 704 states that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case.”¹²¹ The court held that the officer’s statement was a prohibited declaration of Blanchard’s innocence on the charge of murder.¹²²

G. Lack of Testing or Foundation

In *Lytle v. Ford Motor Co.*,¹²³ Lytle appealed summary judgment for Ford, arguing that proffered expert testimony demonstrating that Ford’s seat belt design was defective should have been allowed. The testimony of Lytle’s two expert witnesses was excluded because the trial court found there had been insufficient testing and no credible expert testimony based on scientific principles that the offered theory would work in the real world.¹²⁴

The court began by noting that where expert testimony is advanced to establish causation, summary judgment is appropriate where the testimony does not meet the requirements of Rule 702.¹²⁵ Lytle contended that Indiana law made a distinction between testing based on scientific principles and expert testimony based on skilled observations. While Lytle relied on recent Indiana cases allowing expert testimony based on observation where the basis for the testimony had been established by judicial notice or a showing of reliability, rather than testing and established scientific principles, those cases did not involve an attempt to explain complex physical events.¹²⁶

The court held that the expert testimony had been properly excluded because

119. 802 N.E.2d 14 (Ind. Ct. App. 2004).

120. *Id.* at 34 (quoting Tr. at 192).

121. *Id.* (quoting IND. EVID. R. 704)

122. *Id.* at 35. *But see* *Witte v. M.M.*, 800 N.E.2d 185, 193 (Ind. Ct. App. 2003), *vacated*, 820 N.E.2d 128 (Ind. 2005) (holding, at the court of appeals level, that an officer may be allowed to testify in a civil case as to even the ultimate issue of the case where the testimony concerns matters not within the common knowledge and experience of the ordinary person and where the testimony will aid the jury).

123. 814 N.E.2d 301 (Ind. Ct. App. 2004), *reh’g denied*, (Dec. 2, 2004).

124. *Id.* at 307.

125. *Id.* at 308 (citing *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593, 595 (Ind. Ct. App. 1996), *trans. denied*, 726 N.E.2d 297 (Ind. 1999)).

126. *Id.* at 309-10. Lytle relied on the following cases: *Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1168 (Ind. Ct. App. 2000); *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003); and *PSI Energy, Inc. v. Home Insurance Co.*, 801 N.E.2d 705, 740-41 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004).

the two proffered experts simply hypothesized what might have occurred during the accident and conducted simple manipulation of seat belt mechanisms, whereas the previous cases utilized experts who relied on observations of physical evidence, such as shoe prints, photographs, bullet wounds, concrete cracks, and cells under a microscope.¹²⁷ Although both experts were qualified professionals, they failed to utilize any scientifically-reliable testing and merely hypothesized as to events which may have occurred during the accident.¹²⁸

In *Messer v. Cerestar USA, Inc.*,¹²⁹ expert testimony had been admitted at trial, attesting that a gate had failed, resulting in death, because the gate was not strong enough for its intended purpose. On appeal Cerestar argued that the expert offering the evidence was not qualified because he was not an engineer and his college degree was in Education.¹³⁰ The court found that the witness was qualified under Rule 702 through experience as he had eighteen years of experience working in construction and engineering.¹³¹

Cerestar also argued that the affidavit offered by the expert should have been excluded because the evidence failed to demonstrate that the testimony was based on reliable scientific principles as required by Rule 702(b). Because the affidavit failed to reveal the scientific method used, or any evidence of measurements or scientific analysis, the evidence should have been excluded.¹³²

In *PSI Energy, Inc. v. Home Insurance Co.*,¹³³ the insurance company argued that the trial court abused its discretion in allowing expert testimony because the scientific reliability had not been sufficiently established. The expert testified that damage to certain structures built in the 1800s occurred due to a “cumulative effect” of disruptive events combined with natural decay and the materials contained in the construction process. The expert admitted that there was no method to verify this theory through scientific observations, measurements or calculations.¹³⁴

The expert based his theory on his observations and his experience as an engineer with experience in subsurface structures. The court stated that when examining reliability, the foundation required becomes more advanced and complex as the scientific method proposed becomes more advanced and complex, and that the converse is applicable as well. This type of analysis was more like observations of a person with specialized knowledge than a matter of scientific principles governed by Rule 702(b). Therefore, the trial court properly allowed

127. *Lytle*, 814 N.E.2d at 311-12.

128. *Id.* at 312-15. In other words, no matter how smart you are, you can't make stuff up.

129. 803 N.E.2d 1240 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

130. *Id.* at 1247-48.

131. *Id.* at 1248. The court reasoned that Rule 702 does not require a formal college education in a particular field to be qualified as an expert witness.

132. *Id.* The court noted that this witness would qualify as an expert and could indeed testify, assuming he set out the reliability for the basis of his testimony.

133. 801 N.E.2d 705 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004).

134. *Id.* at 739-40.

the testimony as observations of a person with specialized knowledge.¹³⁵

H. Expert Testimony by a Family Member

In *Mitchell v. State*,¹³⁶ Mitchell appealed his conviction, in part based on his contention that the trial court improperly refused to qualify his wife as an expert witness. Although his wife was a doctor and examined the child shortly after the incident, the trial court held that she could not testify as an expert witness because she was not an unbiased third party.¹³⁷ She was, however, allowed to testify as to the presence of bruises.¹³⁸

The court held that it was an abuse of discretion by the trial court to rule out the testimony of Mitchell's wife without hearing evidence on the issue.¹³⁹ The proper procedure would have been to allow the testimony, while giving the State an opportunity to demonstrate any actual bias. The conviction was affirmed as the error was held harmless due to the cumulative nature of the evidence and because another expert gave testimony on the subject.¹⁴⁰

VI. HEARSAY

A. Testator's Statements Made Non-Contemporaneously Regarding a Will

In *Lasater*,¹⁴¹ discussed *supra*, the Lasaters appealed the exclusion at trial of evidence regarding statements made by the decedent which were not made contemporaneously with the will. House argued that the statements are hearsay and should be excluded because Indiana has traditionally excluded a testator's statements that were not made at the time of the will's execution.¹⁴²

135. *Id.* at 741. The court noted that the expert would be subject to cross-examination on his testimony, where the party opposing the testimony may expose flaws in the observations, qualifications, or conclusions of the witness. See also *Ill. Farmers Ins. Co. v. Wiegand*, 808 N.E.2d 180, 186 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004) (holding that an expert's affidavit was admissible because it did more than make bald assertions; it included admissible facts upon which the opinion was based, provided the reasoning upon which the ultimate opinion was reached, and provided the trial court with sufficient basis to conclude that the principles used to arrive at the opinion were reliable.); *Thayer v. Vaughan*, 798 N.E.2d 249, 253-54 (Ind. Ct. App. 2003) (holding that an affidavit from a licensed psychiatrist who testified to his credentials, experience, and education which expressly detailed how he arrived at his conclusions amounted to more than bald assertions and was reliable for consideration by the court during summary judgment proceedings).

136. 813 N.E.2d 422 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

137. *Id.* at 426.

138. *Id.* at 431.

139. *Id.*

140. *Id.* at 432.

141. *Lasater v. House*, 805 N.E.2d 824 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. 2004).

142. *Id.* at 828.

The court found the statements made after execution of the second will were admissible under Rule 803(3).¹⁴³ The statements may have been admissible both to show the decedent's state of mind and also to prove a fact remembered or believed, as long as the statements pertain specifically to the execution, revocation, or terms of her will.¹⁴⁴

B. Medical Opinions Contained in a Report

In *Wilkinson v. Swafford*,¹⁴⁵ Swafford appealed, claiming that the trial court erred when it excluded testimony from a doctor which discussed medical opinions recorded by the doctor's partner. Swafford argued that the record was admissible under the hearsay exception of Rule 803(6).¹⁴⁶

The court concluded that while the reports may indeed be excluded from the hearsay rule as business records, they must still be otherwise admissible.¹⁴⁷ In this case, the medical opinions contained in the report were properly excluded because the proponent of the evidence failed both to lay a foundation for the expert qualifications of the doctor who made the report and because the accuracy of the records could not be tested without the availability of the doctor who made them for cross-examination.¹⁴⁸

C. Recorded Jailhouse Conversation

In *Dorsey v. State*,¹⁴⁹ Dorsey appealed his conviction, based in part on his contention that the trial court erred when it allowed the State to introduce a recording of a jailhouse phone call between Dorsey and an unidentified man with

143. *Id.* at 829. Rule 803(3) provides that the following are not excluded by the hearsay rule . . . [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will.

IND. EVID. R. 803(3).

144. *Lasater*, 805 N.E.2d at 829.

145. 811 N.E.2d 374 (Ind. Ct. App. 2004).

146. *Id.* at 388. Rule 803(6) provides that the following is not excluded by the hearsay rule: [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 a 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.

IND. EVID. R. 803(6).

147. *Wilkinson*, 811 N.E.2d at 390 (citing *Schaefer v. State*, 750 N.E.2d 787, 793 (Ind. Ct. App. 2001)).

148. *Id.* at 391-92.

149. 802 N.E.2d 991 (Ind. Ct. App. 2004).

whom Dorsey discussed committing perjury in the trial. Dorsey claimed the conversation was hearsay because it was an out of court statement, used to prove the truth of the matter asserted.¹⁵⁰

The court agreed the conversation would indeed qualify as hearsay. However, it also agreed with the State's contention that the unidentified person speaking with Dorsey was acting as Dorsey's agent, and therefore the conversation fell under the hearsay exception for statement by a party opponent.¹⁵¹

D. Arrest Report as a Business Record

In *Serrano v. State*,¹⁵² Serrano appealed his conviction for sexual misconduct with a minor, claiming that the only evidence of his age presented at trial was the arrest record, which was inadmissible hearsay. The court agreed that the arrest record was hearsay under Rule 801(c), and therefore examined whether the trial court had properly allowed the record into evidence under Rule 803(6) as a certified copy of a public record.¹⁵³

At trial the custodian of the records testified that he was the keeper of the records and the arrest record had been made at or near the time of the event recorded. He did not testify that the arresting officer had personal knowledge of the contents of the report, and the arresting officer did not testify, so the arresting officer could not be cross-examined. These facts, combined with evidence of a different date of birth for Serrano (which would have rendered him incapable of committing the charged crime) resulted in the court's holding that the record was

150. *Id.* at 993. Rule 801(c) states that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IND. EVID. R. 801(c).

151. *Dorsey*, 802 N.E.2d at 994. Rule 801(d)(2)(D) states that a statement is not hearsay if it is offered against a party and it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." IND. EVID. R. 801(d)(2)(D).

152. 808 N.E.2d 724 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 977 (Ind. 2004).

153. *Id.* at 727. Rule 803(6) provides that the

following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . 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 a 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. EVID. R. 803(6).

unreliable. The court held the evidence insufficient to support the conviction and reversed the conviction.¹⁵⁴

E. Witness Unavailable

In *Bass v. State*,¹⁵⁵ Bass appealed his convictions for driving while suspended and failure to stop after an accident, arguing that the State's only evidence that he was driving was testimony from a police officer about what Bass's girlfriend, Fewell, had said. Bass argued that this constituted inadmissible hearsay. The State prevailed at trial by claiming that Fewell was unavailable, as she had been issued a subpoena and failed to appear at trial.¹⁵⁶

The court held that it could not determine if Fewell was indeed unavailable because there was no evidence that Fewell had actually been served with the subpoena.¹⁵⁷ The court further found that even had Fewell been found unavailable, the testimony did not meet the requirements of Rule 804(b) because unavailability simply opens the door to one of the exceptions to the hearsay rule rather than automatically rendering the evidence admissible. Although Fewell may have been unavailable as a witness, her statement to the police did not fall under any of the exceptions of Rule 804(b), and was therefore inadmissible. As this was the only evidence that Bass was the driver of the vehicle, the convictions were reversed.¹⁵⁸

F. Admissibility of Breath Tests

In *State v. Lloyd*,¹⁵⁹ the State appealed a reserved question of law. At trial, Lloyd challenged the foundation of the police officer's certification to perform breath tests. The deputy testified that he had received an initial twelve hours of training and an additional four hours. Citing an Indiana Administrative Code provision published in an earlier case, the trial court excluded the deputy's certification as hearsay because breath test certification required at least twenty hours of training.¹⁶⁰ The trial court ruled that the certification was hearsay under Rule 801(c).¹⁶¹

On appeal, the court found that an exception to the hearsay rule exists in Rule 803(8) for public records and reports. Because the documentation of the deputy's certification was a domestic public record, the record was self-authenticating under Rule 902(1), and the court found that such certifications are

154. *Serrano*, 808 N.E.2d at 727-28. The court also held that Serrano could not be retried for the crime a second time.

155. 797 N.E.2d 303 (Ind. Ct. App. 2003).

156. *Id.* at 304-05.

157. *Id.* at 306.

158. *Id.* at 306-07.

159. 800 N.E.2d 196 (Ind. Ct. App. 2003).

160. *Id.* at 198 (citing *Wray v. State*, 751 N.E.2d 679 (Ind. Ct. App. 2001)).

161. *Id.*

specifically admissible under Indiana law.¹⁶²

G. Excited Utterance and the Sixth Amendment

In *Rogers v. State*,¹⁶³ Rogers appealed his conviction for criminal recklessness and battery, in part based on his contention that the trial court improperly admitted hearsay testimony by a police officer containing statements of the victim, Faith, in violation of Rule 803(2). The State offered statements made by Faith to police within seven minutes of the police arriving at the scene. The officer had observed that Faith was visibly upset and shaken at the time the statement was taken.¹⁶⁴

Although the court found that the statements did fall under the excited utterance exception to the hearsay rule, it conducted an additional analysis in response to a recent U.S. Supreme Court case, *Crawford v. Washington*. Rogers argued that Faith's utterances violated his right to confront and cross examine under the Sixth Amendment to the U.S. Constitution.¹⁶⁵

In *Crawford*, the Supreme Court held that the Sixth Amendment required two showings in order to introduce a testimonial out of court statement into evidence against a criminal defendant: unavailability of the witness and a prior opportunity to cross-examine the witness.¹⁶⁶ The court found that statements

162. *Id.* at 199 (citing IND. CODE § 9-30-6-5(c)(1)). Rule 902(1) provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) *Domestic public documents*. The original or a duplicate of a domestic official record proved in the following manner: An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

IND. EVID. R. 902(1). The administrative code provision was also amended in 2000 to require only twelve hours of certification. *Lloyd*, 800 N.E.2d at 200 (citing IND. ADMIN. CODE tit. 260, r. 1.1-1-2).

163. 814 N.E.2d 695 (Ind. Ct. App. 2004).

164. *Id.* at 669. Rule 803(2) provides that “[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (2) Excited Utterance. 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.” IND. EVID. R. 803(2).

165. *Rogers*, 814 N.E.2d at 700 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

166. *Id.*

made during a police interrogation were “testimonial,” and that Faith’s statements to the officer were not given under police interrogation and therefore not subject to the *Crawford* analysis.¹⁶⁷

H. Statement Made for Purposes of Medical Diagnosis or Dying Declaration?

In *Beverly v. State*,¹⁶⁸ the trial court had admitted a statement from the victim that “Jerry did it,” made while the victim was lethargic and declining from a bullet wound to the head. At trial, the State advanced several bases as to the admissibility of the statement, including as a statement made for the purposes of medical diagnosis.¹⁶⁹

The court found that a statement of identification is not necessary to provide effective medical care, and therefore the statement could not be admitted under Rule 803(4).¹⁷⁰ The statement was found admissible as a dying declaration under Rule 804(b)(2).¹⁷¹

167. *Id.* at 701-02; *see also* *Clark v. State*, 808 N.E.2d 1183, 1190 n.2 (Ind. 2004) (noting that *Crawford* is inapplicable where the declarant testifies at trial); *Fowler v. State*, 809 N.E.2d 960, 964-65 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Dec. 9, 2004) (holding that a statement given to police who arrived at the scene and began informally questioning those around while the victim is still bleeding and crying from domestic violence was not testimonial and the evidence fell under the excited utterance exception and outside the Supreme Court’s decision in *Crawford*); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Dec. 9, 2004) (holding that statements from a domestic violence victim, taken by police arriving at the scene and informally questioning those around while the victim seemed frightened and timid and the residence was in disarray with broken glass about qualifies as an excited utterance and falls outside the purview of *Crawford*).

168. 801 N.E.2d 1254, 1258 (Ind. Ct. App. 2004).

169. *Id.*

170. *Id.* at 1259. Rule 803(4) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

IND. EVID. R. 803(4).

171. *Beverly*, 801 N.E.2d at 1260. Rule 804(b)(2) states that the “following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (2) *Statement under belief of impending death*. A statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.” IND. EVID. R. 804(b)(2).

I. Dying Declaration of Death Penalty Subject

In *Thompson v. State*,¹⁷² Thompson appealed the denial of post-conviction relief on the basis of newly discovered testimony. A co-defendant who was administered the death penalty said in his last words that Thompson “did not know what was going on.”¹⁷³

The court found the statement to be unreliable hearsay that did not fit within the dying declaration exception of Rule 804(b)(2).¹⁷⁴ A dying declaration must relate to the cause or circumstances giving rise to the fatal injury and cannot include what happened before or after the injury. The exculpatory statement regarding Thompson’s knowledge of what was going on at the time the crime was committed neither indicated Thompson was not present at the crime, nor involved the cause or circumstances of death for the declarant—the death penalty administered by the Indiana Department of Corrections.¹⁷⁵

J. Public Records Exception

In *Bailey v. State*,¹⁷⁶ Bailey challenged her conviction for theft on the basis that records from the Indianapolis Housing Authority (IHA) admitted at trial were hearsay and were neither business records under Rule 803(6) nor public records under Rule 803(8). Bailey also argued that the officer who testified as to the IHA records was not the regular custodian of the records and did not have personal knowledge of the contents of the records. The documents were various housing applications and recertifications to receive public housing from IHA. By law, changes in income must be reported to IHA when they occur. Bailey had failed to report several changes to her employment situation.¹⁷⁷

The court noted that Rule 803(8) does not have several of the foundational requirements found in Rule 803(6) for a business record and because the records were prepared by an agency in response to its duties under the law, they were admissible as public records.¹⁷⁸ Bailey also contended that the documents were

172. 796 N.E.2d 834 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 794 (Ind. 2004).

173. *Id.* at 837.

174. *Id.* at 839.

175. *Id.* at 839-40.

176. 806 N.E.2d 329 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 969 (Ind. 2004).

177. *Id.* at 331-32.

178. *Id.* at 332-34. Rule 803(8) provides that the

following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . (8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b)

inadmissible under Rule 803(8) because they were investigative reports prepared by an agency, offered in a case in which it is a party. The court noted that a three-part test exists for whether a record of a public agency constitutes an investigative report: "1) whether the report contains findings which address a materially contested issue in the case; 2) whether the record or report contains factual findings; and 3) whether the report was prepared for advocacy purposes or in anticipation of litigation."¹⁷⁹ Because the records in question were not prepared for advocacy or purposes of litigation, they were not investigative reports and therefore were admissible.¹⁸⁰

K. Statements Given Under Oath, Outside the Presence of a Jury

In *Allen v. State*,¹⁸¹ Allen appealed his convictions for murder and robbery, claiming the trial court erred when it excluded testimony of a witness that persons other than Allen were the perpetrators of the crimes. The witness testified outside the presence of the jury, but under oath and subject to cross-examination by the prosecution. The witness eventually balked at testifying before the jury and refused to testify further.¹⁸²

Allen failed to object or make an offer of proof on the record for admission of the testimony. The witness was not cross-examined, and the testimony was halted prior to the end of direct examination.¹⁸³ The court ruled that Allen had not waived the issue because there was no basis for objection to the trial court's admonishment of the jury to ignore the witness's partial testimony and because Allen had clearly set forth the basis for the witness to testify at trial.¹⁸⁴ Because the testimony was "exculpatory, unique, and critical to Allen's defense,"¹⁸⁵ the court held that Allen had the right to present a complete defense and reversed the convictions.¹⁸⁶

investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

IND. EVID. R. 803(8).

179. *Bailey*, 806 N.E.2d at 333 (citing *Shepherd v. State*, 690 N.E.2d 318, 326 (Ind. Ct. App. 1997) (citations omitted)).

180. *Id.* at 334.

181. 813 N.E.2d 349 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 980 (Ind. 2004).

182. *Id.* at 362-63.

183. *Id.* at 363.

184. *Id.*

185. *Id.*

186. *Id.*

VII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

A. Labels Under the Best Evidence Rule

In *Lawson v. State*,¹⁸⁷ Lawson challenged his convictions for illegal possession and illegal consumption of alcohol. Lawson claimed that the trial court violated Rule 1002, the best evidence rule, when it allowed a police officer to testify that the bottles seized from Lawson's vehicle were labeled "Budweiser" and "Bud Light."¹⁸⁸

In a case of first impression on whether the label on a chattel is subject to Rule 1002, the court held that the purpose of the best evidence rule is to avoid the substantial hazard of inaccuracy in items such as wills or other complex writings.¹⁸⁹ Here, a branding or other easily identifiable mark rendered the risk of inaccuracy low and the officer's testimony was allowable, although a second prong of the analysis should involve ease or difficulty of production.¹⁹⁰

B. Evidence of Lost Insurance Policies

In *PSI Energy, Inc.*,¹⁹¹ discussed *supra*, PSI offered evidence of lost insurance policies providing excess coverage. The trial court excluded as speculative expert testimony regarding the probable existence of the policies as well as the probable terms of such coverage. PSI presented secondary evidence of the policies, such as payment invoices and references to the coverage in internal business documents.¹⁹²

Rule 1004 provides that where an original writing is lost or destroyed, other evidence of the contents of the writing can be presented, unless the proponent of the contents acted in bad faith.¹⁹³ The court noted that PSI had submitted secondary evidence regarding the existence of the lost policies, including periods of coverage and limits. PSI had also submitted all but one of the underlying policies. The court held that PSI had submitted sufficient evidence to raise a genuine issue of material fact, making the trial court's grant of summary judgment improper.¹⁹⁴ The expert witness had used the evidence presented and

187. 803 N.E.2d 237 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 802 (Ind. 2004).

188. *Id.* at 240. Rule 1002 states that to prove "the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." IND. EVID. R. 1002.

189. *Lawson*, 803 N.E.2d at 241.

190. *Id.* (following *United States v. Duffy*, 454 F.2d 809 (5th Cir. 1972)). However, the court did question why the bottles in Lawson's immediate area were not introduced at trial. *Id.*

191. 801 N.E.2d 705 (Ind. Ct. App. 2004).

192. *Id.* at 720.

193. Rule 1004 states that an "original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." IND. EVID. R. 1004.

194. *PSI Energy, Inc.*, 801 N.E.2d at 722.

his knowledge of the insurance industry to form his opinion. On remand, PSI would be required to demonstrate, by a preponderance of the evidence, the substance of the relevant policy provisions.¹⁹⁵

C. Admission of Incomplete Documents

In *Belcher v. State*,¹⁹⁶ Belcher appealed his conviction for criminal trespass. He argued that the trial court improperly admitted a copy of a notice of trespass because portions of the original document had been covered up when reproducing the copies. Belcher claimed this was a violation of Rule 1003.¹⁹⁷

Because the covered portions of the document were relevant to the charges against Belcher, the court held the admission of the document to have been error.¹⁹⁸ However, the error was harmless as Belcher testified at trial as to the missing contents.¹⁹⁹

CONCLUSION

The Indiana Rules of Evidence have now entered a second decade of existence. The Rules continue to be further defined by new cases, statutory interpretation, constitutional interpretation, and other factors, including reaction to cases at the federal level which impact the applicability of the Rules under the United States Constitution. The differences between the Rules and their federal counterparts also continue to develop and become more clear.

This development and maturing of the Rules is likely to continue into the indefinite future as conflicts and situations not yet clearly provided for continue to arise. As the Rules develop, the arguments and cases interpreting them are likely to become more complex as areas are defined and additional fact patterns call for application of the Rules. While the Rules will continue to grow and develop in interpretation, they appear to have provided a solid framework within which evidentiary decisions can be made with some degree of reliability, predictability, and fairness.

195. *Id.*

196. 797 N.E.2d 307 (Ind. Ct. App. 2003).

197. *Id.* at 309. Rule 1003 provides that “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” IND. EVID. R. 1003.

198. *Belcher*, 797 N.E.2d at 310.

199. *Id.*

