RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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The Indiana Rules of Evidence ("Rules") became effective in 1994. Although more than a decade has passed since the introduction of the Rules, their interpretation remains a daily exercise as new fact patterns arise and prior decisions are reevaluated. The process of integrating the Rules with statutory law and the remaining elements of common law, as well as their interaction with federal authority will continue for many years.

This Article explains many of the developments in Indiana Evidence law during the period between October 1, 2004, and September 30, 2005. The discussion topics of this Article are grouped in the same subject order as the Indiana Rules of Evidence.

I. SCOPE OF THE RULES

A. In General

According to Rule 101(a), the Rules apply to all Indiana court proceedings "except as 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 provision leaves the applicability of the Rules open to debate.

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

B. Rulings on Evidence

In *Guillen v. State*,[4] Guillen argued that the trial court abused its discretion by excluding specific instances of the victim's reckless behavior while intoxicated to demonstrate a character trait.[5] At trial for battery on the victim, Guillen had been prevented from introducing evidence regarding the victim's prior bad acts, alcoholism, and alcohol usage.[6] Rule 103(a) provides that "error may not be predicated upon a ruling which admits or excludes evidence unless

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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. 829 N.E.2d 142 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005).

5. *Id.* at 145.

6. *Id.*

a substantial right of the party is affected."[7] Guillen's argument on appeal failed because the court determined that his substantial rights were not affected.[8] Guillen was able to provide a vigorous defense through his own testimony and via cross-examination of the victim.[9]

In *Ross v. Olson*,[10] an expert witness had testified as to his understanding of the meaning of the term "Iatrogenic Injury," as it had appeared in the medical report he prepared, and he read the dictionary definition of this term into evidence.[11] During direct examination of their own expert witness, the Rosses asked the witness whether he recognized the term and if he agreed with the dictionary definition. The court sustained an objection to this line of questioning.[12]

In addition to the portion of Rule 103(a) quoted above, Rule 103(a)(2) states that where "the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked."[13] Although the Rosses made no offer of proof, they claimed on appeal that the substance of the excluded evidence was apparent to the trial court. The court determined that the jury had already heard the dictionary definition of the term, and because the testimony regarded the term as used by the writer of the medical report, it was the writer's understanding of the term which was relevant, rather than an interpretation of the term by a second witness.[14] Therefore, the court found that the Rosses had demonstrated no abuse of discretion by the trial court.[15]

In *Illiana Surgery & Medical Center, LLC v. STG Funding, Inc.*,[16] Illiana appealed the trial court's decision to exclude evidence of a missing October 2000 loan commitment letter.[17] The trial court had enforced an April 2001 loan commitment letter and prohibited Illiana from questioning STG on cross-examination regarding the earlier, missing document.[18] This exclusion was based on the finding that the 2001 document was sufficiently complete to enforce the agreement and the parole evidence rule prevented introduction of evidence regarding the earlier, missing document.[19]

Illiana argued that the evidence should have been admitted pursuant to Rule

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7. IND. R. EVID. 103(a).
8. *Guillen*, 829 N.E.2d at 147.
9. *Id.*
10. 825 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).
11. *Id.* at 894.
12. *Id.* at 895.
13. IND. R. EVID. 103(a)(2).
14. *Ross*, 825 N.E.2d at 895.
15. *Id.*
16. 824 N.E.2d 388 (Ind. Ct. App. 2005).
17. *Id.* at 392.
18. *Id.* at 399-400.
19. *Id.* The 2001 document did state that it was "an extension and modification of the original commitment letter dated and executed October 24, 2000 (Exhibit A)." *Id.* at 400.

1004, which provides that

> [t]he 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; (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure . . . .[20]

The court noted that the 2001 agreement contained an integration clause and upheld the trial court's ruling pursuant to the parole evidence rule.[21] The court further noted that, even assuming the trial court abused its discretion by excluding the evidence, any error was harmless under Rule 103(a) because evidence of the previous agreement had been introduced at other times during the trial and Illiana had not demonstrated that its substantial rights had been prejudiced.[22]

C. Preliminary Questions

In *Willis v. Westerfield*,[23] the court of appeals reversed and remanded its previous decision. It found on rehearing that the trial court erred by instructing the jury on the affirmative defense of failure to mitigate damages because there was no expert testimony supporting the contention that the plaintiff took action or failed to take action resulting in aggravation of injuries.[24] This decision rested, in part, on Rule 104(b), which provides that "when the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[25]

On transfer, the Indiana Supreme Court held that failure to mitigate damages may not always require expert testimony. This should be determined on a case by case basis. Where the failure to mitigate involves technical or medical issues, expert testimony may be required; where the issues are simple and may be interpreted by lay jurors, such as failure to take recommended medical treatment, expert testimony may not be required.[26] The supreme court vacated the judgment as to damages and remanded for a new trial on damages because the defendant's theory of failure to mitigate should have been (and was not) supported by expert testimony.[27]

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20. IND. R. EVID. 1004.
21. *Illiana*, 824 N.E.2d at 400.
22. *Id.* at 401.
23. 817 N.E.2d 672 (Ind. Ct. App. 2004), *vacated*, 839 N.E.2d 1179 (Ind. 2006).
24. *Id.* at 673.
25. IND. R. EVID. 104(b).
26. *Willis*, 839 N.E.2d at 1188-89.
27. *Id.* at 1190.

D. Limited Admissibility

In *Glasscock v. Corliss*,[28] Glasscock argued that the jury had based its decision on improper evidence in considering the amount of commissions owed to Corliss when she was terminated from the company and the total net worth of Glasscock.[29] However, the $49,000 commission foregone and the net worth information had been admitted pursuant to Rule 105 limiting instructions.[30]

The court found that the commission evidence was relevant to show motive for sullying Corliss's reputation, and the net worth information was relevant to the jury's assessment of punitive damages.[31] Because Rule 401 provides 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,"[32] it was not error for the trial court to admit this evidence with the relevant limiting instruction.[33]

E. Request for Introduction of Remainder of Writing

In *Sanders v. State*,[34] Sanders appealed his conviction arguing that a letter he wrote to the judge should have been admitted in its entirety.[35] The letter apologized to the court and the victim's family, but never admitted that Sanders committed the crime. The letter also claimed that the victim's father and her mother's boyfriend had molested the girl, but this claim was redacted from the version admitted into evidence.[36]

Sanders argued on appeal that under Rule 106, the letter should have been admitted in its entirety. Rule 106 provides that when "a writing . . . 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 . . . which in fairness ought to be considered contemporaneously with it."[37] The court noted that admission of the redacted portion of the letter would have violated Rule 412,[38] but determined that admission of the letter without the redacted portion was more prejudicial

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28. 823 N.E.2d 748 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

29. *Id.* at 758.

30. *Id.* Rule 105 states that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." IND. R. EVID. 105.

31. *Glasscock*, 823 N.E.2d at 758.

32. IND. R. EVID. 401.

33. *Glasscock*, 823 N.E.2d at 758.

34. 823 N.E.2d 313 (Ind. Ct. App. 2005).

35. *Id.* at 317.

36. *Id.*

37. IND. R. EVID. 106.

38. Rule 412 provides that, "[i]n a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted." IND. R. EVID. 412.

than probative under Rule 403 and ordered a new trial.[39]

II. Relevance and Probative Versus Prejudicial

A. Relevant Evidence

In *Brown v. State*,[40] the defendant appealed his conviction for fleeing police officers. Brown sought at trial to introduce evidence of police officer brutality during his arrest as evidence relevant to his claim that he was justified in fleeing because the officers had a violent history with Brown.[41] The trial court had refused to allow this evidence, and the Indiana Court of Appeals agreed.[42] The court found the evidence remote and not relevant to the charges, and ruled that the evidence had been properly excluded under Rule 401[43] as irrelevant because it showed examples of officer conduct or Brown's conduct after Brown had completed the charged crime.[44]

In *Davidson v. Bailey*,[45] Davidson argued that the trial court had erred in admitting evidence of his prior DUI convictions and in excluding evidence of the plaintiff's prior DUI convictions. Davidson argued that this evidence was highly prejudicial as there was a danger that the jury would punish him for his prior acts.[46] The court held that evidence regarding Davidson's prior DUI convictions was properly admitted because it was relevant to Davidson's state of mind at the time of the accident as to whether his behavior was willful and wanton.[47] This result was distinguished from the result in *Wohlwend v. Edwards*,[48] which had determined that it was not permissible to admit evidence of drunken driving committed subsequent to the act in question, even if limited to the subject of

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39. *Glasscock*, 823 N.E.2d at 318. 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.

40. 830 N.E.2d 956 (Ind. Ct. App. 2005).

41. *Id.* at 964-65.

42. *Id.* at 966.

43. Rule 401 provides that relevant evidence is evidence "having 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." IND. R. EVID. 401. Rule 402 follows this thought by stating that "[e]vidence which is not relevant is not admissible." IND. R. EVID. 402. The court of appeals did, however, vacate two of the charges related to fleeing as the State had charged three portions of one continuing act of fleeing as separate crimes. *Brown*, 830 N.E.2d at 966.

44. *Brown*, 830 N.E.2d at 966. In other words, actions the officers or Brown took at Brown's arrest could not have served as the basis for his actions in fleeing the officers prior to the arrest. *See id.*

45. 826 N.E.2d 80 (Ind. Ct. App. 2005).

46. *Id.* at 86.

47. *Id.* (quoting Wohlwend v. Edwards, 796 N.E.2d 781, 784 (Ind. Ct. App. 2003)).

48. *Id.* at 85-86.

punitive damages.[49]

The court also found that evidence of the plaintiff's prior DUI convictions had been properly excluded.[50] The evidence was not relevant to any issue in dispute, and because DUI convictions are not crimes of dishonesty, the evidence was not admissible under the Rule 609 exception.[51]

In *Sandifur v. State*,[52] Sandifur appealed his conviction for a drug offense, arguing that evidence that a person (who had last been seen alive by Sandifur) had died of a drug overdose was irrelevant and unfairly prejudicial.[53] The State argued that the evidence was relevant to its contention that Sandifur had delivered drugs to the deceased person, and that the evidence was necessary under the *corpus delicti* rule. Under the *corpus delicti* rule in Indiana, a person may not be convicted of a crime based solely on a confession.[54]

The court ruled that the evidence was relevant under Rule 401, as it provided evidence of the crime other than the confession and related to the charge against Sandifur. In considering Rule 403(b)'s balancing test, the court determined that although the evidence was prejudicial, the prejudice was outweighed by the evidence's probative value.[55] The autopsy report contained no photos, was written in a professional manner, and showed that the deceased had received drugs.[56]

B. Prohibition on Character and Other Evidence to Prove Conduct

In *Wilhelmus v. State*,[57] Wilhelmus appealed his conviction, in part, on the basis that highly prejudicial evidence with little probative value had been allowed in by the trial court without a limiting instruction.[58] The State was allowed to introduce evidence of Wilhelmus's prior arrest for involvement with a methamphetamine lab in order to prove identity. Wilhelmus argued that there had been no question of identity in the current case, and had objected at trial that the evidence served no legitimate purpose. The trial court twice denied his

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49. *Id.*

50. *Id.* at 87.

51. *Id.* Rule 609(a) provides that

> [f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

IND. R. EVID. 609(a).

52. 815 N.E.2d 1042 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 984 (Ind. 2004).

53. *Id.* at 1044, 1047.

54. *Id.* at 1047; *see* Lawson v. State, 803 N.E.2d 237, 240 (Ind. Ct. App. 2004).

55. *Sandifur*, 815 N.E.2d at 1048.

56. *Id.*

57. 824 N.E.2d 405 (Ind. Ct. App. 2005).

58. *Id.* at 410, 414.

request for a limiting instruction.[59]

The court declined to accept Wilhelmus's argument on appeal, noting that the identity exception to Rule 404(b)[60] is crafted primarily for signature crimes, and the meth labs in the previous arrest and current case were quite similar.[61] It also noted that a final instruction was given to the jury, limiting consideration of the prior arrest evidence to the question of identity.[62]

In *Purvis v. State*,[63] Purvis objected to admission of evidence at trial from two police officers that he had previously used an alias and represented himself as being fifteen years old.[64] The court found this evidence was properly admitted to show identity under Rule 404(b) because it was the same alias and false age Purvis had used in dealing with the current victim.[65] The evidence allowed at trial also did not identify the prior crimes or bad acts involved in the prior incidents.[66]

In *Vandivier v. State*,[67] the defendant appealed his conviction for obstruction of justice. Vandivier had convinced a friend to provide police with a false statement, stating that his wife had falsely accused him of breaking into her house.[68] Vandivier had been convicted at trial for obstruction because this statement to the police was to be used to bolster his position in a child custody proceeding. On appeal, Vandivier argued that his friend's actions had no relevance to his own actions.[69]

The court determined that the false statement had been initiated by Vandivier, and the statement could have misled a public servant in the custody hearing.[70] Therefore, the statement was indeed relevant to the obstruction charge and had been properly admitted pursuant to Rule 401.[71]

In *Goldsberry v. State*,[72] Goldsberry appealed his convictions for criminal recklessness and battery. He argued that the trial court had improperly admitted

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59. *Id.* at 413-14.

60. 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 . . . identity." IND. R. EVID. 404(b).

61. *Wilhelmus*, 824 N.E.2d at 415.

62. *Id.* However, the court found the denial of Wilhemus's requests for limiting instructions troubling. It noted that Rule 105 is mandatory and a trial court must admonish the jury prior to the introduction of such evidence. *Id.*

63. 829 N.E.2d 572 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005), *cert. denied*, 126 S. Ct. 1580 (2006).

64. *Id.* at 586.

65. *Id.* at 586-87.

66. *Id.* at 587.

67. 822 N.E.2d 1047 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

68. *Id.* at 1050.

69. *Id.* at 1052-53.

70. *Id.* at 1053.

71. *Id.*

72. 821 N.E.2d 447 (Ind. Ct. App. 2005).

evidence of prior altercations between himself and the victim.[73] The court found this evidence admissible under Rule 404(b) because Goldsberry had claimed that he acted in self-defense and that discharge of the firearm was an accident.[74]

The court distinguished this case from *Wickizer v. State*,[75] in which the Indiana Supreme Court had ruled such evidence inadmissible where the opponent had not presented a particularly contrary intent prior to the State introducing the prior bad act evidence.[76] The court also noted that in *Iqbal v. State*[77] such evidence was admitted in order to show the relationship between the parties and the lack of accident or mistake.[78] Goldsberry attempted to distinguish his case in that Iqbal had used a gun in the prior and charged incidents, while Goldsberry had not previously used a firearm.[79] The court determined that, because the evidence was used for a purpose other than to demonstrate Goldsberry's propensity to commit the crime, it was admissible under Rule 404(b).[80]

Goldsberry also appealed based on the introduction of threatening phone messages left on the victim's voice mail three months after the crime occurred.[81] Because nothing in those messages was helpful to the jury in determining whether Goldsberry committed the crime, the court agreed that this evidence was improperly admitted under Rule 401.[82] However, the error was found harmless due to the amount of other evidence properly admitted and Goldsberry's inability to show sufficient prejudice from the error to overturn his convictions.[83]

C. Methods of Proving Character

In *Guillen*,[84] discussed *supra*, Guillen argued that evidence of specific instances of the victim's reckless behavior when intoxicated should have been admitted under Rule 405(b).[85] Rule 405(b) provides that "[i]n cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."[86] The court found no authority suggesting that the victim's character was an essential element of Guillen's defense that he did not hit her, and

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73. *Id.* at 453.
74. *Id.* at 455-56.
75. 626 N.E.2d 795, 799 (Ind. 1993).
76. *Goldsberry*, 821 N.E.2d at 455-56.
77. 805 N.E.2d 401, 408 (Ind. Ct. App. 2004).
78. *Goldsberry*, 821 N.E.2d at 456.
79. *Id.*
80. *Id.*
81. *Id.* at 457.
82. *Id.* at 457-58.
83. *Id.* at 458.
84. Guillen v. State, 829 N.E.2d 142 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005).
85. *Id.* at 145-47.
86. IND. R. EVID. 405(b).

therefore the court rejected Guillen's argument under Rule 405(b).[87]

In *Bell v. State*,[88] Bell appealed his convictions for child molesting. Bell argued that he should have been allowed to present evidence of the victim's assertiveness in other instances.[89] He argued this would show that the molestations did not occur because, if they had, she would have told someone sooner or behaved aggressively towards Bell.[90]

Although Rule 404(a)(2) does allow for evidence of a person's character trait where it is evidence of "a pertinent trait of character of the victim of the crime offered by an accused,"[91] Rule 405 requires such evidence to be offered only by reputation or opinion testimony.[92] The court determined that Bell's testimony would not have been reputation or opinion testimony, but rather would have been direct testimony of specific instances of the victim's conduct to illustrate her behavior in this case. Bell's appeal failed as this type of evidence is specifically what Rules 404 and 405 were designed to exclude.[93]

In *Pinkston v. State*,[94] Pinkston argued that evidence of a prior bad act had been admitted erroneously at trial. The trial court had admitted Pinkston's statement, made while awaiting trial, that he had "'killed a motherf****r before and got away with it and I'll get off on this one too.'"[95] The court cited *Evans v. State*[96] for its proposition that, in such cases, the trial court should: "(1) determine whether the evidence of other [bad] acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect [under Rule 403]."[97] The court further noted that evidence of prior bad acts is relevant to negate a claim of contrary intent where the defendant goes beyond a mere denial and makes a claim of particular contrary intent.[98]

Pinkston's statement that he would "get off on this one too" was relevant to

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87. *Guillen*, 829 N.E.2d at 147. The court noted that Rule 405(b) applies when "a person's character is a material fact that determines the parties' rights and liabilities under the substantive law." *Id.* at 146 (quoting *In re* J.L.V., 667 N.E.2d 186, 190 (Ind. Ct. App. 1996)).

88. 820 N.E.2d 1279 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

89. *Id.* at 1282.

90. *Id.*

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

92. Rule 405 provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." IND. R. EVID. 405. Evidence of specific instances of conduct may only be offered on cross-examination or where character is an essential element of a charge, claim, defense, or proof. *Id.*

93. *Bell*, 820 N.E.2d at 1282-83.

94. 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 738 (Ind. 2005).

95. *Id.* at 837 (quoting Appellant's App. p. 215-17).

96. 727 N.E.2d 1072, 1079 (Ind. 2000).

97. *Pinkston*, 821 N.E.2d at 837-38; IND. R. EVID. 403.

98. *Pinkston*, 821 N.E.2d at 838. (citing Iqbal v. State, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)).

show his intent to murder the victim and to rebut his claim that he had not been the aggressor.[99] Because the statement was highly probative of Pinkston's intent, the court ruled that the statement had been properly admitted.[100]

D. Ineffective Assistance of Counsel Claim for Failure to Object

In *Polk v. State*,[101] Polk appealed his conviction for possession of cocaine in part based on ineffective assistance of counsel because his attorney had failed to object on 404(b) grounds to the introduction of evidence that Polk had failed a drug test after his arrest.[102] Although this may have been evidence of an uncharged bad act, the court noted that in order to succeed on a claim of ineffective assistance of counsel for failure to object, the proponent must show that he would have prevailed had a proper objection been made, and, therefore, the lack of an objection was prejudicial.[103]

The court found that there was insufficient prejudice to sustain this argument, given the weight of other evidence introduced against Polk.[104] Polk also failed to show that this evidence was irrelevant.[105] Although it may have been an uncharged bad act, it occurred during the same incident and could have been relevant to prove that Polk knew the substance he was concealing was cocaine.[106] Because Polk could not demonstrate on appeal that an objection would have been sustained, and because counsel appeared adequate in other respects, Polk's ineffective assistance of counsel claim was rejected.[107]

E. Probative and Prejudicial Weight of 911 Recording

In *Highler v. State*,[108] Highler argued that a recording of the 911 call made by the rape victim should not have been admitted into evidence at trial. Highler contended that any probative value of the tape was outweighed by its prejudicial effect, and therefore it should have been excluded under Rule 403.[109]

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99. *Id.*

100. *Id.* See also *Welch v. State*, 828 N.E.2d 433 (Ind. Ct. App. 2005), for the proposition that the state-of-mind exception to Rule 404 may not be used in a claim of self-defense to introduce evidence regarding the victim's state of mind if the accused was unaware of such information at the time of the incident. *Id.* at 437-38.

101. 822 N.E.2d 239 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

102. *Id.* at 245.

103. *Id.*

104. *Id.* at 250-51.

105. *Id.* at 251.

106. *Id.*

107. *Id.*

108. 834 N.E.2d 182 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 191 (Ind. 2005).

109. *Id.* at 198. 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. R. EVID. 403.

On the 911 recording, the victim says that she was raped by Marshall (Highler's first name), and the victim and another person discuss some of the events.[110] The only question asked by the operator was where the victim lived. In this case, the trial court had admonished the jury on use of the evidence. Although the tape was prejudicial to Highler, the recording was highly probative as Highler had claimed that the encounter was consensual and the victim had only later accused him of rape.[111] Because the probative value was not outweighed by the prejudicial effect, and the trial court had admonished the jury, the court found that the evidence had been properly admitted.[112] Transfer has been granted by the Indiana Supreme Court in this case, but no further action has been taken.[113]

F. Admission of Prior Bad Acts by Opening the Door

In *Crafton v. State*,[114] Crafton appealed his convictions for intimidation, battery, and pointing a firearm.[115] After testimony at trial, the trial judge had asked the jury if it had any questions about Crafton's testimony. The jury submitted written questions asking if there had been any prior instances of domestic abuse. Crafton failed to object to the question, and related one instance in which he had been the victim.[116]

Rule 404(b) prohibits evidence of other bad acts "to show action in conformity therewith,"[117] and Rule 403 further requires a balancing of probative value versus prejudicial effect.[118] However, where the defendant opens the door to such testimony, it becomes admissible if the evidence used to open the door leaves the trier of fact with a false or misleading impression of the facts related.[119] Because Crafton only offered the single alleged instance in which he was the victim, he had opened the door to testimony offered by the State of two instances in which he had been the aggressor.[120] The State was entitled to correct the misconception that there had been no other instances of domestic abuse.[121]

In *Johnson v. State*,[122] Johnson claimed that evidence of a prior fight that had been admitted at trial was improper evidence of a prior bad act.[123] While Rule

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110. *Highler*, 834 N.E.2d at 198.
111. *Id.*
112. *Id.* at 199.
113. *Id.*
114. 821 N.E.2d 907 (Ind. Ct. App. 2005).
115. *Id.* at 909-10.
116. *Id.* at 911.
117. IND. R. EVID. 404(b).
118. IND. R. EVID. 403.
119. *Crafton*, 821 N.E.2d at 910-11 (citing Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000)).
120. *Id.* at 911.
121. *Id.* at 911-12.
122. 831 N.E.2d 163 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).
123. *Id.* at 169.

404(b) would normally exclude such evidence,[124] Johnson's counsel had opened the door by asking a prosecution witness on cross-examination if he and Johnson had engaged in a confrontation the last time they were together.[125] Before Johnson's counsel could stop him, the witness testified that Johnson had sucker-punched him. On re-direct, the State was allowed to elicit testimony regarding the prior, unrelated confrontation. The court ruled this admission appropriate, as Johnson had opened the door to such testimony.[126]

G. Admission of Extra-Jurisidictional Acts

In *Ware v. State*,[127] Ware argued that evidence of sexual acts between himself and the victim which took place outside the county before the victim turned sixteen is not relevant to any issue other than Ware's propensity to commit this crime.[128] The State argued that this evidence was relevant to show that Ware had knowledge of the victim's age. The court found that the probative value of this evidence was outweighed by the prejudicial effect.[129] However, a proper limiting instruction had been given to the jury, and other evidence was cumulative.[130] Therefore, the court found insufficient proof that this improperly-admitted evidence had contributed to Ware's verdict and upheld the conviction.[131]

H. Rule 412 and Prior Acts of the Victim

In *Morrison v. State*,[132] Morrison appealed his conviction for molestation. On cross-examination outside the presence of the jury a witness had responded to a jury question about the victim's past sexual history with information (outside the presence of the jury) that another man had once touched the victim inappropriately in a restroom.[133] At trial, Morrison had been prohibited from introducing this evidence pursuant to Rule 412.[134]

On appeal, Morrison argued that Rule 412 must give way to the right to cross-examine witnesses in this case in order to rebut the prosecution's implication that the victim was ignorant of sexual matters, especially the possibility of sex between two men.[135] The court noted that although *Steward v.*

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124. IND. R. EVID. 404(b) (excluding evidence of other crimes, wrongs, or acts).

125. *Johnson*, 831 N.E.2d at 169 n.4.

126. *Id.* (citing Kubsch v. State, 784 N.E.2d 905, 919 n.6 (Ind. 2003)).

127. 816 N.E.2d 1167 (Ind. Ct. App. 2004).

128. *Id.* at 1175.

129. *Id.* at 1175-76.

130. *Id.* at 1176.

131. *Id.*

132. 824 N.E.2d 734 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005).

133. *Id.* at 738-39.

134. *Id.* Rule 412 invokes a general bar on the admission of evidence of past sexual misconduct. IND. R. EVID. 412.

135. *Morrison*, 824 N.E.2d at 740.

State[136] held that Rule 412 may not violate a defendant's right to cross-examination, the present case was distinguishable from cases allowing such testimony. Morrison had relied on *Davis v. State*[137] for its holding that the trial court in that case had improperly prevented cross-examination.[138] However, unlike in *Davis*, this evidence did not imply that someone else had committed the crime, or bring other facts into question.[139] The witnesses present at the scene had testified that they saw the crime committed, and that the victim seemed confused. There was also no implication that the victim was confusing the two incidents. The trial court had also allowed Morrison to craft questions which did not violate Rule 412, and therefore his right to cross-examination had not been unduly impeded.[140]

III. WITNESSES

A. Leading Questions During Direct Examination

In *Riehle v. State*,[141] Riehle argued that the State had improperly been allowed to ask leading questions on direct testimony of the victim.[142] The victim was ten years old at the time of trial, reluctant to testify, and had to be called to the stand on two different days to elicit testimony. Riehle only noted one instance in which the State's leading questions led to an answer by the victim.[143]

Rule 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."[144] However, the court noted that in *Williams v. State*,[145] the Indiana Supreme Court had held that some witnesses, "including children and young, inexperienced, and frightened witnesses, may be asked leading questions on direct examination to develop their testimony."[146] The court further noted that this answer was cumulative and not as unfairly prejudicial as other evidence that had been properly introduced on the same subject, and ruled against Riehle's appeal.[147]

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136. 636 N.E.2d 143, 148 (Ind. Ct. App. 1994), *aff'd*, 652 N.E.2d 490 (Ind. 1995).
137. 749 N.E.2d 552, 554 (Ind. Ct. App. 2001).
138. *Morrison*, 824 N.E.2d at 740-41.
139. *Id.* at 741.
140. *Id.*
141. 823 N.E.2d 287 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 746 (Ind. 2005).
142. *Id.* at 292.
143. *Id.* at 294.
144. IND. R. EVID. 611(c).
145. 733 N.E.2d 919 (Ind. 2000).
146. *Riehle*, 823 N.E.2d at 294 (citing *Williams*, 733 N.E.2d at 922).
147. *Id.*

B. Child Witnesses

In *Richard v. State*,[148] Richard appealed his conviction for dealing in marijuana.[149] His eight year old daughter had given a school counselor and a police officer detailed information regarding marijuana on Richard's property. Richard challenged the search warrant's probable cause because there was no basis to establish credibility of an eight-year-old informant.[150]

The court recognized that there are two categories of informants, cooperative citizens and professional informants.[151] Each type has its own requirements for determining credibility.[152] In *Frasier v. State*,[153] the test for cooperative citizens was set forth: such information may be relied upon where there is no evidence calling the witnesses' motives into question.[154] However, the amount of evidence needed to determine credibility varies on a case-by-case basis.[155]

The court further noted that the statute establishing a presumption against child witnesses was repealed in 1990, and the relevant rule is now found in Rule 601.[156] Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly."[157] Although a child's competency to testify at trial must be examined under the test set forth in *Harrington v. State*,[158] the threshold for using such statements for probable cause are more relaxed.[159] The court determined that probable cause had existed because the girl made statements with specificity, said she knew what marijuana looked like from being around it before, and made personal observations.[160]

C. Separation of Witnesses

In *Hayden v. State*,[161] Hayden had been an officer at a juvenile facility and

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148. 820 N.E.2d 749 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005), *cert. denied*, 126 S. Ct. 1034 (2006).

149. *Id.* at 751.

150. *Id.* at 753-54.

151. *Id.* at 754.

152. *Id.*

153. 794 N.E.2d 449 (Ind. Ct. App. 2003).

154. *Id.* at 457.

155. *Richard*, 820 N.E.2d at 754. The court specifically noted that the fact that Richard was involved in a contentious custody dispute involving their other daughter was not an incriminating circumstance calling the girl's motives into question. *Id.* at 754 n.3.

156. *Id.* at 754.

157. IND. R. EVID. 601.

158. 755 N.E.2d 1176 (Ind. Ct. App. 2001).

159. *Richard*, 820 N.E.2d at 755.

160. *Id.* at 755-56. See also *Howard v. State*, 816 N.E.2d 948, 954-57 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App. 2005), for additional discussion of establishing child witness competency.

161. 830 N.E.2d 923 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

was convicted of sexual misconduct with minors at the facility.[162] On appeal, Hayden contended it was error for the trial court to allow the Superintendent of the facility to sit at the prosecution table before and after she testified, in violation of the separation of witnesses order.[163]

Although Rule 615 does provide that, at a party's request, "the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses,"[164] it exempts from exclusion under this rule an "officer or employee of a party that is not a natural person designated as its representative by its attorney."[165] In his appeal, Hayden claims that Indiana only recognizes police officers or detectives as exempt individuals.[166] The court noted that Hayden is correct insomuch as that such officers have been found exempt.[167] However, the court noted that in the cases cited by Hayden, *Stafford v. State*[168] and *Heeter v. State*,[169] such officers were found exempt but there was no indication that other officers or employees could not qualify.[170] The court concluded that there was no error because the Superintendent was an employee of the State of Indiana and thus qualified for the exemption.[171]

D. Religious Beliefs in Child Custody

In *Pawlik v. Pawlik*,[172] Joseph Pawlik lived with his parents.[173] During a custody dispute over his child, counsel for the mother had questioned Pawlik's mother regarding her practices and beliefs stemming from being a Jehovah's Witness. Pawlik claimed that this line of questioning violated Rule 610, which states that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced."[174]

The questions asked of Pawlik's mother were not designed to impugn her credibility, but rather to demonstrate what influence she may have on the child's religious upbringing.[175] While the court noted that Rule 610 applies in dissolution and custody hearings, it is not a complete bar to evidence about the

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162. *Id.* at 926-27.
163. *Id.* at 927-28.
164. IND. R. EVID. 615.
165. *Id.*
166. *Hayden*, 830 N.E.2d at 928.
167. *Id.*
168. 736 N.E.2d 326, 330 (Ind. Ct. App. 2000).
169. 661 N.E.2d 612, 615 (Ind. Ct. App. 1996).
170. *Hayden*, 830 N.E.2d at 928.
171. *Id.*
172. 823 N.E.2d 328 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).
173. *Id.* at 329.
174. IND. R. EVID. 610.
175. *Pawlik*, 823 N.E.2d at 333.

religious beliefs of parties seeking custody.[176] The rule only operates to bar such testimony where it is used to buttress or impugn the credibility of a witness.[177]

E. Authenticating Prior Statements for Impeachment Purposes

In *LeFlore v. State*,[178] LeFlore argued that the State had improperly been allowed to use a transcript of a prior conversation to impeach a witness without authenticating the transcript first. Rule 613 provides that:

> (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).[179]

LeFlore cited *Hightower v. State*[180] to support his contention that non-authenticated evidence may not be used for such purposes.[181] However, in *Hightower*, the proponent of the document had been trying to have it admitted into evidence, and thus it was properly denied as unauthenticated.[182] In the present case, the court found that because the State had not been offering the document for submission into evidence, but merely using it to impeach a witness, Rule 613 clearly allowed such use without authentication.[183]

IV. EXPERT TESTIMONY

A. Rule 702 in FELA Actions

In *Norfolk Southern Railway Co. v. Estate of Wagers*,[184] Norfolk appealed the trial court's decision, which had been brought under the Federal Employer's

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176. *Id.* at 334.
177. *Id.*
178. 823 N.E.2d 1205 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).
179. IND. R. EVID. 613.
180. 735 N.E.2d 1209 (Ind. Ct. App. 2000).
181. *LeFlore*, 823 N.E.2d at 1213.
182. *Id.*
183. *Id.*
184. 833 N.E.2d 93 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

Liability Act ("FELA").[185] The trial court had acknowledged that Norfolk had made compelling arguments that Estate's expert testimony should have been excluded. However, the trial court ultimately found that FELA actions have a substantially more liberal standard of causation than standard common law actions.[186]

Norfolk argued on appeal that the expert testimony was unreliable because it was not based on any specific information regarding Wager's level of exposure to asbestos or diesel fumes.[187] However, the court concluded that the Estate had demonstrated the quantity of exposure by showing that Wager was exposed to the substances for a significant amount of time each work day for twenty-one years.[188] Although the testimony was not based on scientific or medical tests, the expert relied on the known carcinogenic effects of diesel fumes, his knowledge of related literature, and proof of sustained exposure to reach his conclusion on causation.[189] In conjunction with the liberal causation standard under FELA, the court determined that the testimony was admissible under Rule 702.[190]

B. Expert Testimony on General Background

In *Ott v. AlliedSignal, Inc.*,[191] Ott appealed the exclusion at trial of three physicians' affidavits which had been excluded because they did not specifically deal with Mr. Ott. The court determined that the evidence should not have been excluded as it represented the prevailing medical view of the general way in which cancer develops.[192] The evidence had not been offered to show the specific way in which Mr. Ott had developed cancer, and therefore it was reliable under Rule 702.[193]

C. Expert Testimony on Eyewitness Identification

In *Farris v. State*,[194] Farris argued that the trial court erred when it refused to allow expert testimony regarding psychological phenomena that might cause a witness to misidentify a suspect.[195] The trial court had found that the witness was qualified to testify as an expert. However, his testimony was inadmissible under the Rules. The trial court had properly found the testimony inadmissible under Rule 704(b)[196] because it included conclusions that there existed potential

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185. *Id.* at 99.
186. *Id.* at 101.
187. *Id.* at 104.
188. *Id.* at 108.
189. *Id.*
190. *Id.*
191. 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).
192. *Id.* at 1150.
193. *Id.*
194. 818 N.E.2d 63 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 735 (Ind. 2005).
195. *Id.* at 67.
196. Rule 704(b) states that "[w]itnesses may not testify to opinions concerning . . . whether

sources of error that led the expert witness to question the veracity of the State's identification witnesses.[197]

The court also found that the expert testimony had been correctly excluded under Rule 702.[198] Rule 702(a) states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise."[199] Because the identification witnesses were subject to cross-examination and argument from counsel, the expert opinion in this case would not have aided the jury in considering the identification testimony.[200]

On the last day of trial, Farris had sought to have the owner of the convenience store he robbed testify.[201] The trial court refused to allow the testimony because the owner did not appear on either party's witness list, and the owner had been in the courtroom while a separation of witnesses order was in effect. However, the owner had appeared as a material witness on the State's charging information. Farris sought to have the owner testify that money had been missing from the cash register the night before the robbery, and that the store had been robbed again shortly after the incident in question.[202]

The court held that it had been improper to exclude the store owner's testimony under the Sixth Amendment to the U.S. Constitution, which guarantees a defendant the right to present witnesses on his behalf.[203] Although this right is not absolute and may be overcome by a showing of bad faith on the part of counsel or substantial prejudice to the State,[204] neither of these qualifiers were present in this case. Farris's counsel claimed she called the owner but could not find him, and the State knew of his potential knowledge as it had listed him as a material witness in the charging information.[205]

The court also found that it was error to preclude the testimony on the basis of the separation of witnesses order.[206] It noted that it is abuse of discretion to refuse to allow the testimony of a witness due to a separation of witnesses order if the proponent is without fault in the violation.[207] Neither party had listed the owner as a potential witness, and Farris's counsel did not know what he looked like and had just learned of his potentially useful testimony on the last day of the trial. The State also argued that this evidence was irrelevant, but that the testimony could have indicated to the jury that an employee or third party had

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a witness has testified truthfully." IND. R. EVID. 704(b).

197. *Farris*, 818 N.E.2d at 67.

198. *Id.* at 67-68.

199. IND. R. EVID. 702(a).

200. *Farris*, 818 N.E.2d at 68.

201. *Id.*

202. *Id.*

203. *Id.* at 69-70.

204. *See* Williams v. State, 714 N.E.2d 644, 651 (Ind. 1999).

205. *Farris*, 818 N.E.2d at 69-70.

206. *Id.* at 69.

207. *Id.*

actually committed the crime. The court acknowledged that the testimony had been improperly excluded, but the error was harmless because the weight of other evidence presented and the likelihood that the owner's testimony would not have been helpful to Farris.[208]

An additional issue raised on appeal by Farris regarding introduction of photo arrays involved an exchange at trial where the transcript failed to record the substance of the bench conference in which Farris objected to the photos. The transcript does indicate that Farris's objection was overruled. On appeal, the State argued that Farris had waived this issue under Indiana Appellate Rule 31, which states that if no "[T]ranscript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources . . . ."[209] However, the court agreed with Farris that this rule allows a party to submit such statement, but does not require it.[210] Since a transcript had been provided that made it clear Farris had objected in some form at trial, Farris had not waived this issue.[211]

D. "Garbology"

In *Leisure v. Wheeler*,[212] Leisure appealed a ruling which did not allow her to modify custody or child support obligations.[213] Wheeler had hired an investigator, who testified that he collected garbage from Leisure's home for two weeks and the garbage included liquor bottles, cigarette boxes, fast food wrappers, rolling papers, and possible evidence of marijuana.[214]

Leisure objected to this testimony on the basis that it was expert testimony without a proper foundation, and that any scientific principles underlying Garbology are not reliable. Although the investigator did refer to himself as an expert, the court ruled that the testimony was proper and that the testimony was not in the form of an opinion.[215] The investigator had made it clear he did not see the items in use and that he was not saying how anyone lived, but rather he was simply listing items that he discovered in Leisure's garbage. Because this was not opinion testimony, its admission did not violate Rule 702.[216]

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208. *Id.* at 69-70.

209. IND. APP. R. 31.

210. *Farris*, 818 N.E.2d at 70-71.

211. *Id.*

212. 828 N.E.2d 409 (Ind. Ct. App. 2005).

213. *Id.* at 411.

214. *Id.* at 417-18.

215. *Id.* at 418.

216. *Id.* In other words, you do not need to be a genius to go through someone's trash and produce an inventory list. Although the court found that the testimony was not admitted erroneously, it refused to place its "Imprimatur" on this type of investigative work. *Id.*

E. Lay Opinion Testimony

In *Smith v. State*,[217] Smith argued that the trial court had erroneously allowed a police officer to testify as to what a suspect appeared to be doing on a surveillance tape taken from the police station.[218] While left alone prior to questioning, Smith had been videotaped and the officer testified at trial that she appeared to be removing drug buy money from her vagina. Smith argues that this testimony was allowed in violation of Rule 701 because the State failed to show it should be allowed as lay opinion testimony.[219]

Rule 701 provides that "[i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which 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."[220] Smith argued that as the evidence was a videotape, the officer's testimony was simply a lay opinion and improperly interfered with the jury's interpretation of the video.[221]

The court disagreed, and pointed out that the detective had been a police officer for thirteen years and a drug task force member for over three years, that she had received specific drug law enforcement training, and that she had participated in numerous drug buys as a police officer.[222] The court concluded that the detective therefore possessed a level of knowledge beyond that of an average juror and that her testimony was based on her rational perceptions of Smith's actions and the drug culture in general.[223]

In *Prewitt v. State*,[224] Prewitt claimed that the victim had committed suicide. The victim's father testified at trial that his son would not have contemplated suicide.[225] Prewitt contends that Rule 701 prohibits such testimony. However, the court found that the father had testified in great detail about the close relationship he had with his son and that this closeness allowed the father to testify about his son's thoughts on suicide; the father's opinions were based on a rational perception and a greater level of knowledge than the average lay observer would have of his son's views on suicide.[226] Because Prewitt's defense was that the victim had committed suicide, the father's testimony was helpful to the jury in determining guilt or innocence.[227]

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217. 829 N.E.2d 64 (Ind. Ct. App. 2005).
218. *Id.* at 72.
219. *Id.*
220. *Id.* at 73; IND. R. EVID. 701.
221. *Smith*, 829 N.E.2d at 72-73.
222. *Id.* at 73.
223. *Id.*
224. 819 N.E.2d 393 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 739 (Ind. 2005).
225. *Id.* at 414.
226. *Id.* at 414-15.
227. *Id.* at 415.

F. Testifying as to the Credibility of Another Witness

In *Prewitt*, Prewitt also claimed that an expert witness for the State had improperly testified as to the truthfulness of Prewitt's statements.[228] Prewitt had claimed that she was in bed five to ten feet from the bathroom where the victim was murdered and that she had not heard any gunshot. The expert had testified at trial that he had "a very difficult time believing or understanding that a gunshot in a bathroom where you have tiles, which would cause reverberation" would not have been heard by someone five to ten feet away.[229] Prewitt claimed this was a violation of 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."[230]

The State had acknowledged that the witness was not a firearms expert, but that he was a forensic pathologist and a professor of criminology and that both of those fields require knowledge of firearms beyond that of normal laypersons. The expert was simply testifying as to the likelihood that a person five to ten feet away would have heard a gunshot.[231] The court found no error here as this testimony simply goes to the jury for assignment of weight in examining the testimony of Prewitt and the expert.[232]

G. Expert Testifying as to Underlying Information

In *Schmidt v. State*,[233] Schmidt appealed his conviction for Operating While Intoxicated.[234] At trial, Schmidt had been prevented from offering expert testimony as to his level of intoxication when the expert planned to use underlying data, such as Schmidt's height, weight, and amount and type of alcohol he had consumed. Schmidt contended that the expert could testify as to this underlying data because it was the type of information on which such a professional would rely in the normal course of conducting his business.[235]

Rule 705 provides that an "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."[236] Furthermore, Rule 703 states that

> [t]he facts or data in the particular case upon which an expert bases an

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228. *Id.* at 413.
229. *Id.*
230. IND. R. EVID. 704(b).
231. *Prewitt*, 819 N.E.2d at 414.
232. *Id.*
233. 816 N.E.2d 925 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).
234. *Id.* at 928-29.
235. *Id.* at 937.
236. IND. R. EVID. 705.

> opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.[237]

The court agreed with the State that allowing this type of reliance would be unfair as the defendant did not testify, and this could simply allow the defendant's version of events to enter into evidence via the expert's testimony about information passed to him by Schmidt prior to trial.[238] The court stated that the expert testimony was properly excluded unless and until Schmidt testified, placing the information into the record for use by the expert.[239] The exceptions set forth in Rules 703 and 705 were intended for professionals to utilize the work of other professionals, such as a medical doctor relying upon the findings of an X-Ray technician.[240] The exceptions were not intended to allow facts at issue to enter by having a party disclose them to an expert witness prior to trial.[241]

H. The Unproven Theory

In *Smith v. Yang*,[242] Smith appealed the judgment against her on grounds that her expert testimony had been improperly prohibited at trial.[243] Yang had been granted summary judgment on the issue of causation as Smith had presented no evidence that she had not crossed the center line of the road and struck Yang's vehicle. Yang had presented evidence that Smith had crossed the center line.[244]

Smith had offered expert testimony regarding the "faked left syndrome" in which a vehicle crosses the center line of the road, the second vehicle swerves to the far left to avoid an accident and the original vehicle corrects back right-of-center prior to impact. In this scenario, physical evidence would support a finding that Smith had indeed crossed the center line, but it would have been in avoidance of Yang initially crossing the center line. Other than this expert testimony, there was no other evidence offered that Yang had crossed the center line.[245]

In order to determine admissibility of expert testimony, the court must examine Rule 702(b), which states that expert testimony is only admissible when "the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."[246] Although there is no specific test for reliability under the Rules, the Indiana Supreme Court has stated that Indiana courts may

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237. IND. R. EVID. 703.
238. *Schmidt*, 816 N.E.2d at 939.
239. *Id.*
240. *Id.*
241. *Id.*
242. 829 N.E.2d 624 (Ind. Ct. App. 2005).
243. *Id.* at 625.
244. *Id.*
245. *Id.* at 626.
246. *Id.*; IND. R. EVID. 702(b).

consider the "Five Daubert Factors" in determining reliability.[247]

In the present case, the court found the "faked left syndrome" lacking under the Daubert factors.[248] There was no evidence that the theory had been tested, or that it had been subjected to "substantial peer review."[249] There was only one article on the theory, and it had been published in 1988. There was no evidence about this periodical's circulation, and there was no objective evidence to support this theory as generally accepted as a reliable theory. The expert also failed to present any evidence on the rate of error under this theory.[250] Although the expert was highly qualified according to his credentials and experience, there was almost no evidence that the faked left theory was credible, reliable, or widely accepted, and the trial court had properly denied the use of the testimony.[251]

I. Does the Expert Testimony Assist the Trier of Fact?

In *F.A.C.E. Trading, Inc. v. Carter*,[252] F.A.C.E. appealed a determination that some of its products were illegal gaming devices under Indiana law. F.A.C.E. contended that it was improperly prevented from offering expert testimony regarding the legality of the devices.[253]

F.A.C.E. had offered the testimony of two individuals who were experts on the contention that the devices were clearly not illegal under Michigan law and that the Michigan and Indiana laws were precisely the same. The trial court did not give a reason for striking the affidavits of these experts.[254]

Rule 702(a) provides that expert testimony may be utilized if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."[255] The court found that Michigan and Indiana law differ quite significantly, and therefore the expert testimony from experts on Michigan law would not be helpful to the trier of fact.[256]

Also worth mentioning here is *Mullins v. Parkview Hospital, Inc.*[257] In this

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247. *Smith*, 829 N.E.2d at 626-27; *see* McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997). The U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993), stated the factors to be considered: (1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique is generally accepted within the relevant scientific community. *Id.*

248. *Smith*, 829 N.E.2d at 629.

249. *Id.*

250. *Id.*

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

252. 821 N.E.2d 38 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

253. *Id.* at 43.

254. *Id.* at 44.

255. IND. R. EVID. 702(a).

256. *F.A.C.E. Trading*, 821 N.E.2d at 44.

257. 830 N.E.2d 45 (Ind. Ct. App. 2005), *reh'g denied*, 830 N.E.2d 45 (Ind. Ct. App. 2006).

case, a patient had instructed her doctor that she did not want any student learners present during her procedure.[258] The patient also crossed out language on the consent form regarding authorization for student learners, and completed a second authorization form which specifically restricted patient interaction to authorized personnel. During the procedure an EMT student was allowed to attempt multiple intubations, causing an injury.[259]

A Medical Review Panel found all defendants had acted properly. The Mullinses failed to respond to this determination with expert testimony in opposition to that presented by the defendants. On appeal, the Mullinses argued that no expert testimony was necessary to understand that consent had not been given for a student learner to perform the procedure. The court found that retrial was warranted as to the individual physician, anesthesiologist, and student learner and their employers, but as to the hospital and university defendants, summary judgment was upheld because expert testimony was indeed required to understand the internal working, procedures, and standard practices of a hospital in situations involving student learners.[260]

J. Expert Testimony on Legal Conclusions

In *Kelly v. Levandoski*,[261] a lawyer had asked a towing company to store a client's automobile pending outcome of a case.[262] Years later, the clients failed to pay the fees after they received resolution of the case. The towing company sued the lawyer to recover, and the trial court held that the normal rule relieving agents acting in the scope of their duties from personal liability does not extend to attorneys who are managing a client's lawsuit. The lawyer attempted to have another lawyer testify as an expert witness regarding whether a contract was formed and various other legal issues.[263]

Rule 704(b) provides that a witness may not testify "to opinions concerning . . . legal conclusions."[264] The court found that expert testimony on legal issues had been properly excluded at trial, although it would have been proper for the witness to testify as to procedures which are normal for attorneys to take in such cases.[265]

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258. *Id.* at 49.

259. *Id.* at 50-51.

260. *Id.* at 58. The court cited *Perry v. Driehorst*, 808 N.E.2d 765, 768 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004), for its proposition that failure to offer expert testimony will usually cause the plaintiff's case to fail unless the deviation from standards of care is clear to lay people. *Mullins*, 830 N.E.2d at 57.

261. 825 N.E.2d 850 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

262. *Id.* at 854.

263. *Id.* at 863.

264. *Id.*; IND. R. EVID. 704(b).

265. *Kelly*, 825 N.E.2d at 864-65.

V. HEARSAY

A. Probable Cause Affidavit is Hearsay

In *Rhone v. State*,[266] Rhone appealed his conviction for reckless homicide.[267] The only evidence offered at trial which supported a key element of this crime was the probable cause affidavit issued in the homicide case. Rhone argued on appeal that this document was hearsay and should not have been admitted.[268]

The Indiana Court of Appeals agreed that the evidence was hearsay because Rule 801(c) states that "[h]earsay 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."[269] The court also noted that "[h]earsay is generally not admissible unless it fits into one of the exceptions delineated in the evidence rules."[270]

The State argued that the affidavit was admissible under the public records exception, Rule 803(8).[271] The court noted that Rule 803(8) concludes with the caveat that this exception to the hearsay rule does not apply to: "factual findings offered by the government in criminal cases."[272] The court then applied the test set forth by the Indiana Supreme Court in *Ealy v. State*,[273] which states that the Rule 803(8) exception cannot apply where the evidence contains findings that address a materially contested issue, contains conclusions drawn by an investigator (rather than simple listings of facts), and the document was prepared for advocacy purposes or in anticipation of litigation.[274] Since all three of these factors applied to the probable cause affidavit against Rhone, it should not have been admitted at trial.[275] Although the conviction was overturned, the court noted that the State was not barred from retrial because the Indiana Supreme Court has held that if all "the evidence, even that erroneously admitted, is

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266. 825 N.E.2d 1277 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

267. *Id.* at 1280.

268. *Id.*

269. *Id.* at 1282-83 (quoting IND. R. EVID. 801(c)).

270. *Id.* (citing IND. R. EVID. 802).

271. *Id.* Rule 803(8) provides that

> [u]nless 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 are not excluded by the hearsay rule.

IND. R. EVID. 803(8).

272. *Rhone*, 825 N.E.2d at 1283 (quoting IND. R. EVID. 803(8)(c)).

273. 685 N.E.2d 1047 (Ind. 1997).

274. *Id.* at 1054.

275. *Rhone*, 825 N.E.2d at 1284.

sufficient to support the jury verdict, double jeopardy does not bar a retrial on the same charge."[276]

B. Avoiding Hearsay by Manifesting an Adoption or Belief in Truth

In *Collins v. State*,[277] Collins appealed in part based on admission at trial of a taped statement made by Collins.[278] This tape included statements made by another party, implying guilt on Collins's part, after which Collins changed his story to an accidental shooting. Collins argued that the portion of the recording which includes statements by another party were inadmissible because the speaker did not testify and was not available for cross-examination. The State argued that the testimony was admissible as a statement by a party opponent because Collins had manifested an adoption or belief in its truth. The State claimed that since he changed his story to admit responsibility for the shooting after hearing the accusation on the earlier recording, Collins had adopted the statement as truthful.[279]

Rule 801(d)(2)(b) does allow for such an adoption by stating that a statement is not hearsay if it is "offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth."[280] However, the court ordered a new trial on the murder charge because Collins had clearly not adopted the characterization of the earlier recording that he had committed murder; he claimed it was an accidental shooting.[281] Because this evidence was not cumulative or of minor impact, a new trial on this charge was required.[282]

C. Excited Utterance

In *Fowler v. State*,[283] Fowler appealed his conviction for domestic battery, in part claiming that statements made by his wife were inadmissible hearsay and that this was the only evidence supporting his conviction.[284] Rule 803(2) does allow for an exception to the hearsay rule for "[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."[285]

The court noted that, in order for a statement to be admitted under Rule 803(2), "three elements must be shown: (1) a startling event, (2) a statement

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276. *Id.* at 1285 (internal quotation marks omitted) (quoting Carpenter v. State, 786 N.E.2d 696, 705 (Ind. 2003)).

277. 826 N.E.2d 671 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005), *cert. denied*, 126 S. Ct. 1058 (2006).

278. *Id.* at 676-77.

279. *Id.* at 678-79.

280. IND. R. EVID. 801(d)(2)(B).

281. *Collins*, 826 N.E.2d at 679.

282. *Id.* at 680.

283. 829 N.E.2d 459 (Ind.), *reh'g denied* (Ind. 2005).

284. *Id.* at 463.

285. IND. R. EVID. 803(2).

made by a declarant while under the stress of excitement caused by the event, and (3) that the statement relates to the event."[286] In this case, the police officer had testified that no more than fifteen minutes had passed between a 911 call and the victim making the statement, the victim was crying, claimed to be in pain, had trouble catching her breath, and was bleeding. Therefore, the court found it reasonable that the victim was still under the stress of the event in question when the statements were made to police, and agreed that the evidence had been properly admitted as an excited utterance.[287]

In *D.G.B. v. State*,[288] D.G.B. appealed his adjudication as a delinquent for crimes that, if committed by an adult, would constitute child molestation and intimidation.[289] The victim was a six-year old girl who blurted out the accusations to her mother while being treated at the hospital for vaginal injuries. The girl later repeated the allegations for a police officer, but was unable to testify at an admissibility hearing. The statements made to her mother and to the police officer had been admitted at trial.[290]

Although the statements made to the police officer had been admitted at trial pursuant to the protected persons statute, the court found that this was error as the victim was not available for cross-examination at the admissibility hearing and did not testify at trial.[291] The statements made to her mother at the hospital had been properly admitted under the excited utterance exception.[292]

Although the incident had occurred earlier that day, and the statement would most likely not qualify if made by an adult, circumstances led the court to conclude that the statement was an excited utterance.[293] The girl found that she was bleeding profusely, had to be rushed to the hospital, was subjected to surgery, and upon waking from surgery saw a fork and knife (instruments used to mutilate her genitalia). She had also been threatened with being burned on a grill and fed to a dog if she revealed what happened. The court determined that due to her young age and having been subjected to surgery, it is unlikely that the victim had an opportunity for thoughtful reflection prior to making the statements to her mother.[294] Although the statements made at the police station did not qualify as excited utterances, the information was merely cumulative and its introduction at trial was not error.[295]

The excited utterance exception was also at issue in *Hammon v. State*.[296] The

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286. *Fowler*, 829 N.E.2d at 463 (citing Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996)).
287. *Id.* at 463-64.
288. 833 N.E.2d 519 (Ind. Ct. App. 2005).
289. *Id.* at 523-24.
290. *Id.* at 524-25.
291. *Id.* at 525.
292. *Id.* at 526.
293. *Id.*
294. *Id.*
295. *Id.* at 526-27.
296. 829 N.E.2d 444 (Ind.), *cert. granted sub nom.* Hammon v. Indiana, 126 S. Ct. 552 (2005).

court discussed the fact that, unlike most other jurisdictions, Indiana has no provision similar to Federal Rule of Evidence 807, which allows additional hearsay evidence not enumerated in Rules 803 and 804 if the evidence has equivalent circumstantial guarantees of trustworthiness, is offered as evidence of a material fact, and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and the general purpose of the rules and the interests of justice would be served by admitting the evidence.[297]

The court noted that in Indiana, the excited utterance exception has been interpreted broadly to permit admission of trustworthy statements under the *Yamobi* factors.[298] The court concluded that in this case, the evidence would have been admissible. The court went on to consider *Crawford v. Washington*[299] and Confrontation Clause issues and ultimately determined that any error under these standards was harmless.[300] It is worth noting that certain statements that may be admissible under the Indiana Rules may not be sufficient under the United States Supreme Court decision in *Crawford*.[301] *Hammon* was granted certiorari by the U.S. Supreme Court on October 31, 2005, and may be pivotal for future cases involving hearsay in domestic abuse cases.[302] This includes decisions such as *Gamble v. State*,[303] where the court determined that 911 tapes were not testimonial in nature and thus their admission did not violate *Crawford* in light of the Indiana Supreme Court's decision in *Hammon*.[304]

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297. *Id.* at 448 (citing FED. R. EVID. 807).

298. *Id.* at 449.

299. 541 U.S. 36 (2004). In *Crawford*, the U.S. Supreme Court held that testimonial out of court statements may not be introduced in a criminal trial where the defendant had no opportunity to cross-examine the person who made the statements.

300. *Hammon*, 829 N.E.2d at 459.

301. *See id.* at 446. The Indiana Supreme Court distinguished the present case from *Crawford* by holding that

> statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial. More generally, we conclude that testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings.

Id.

302. *See* Hammon v. Indiana, 126 S. Ct. 552 (2005). The U.S. Supreme Court reversed and remanded this case on June 19, 2006, stating that "absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious." Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

303. 831 N.E.2d 178 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

304. *Id.* at 181-83; *see also* Beach v. State, 816 N.E.2d 57 (Ind. Ct. App. 2004), *abrogated by* Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

D. Question or Instruction as Hearsay

In *Lampitok v. State*,[305] Lampitok argued that the trial court had improperly admitted testimony of a witness who claimed that a participant had telephoned her and asked her to get rid of the gun.[306] The trial court had agreed with the prosecution that as long as the statement made to the witness was a question or an instruction, it was not hearsay because it was not offered to prove the truth of the matter asserted.[307]

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."[308] The court referred to *Vertner v. State*[309] for its proposition that when an out of court statement is challenged as hearsay, it must be determined if the statement asserts a fact capable of being true or false, and if it contains no such assertion it cannot be hearsay.[310] However, the court stated that it did not agree that an assertion can never be found in a command or a question.[311] The command to dispose of the gun is a factual assertion that there was actually a gun and that it was relevant to the crime.[312] Because this was an issue at trial, the utterance was used in order to prove the truth of the matter asserted and was inadmissible hearsay.[313] Although the court found error in the statement's admission, it was harmless error.[314]

VI. INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO OBJECT

In *Smith v. State*,[315] Smith contended on appeal that he had received ineffective assistance of counsel because counsel had failed to object to a statement made at trial by a prosecution witness that he believed the statements of another person.[316] This statement would be prohibited by Rule 704(b), which prohibits testimony on "opinions concerning intent, guilt, or innocence in a criminal case . . . [or] whether a witness has testified truthfully."[317]

Smith's counsel had not objected to this testimony. However counsel did explain later that a tactical decision was made not to object to the statement in

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305. 817 N.E.2d 630 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied*, 831 N.E.2d 739 (Ind. 2005).

306. *Id.* at 639.

307. *Id.*

308. *Id.*; IND. R. EVID. 801(c).

309. 793 N.E.2d 1148, 1151 (Ind. Ct. App. 2003).

310. *Lampitok*, 817 N.E.2d at 639-40.

311. *Id.* at 640.

312. *Id.*

313. *Id.*

314. *Id.* The court cited *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002) for its holding that "an utterance in the form of a question can in substance contain an assertion of a fact." *Id.*

315. 822 N.E.2d 193 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005).

316. *Id.* at 202.

317. IND. R. EVID. 704(b).

order to avoid drawing attention to it.[318] The court noted that the Indiana Supreme Court has recognized this as a legitimate trail strategy in *Conner v. State*.[319] Therefore, failure to object to this testimony did not constitute ineffective assistance of counsel.[320]

CONCLUSION

The Rules have now been in effect for more than twelve years. As new fact patterns are appealed, new statutes are enacted, and the Federal Rules of Evidence continue to interact with Indiana law, the interpretation of the Rules continues to be refined. Students of Indiana Evidence law can observe major decisions regarding interpretation of the Rules on a regular basis. The upcoming decision by the U.S. Supreme Court regarding the *Hammon* case may prove pivotal for the excited utterance rule in Indiana in domestic abuse circumstances.

Unfortunately, there is no reasonable expectation on the horizon that criminal cases or civil litigation will decrease significantly anytime in the near future. This makes proper understanding of the Rules critical to provide all parties with a level playing field to make their case at trial.

Although no set of rules can ever anticipate all possible fact patterns with specificity, the Rules have now been in place long enough for many of the questions regarding which portions of the common law survived enactment of the Rules and how the Rules interact with the Federal Rules of Evidence to begin to be explored.

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318. *Smith*, 822 N.E.2d at 205.

319. 711 N.E.2d 1238, 1250 (Ind. 1999).

320. *Smith*, 822 N.E.2d at 205. The Indiana Court of Appeals has found ineffective assistance of counsel in other recent cases. *See* Carew v. State, 817 N.E.2d 281 (Ind. Ct. App. 2004).