

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW OCTOBER 1, 2009 – SEPTEMBER 30, 2010

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INTRODUCTION

The Indiana Rules of Evidence (the “Rules”) went into effect in 1994. Since that time, court decisions and statutory changes have continued to refine the Rules. This Article explains the developments in Indiana evidence law during the period from October 1, 2009 through September 30, 2010.¹ The discussion topics track the order of the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

A. General—Rule 101

Pursuant to Rule 101(a), the Rules apply to all court proceedings in Indiana except when “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.”² The same rule provides that common law and statutory law apply to specific issues not covered by the Rules.³

Judge Robert L. Miller, Jr. of the U.S. District Court for the Northern District of Indiana succinctly summarized the preliminary issues and questions affecting admissibility of evidence as follows:

- Is it covered by a Rule of Evidence? If not (but only if not), is it covered by a statute or by pre-Rule case law?
- Is it a preliminary issue of fact to be decided by the judge rather than the factfinder and therefore not governed by the Rules (except those concerning privilege)?
- If in a sentencing hearing (which is not generally governed by the Rules), is the evidence against the accused reliable and therefore consistent with principles of due process?⁴

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1. The Indiana Supreme Court granted transfer in the following cases, which have been excluded from this article for that reason. *See* Konopasek v. State, 934 N.E.2d 762 (Ind. Ct. App. 2010), *aff'd in part and vacated in part*, 946 N.E.2d 23 (Ind. 2011); *In re* C.G., 933 N.E.2d 494 (Ind. Ct. App. 2010), *trans. granted*.

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

3. *Id.*

4. *See* ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE 5 (2010).

B. Situations in Which Use of Evidentiary Rules Is Limited—Rule 101

In probation and community corrections placement revocation hearings, “judges may consider any relevant evidence bearing some substantial indicia of reliability.”⁵ In *Mogg v. State*,⁶ Mogg challenged the admissibility of scientific evidence in her probation revocation hearing. As a condition of her probation, Mogg was banned from consuming alcohol and was required to wear a secure continuous remote alcohol monitor (SCRAM II) bracelet.⁷ Noting that “expert scientific testimony in probation revocation hearings is not subject to . . . Rule 702(b),”⁸ the Indiana Court of Appeals nonetheless reaffirmed the principle that

like any evidence in probation revocation hearings, [expert scientific testimony] is admissible only upon some showing of reliability. . . . As in a criminal trial, the reliability of expert scientific evidence may be established by judicial notice or a sufficient foundation to persuade the trial court that the relevant scientific principles are reliable.⁹

Although Rule 702(b) does not apply to probation revocation hearings, the court of appeals held that “the caselaw regarding Rule 702(b) and the factors articulated in *Daubert* are helpful to Indiana courts in determining whether expert scientific testimony in probation revocation hearings possesses substantial indicia of reliability and is therefore properly admissible.”¹⁰ With these principles in mind, the trial court was found to have considered the proper factors when it held that the scientific evidence regarding the SCRAM II system had sufficient indicia of reliability and that Mogg violated the terms of her probation.¹¹

Rule 101(c)(2) provides that the Rules do not apply in proceedings relating to sentencing, probation, or parole.¹² Consequently, in probation community corrections hearings, a judge may consider “any relevant evidence bearing some substantial indicia of reliability,” which may include “reliable hearsay.”¹³ In *Holmes v. State*, for example, the court of appeals found that the trial court had not abused its discretion in admitting the defendant’s urinalysis report during a

5. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999); *see also* IND. R. EVID. 101(c)(2).

6. 918 N.E.2d 750 (Ind. Ct. App. 2009).

7. *Id.* at 752-53.

8. *Id.* at 756.

9. *Id.* (citing *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003)).

10. *Id.*

11. *Id.* at 758. The *Mogg* court limited its holding to probation hearings only, stating, “Our conclusion in this regard is not to be read for the proposition that SCRAM data are admissible in any type of proceeding or for purposes other than to prove the subject consumed alcohol.” *Id.* (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)).

12. IND. R. EVID. 101(c)(2). Likewise, as noted in *Kalwitz v. Kalwitz*, 934 N.E.2d 741, 751 (Ind. Ct. App. 2010), Rule 101(c)(2) provides that the Indiana Rules of Evidence do not apply in small claims proceedings. *See* IND. SMALL CLAIMS R. 8(A).

13. *Holmes v. State*, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010) (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

factfinding hearing at which the court concluded that Holmes had violated the terms of his home detention.¹⁴ The urinalysis report contained assurances from the laboratory that prepared it; these assurances provided that the report was prepared in accordance with the lab's standard operating procedures and "all applicable requirements."¹⁵

In *Malenchik v. State*,¹⁶ the Indiana Supreme Court held that the trial court did not err in considering, for sentencing purposes, the results of two assessments conducted by a county probation department: the Level of Service Inventory-Revised (LSI-R), used to predict the likelihood of an offender's recidivism, and the Substance Abuse Subtle Screening Inventory (SASSI), used to aid in identifying offenders with a high probability of having a substance abuse disorder.¹⁷ The defendant and amici argued that the results of these assessment tools should not be admissible because they lacked the scientific reliability required by Rule 702.¹⁸ The court explained that Rule 702 does not apply at sentencing hearings but noted that due process considerations nevertheless compel trial courts to disregard unreliable evidence in making sentencing decisions.¹⁹ The court concluded that both the SASSI and LSI-R were sufficiently reliable and that the trial court had not erred in considering their results.²⁰

In *Figures v. State*,²¹ the conditions of Figures's probation required that he not commit a criminal offense.²² Figures appealed the Marion Superior Court's revocation of his probation and order that he serve the entirety of his previously suspended sentence. The trial court based its revocation decision on its finding that Figures failed to report as directed to the probation department or to complete any community service work, and that there was probable cause that he committed a criminal act.²³ Figures argued that the trial court erred in admitting, over his objection on the grounds of insufficient reliability, the case chronology and probable cause affidavit from his domestic battery case.²⁴ The Indiana Court of Appeals held that the trial court properly admitted the certified docket (case chronology) because it had sufficient indicia of reliability in that it was an item "of public record which, pursuant to . . . Rule 803(8), would be admissible as [an] exception[] to the hearsay rule at a proceeding where the rules of evidence are

14. *Id.* at 484-85.

15. *Id.* at 484 (citation omitted).

16. 928 N.E.2d 564 (Ind. 2010).

17. *Id.* at 570-72.

18. *Id.* at 573.

19. *Id.* at 574 (citing ROBERT L. MILLER JR., 12 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 101.304 (3d ed. 2007)).

20. *Id.* at 575.

21. 920 N.E.2d 267 (Ind. Ct. App. 2010).

22. *Id.* at 269.

23. *Id.* at 270-71.

24. *Id.* at 271.

applicable.”²⁵ On the other hand, the court agreed with Figures’s argument that the trial court erred in admitting the probable cause affidavit because the State did not lay a foundation to establish its admissibility, and the case that the probable cause affidavit supported had been dismissed on the State’s own motion due to “[e]videntiary [p]roblems.”²⁶ Even with the exclusion of the probable cause affidavit, the court of appeals affirmed the trial court’s decision due to the sufficiency of the evidence. The admission of the probable cause affidavit was found to be harmless error.²⁷

C. Formal Offer of Proof—Rule 103

In *Simpson v. State*,²⁸ Simpson appealed his conviction for class A felony voluntary manslaughter and class D felony criminal recklessness, in part asserting that the trial court erred when it denied his request to recall one of the State’s witnesses—one of Simpson’s fellow inmates, Brian Gates.²⁹ On cross-examination, Gates testified, among other things, that he was not testifying against Simpson to obtain a lighter sentence, but “because . . . [it was] the right thing to do.”³⁰ Two days after Gates’s testimony at trial, but while the trial was still in progress, “Simpson’s counsel learned that Gates had written a letter to the trial court requesting [a] sentence modification or early release based on concerns for his safety.”³¹ After a bench conference, the trial court decided not to allow the introduction of the Gates letter into evidence; however, the judge did inform the jury that “Gates ‘did have on record with this [c]ourt, unrelated to his testimony here, a pending letter requesting that he be housed elsewhere or released early’ based on ‘[s]afety concerns unrelated to this case.’”³² The court noted, “To reverse a trial court’s decision to exclude evidence, there must have been error by the court that affected the defendant’s substantial rights *and* the defendant must have made an offer of proof or the evidence must have been clear from the context.”³³ Simpson failed to make a formal offer of proof in accordance with Rule 103 during the trial.³⁴ Nonetheless, the Indiana Court of Appeals did not find Simpson to have waived the issue on appeal due to the completeness of the

25. *Id.* at 271-72 (quoting *Pitman v. State*, 749 N.E.2d 557, 560 (Ind. Ct. App. 2001); *see also* *Hernandez v. State*, 716 N.E.2d 601, 602 (Ind. Ct. App. 1999) (noting that “substantial indicia of reliability . . . may be inferred where the evidence falls within a firmly rooted exception to the hearsay rule”).

26. *Figures*, 920 N.E.2d at 272.

27. *Id.* at 272-74.

28. 915 N.E.2d 511 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

29. *Id.* at 517.

30. *Id.* at 515.

31. *Id.* at 515-16.

32. *Id.* at 517 (citation omitted).

33. *Id.* (quoting *Woods v. State*, 892 N.E.2d 637, 641-42 (Ind. 2008)).

34. *See* IND. R. EVID. 103(a)(2).

record from the bench conference.³⁵ The court held that although “the better practice would have been to allow Simpson to call Gates as a witness . . . [the court could not] conclude that the trial court prejudiced Simpson’s substantial rights by not allowing him to recall Gates to the stand.”³⁶ In affirming Simpson’s conviction, the court went on to state that “[a]lthough the refusal to admit the letter as an exhibit was probably error,” it was a harmless error because “the trial court accurately described Gates’s letter to the jury.”³⁷

In *Bishop v. Housing Authority of South Bend*,³⁸ Bishop alleged that the trial court erred when it refused to order that her incarcerated child, Derek, be transported from prison to testify at Bishop’s immediate possession hearing.³⁹ On March 27, 2003, Bishop had entered into a lease agreement with the Housing Authority of South Bend (“HASB”) to rent an apartment at the Laurel Court complex for herself and her nine listed children, one of whom was Derek. The lease included a provision advising Bishop of HASB’s zero-tolerance policy for criminal activity.⁴⁰ Nevertheless, on July 18, 2008, Derek committed an armed robbery; thus, on August 1, 2008, HASB began proceedings to evict Bishop and her children.⁴¹ Bishop and HASB introduced conflicting evidence on the issue of whether or not Derek actually lived at Bishop’s HASB-leased residence.⁴² The trial court held that it was “‘more likely than not true’ that Derek was a resident of the unit” in its order for eviction and immediate preliminary possession.⁴³ Affirming the trial court’s order, the Indiana Court of Appeals noted that Bishop failed to make an offer of proof of Derek’s anticipated testimony in accordance with Rule 103(a)(2) and thus waived the issue on appeal. The court further held that even if the issue had not been waived, there was “no abuse of discretion in the trial court’s refusal to order Derek’s presence at the immediate possession hearing.”⁴⁴

In *Carter v. State*,⁴⁵ the Indiana Court of Appeals noted that under Rule 103(a)(2), a trial court’s error may not be predicated on a ruling excluding evidence unless the party attempting to admit the evidence made its substance known to the court through a proper offer of proof or the substance “was apparent from the context within which questions were asked.”⁴⁶ Carter, who was convicted by the trial court of Class D felony theft and Class B felony robbery for

35. *Simpson*, 915 N.E.2d at 518.

36. *Id.*

37. *Id.*

38. 920 N.E.2d 772 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010), *cert. denied*, 131 S. Ct. 1022 (2011).

39. *Id.* at 780.

40. *Id.* at 775.

41. *Id.* at 776.

42. *Id.* at 777-78.

43. *Id.* at 778 (citation omitted).

44. *Id.* at 780-81.

45. 932 N.E.2d 1284 (Ind. Ct. App. 2010).

46. *Id.* at 1287 (quoting IND. R. EVID. 103(a)(2)).

stealing liquor from a Wal-Mart store and punching a Wal-Mart loss prevention officer who pursued him from the store, argued on appeal that the lower court erred in refusing to admit evidence of the store's loss prevention policy.⁴⁷ Carter conceded that he made no offer of proof at trial, but he contended that the substance of the evidence was made clear by the cross-examinations of two Wal-Mart loss prevention officers, including Carter's alleged victim.⁴⁸

The court of appeals disagreed, noting that the trial court had ruled the policy irrelevant before trial and that when the State objected to a defense question that alluded to the policy, the defense failed to indicate why evidence regarding the policy had become relevant.⁴⁹ Thus, the defense had waived the issue for appellate review. Further, the court held that even if Carter had not waived the issue, he failed to demonstrate on appeal how the evidence of the policy bore relevance to whether he committed the criminal offenses of which he stood convicted.⁵⁰

D. *The Rule of Completeness—Rule 106*

In *Barnett v. State*,⁵¹ Barnett appealed his convictions for two counts of child molesting as a class C felony, asserting in part that the trial court abused its discretion when it excluded his videotaped statement to the police.⁵² Rule 103(a) provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case 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.⁵³

Barnett argued that “[u]nder the completeness doctrine, [he] was entitled to introduce the videotape[d] statement to avoid reference made to the statements on cross-examination from being taken out of context.”⁵⁴ Embodying the “completeness doctrine,”⁵⁵ Rule 106 provides: “When 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.”⁵⁶

The Indiana Court of Appeals found the “completeness doctrine” inapplicable

47. *Id.* at 1286-87.

48. *Id.* at 1287.

49. *Id.*

50. *Id.* at 1288.

51. 916 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

52. *Id.* at 282.

53. IND. R. EVID. 103(a).

54. *Barnett*, 916 N.E.2d at 286 (citation omitted).

55. *See Sanders v. State*, 840 N.E.2d 319, 323 (Ind. 2006).

56. IND. R. EVID. 106.

to this case because Barnett testified about the conversation that he had with the police regarding the alleged molestation, and the State did not offer the videotape or transcript of the conversation into evidence. Affirming Barnett's conviction, the Indiana Court of Appeals also held that Barnett failed to make an offer of proof with regard to the videotape or the transcript in accordance with Rule 103.⁵⁷

II. JUDICIAL NOTICE (RULE 201)

In *Taylor v. State*,⁵⁸ after his conviction for felony murder was affirmed by the Indiana Court of Appeals, Taylor petitioned for post-conviction relief, arguing that he received ineffective assistance of trial and appellate counsel because both failed to object to the trial court's final instructions.⁵⁹ The trial court denied Taylor's petition, and he appealed that ruling, asserting in part that the trial court committed reversible error when it refused to take judicial notice—pursuant to Rule 201(b) and (d)—of the Indiana Court of Appeals decision *Thomas v. State*.⁶⁰ Thomas was Taylor's co-defendant. In *Thomas*, the Indiana Court of Appeals held the trial court's failure to instruct the jury on the elements of robbery, the underlying felony for Thomas's felony murder conviction, to be a fundamental reversible error.⁶¹ The Indiana Court of Appeals agreed with Taylor, reversed his conviction, and remanded the case for a new trial.⁶²

III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS (RULE 301)

Rule 301 governs the application of presumptions in civil actions. It provides:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.⁶³

A common interpretation of Rule 301 is that the rule requires the finder of fact to “find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the

57. *Barnett*, 916 N.E.2d at 286-87.

58. 922 N.E.2d 710 (Ind. Ct. App.), *trans. granted*, 940 N.E.2d 823 (Ind.), *trans. denied as improvidently granted*, 936 N.E.2d 1241 (Ind. 2010).

59. *Id.* at 712.

60. *Id.*; see *Thomas v. State*, 844 N.E.2d 229 (Ind. Ct. App. 2006) (unpublished table decision).

61. *Taylor*, 922 N.E.2d at 712 (citing *Thomas*, 844 N.E.2d at 229).

62. *Id.* at 719-20.

63. IND. R. EVID. 301.

presumed fact.”⁶⁴

In *Clay City Consolidated School Corp. v. Timberman*,⁶⁵ the plaintiffs brought a wrongful death action against the school corporation arising from the death of their thirteen-year-old son during basketball practice.⁶⁶ The trial court entered judgment on the jury’s verdict in favor of the parents. The Indiana Court of Appeals reversed the judgment and remanded the case for a new trial, holding that the trial court committed reversible error when it instructed the jury that “children from the age of 7 to 14 years of age are rebuttably presumed to be incapable of contributor[y] negligence.”⁶⁷ The Indiana Supreme Court granted transfer to resolve several questions, one of which was “whether Indiana law recognizes a rebuttable presumption that children between the ages of seven and . . . [fourteen] are incapable of contributory negligence.”⁶⁸ The Indiana Supreme Court noted that the standard of care for children between the ages of seven and fourteen is well-established:

Our cases have consistently declared that a child between seven and 14 is required to exercise due care for his or her own safety under the circumstances and that the care required is to be measured by that ordinarily exercised under similar circumstances by children of the same age, knowledge, judgment, and experience.⁶⁹

The court held that “a presumption is properly given continuing effect (and remains in the case) despite the presentation of contrary proof. . . . Rule 301 ‘authorizes a court to instruct the jury on permissible inferences that may be drawn from the basic facts that give rise to presumptions.’”⁷⁰ The Indiana Supreme Court affirmed the jury verdict for the parents and affirmed what it suggested in its decision in *Bottorff v. South Construction Co.*:⁷¹ “Indiana law recognizes a rebuttable presumption that children between the ages of seven and 14 are incapable of contributory negligence. . . .”⁷²

In *Value World Inc. of Indiana v. Review Board of the Indiana Department of Workforce Development*,⁷³ the Indiana Court of Appeals considered the quantum of evidence necessary to rebut the presumption that a party to an unemployment compensation appeal has received notice of the hearing when the case file indicates that the notice has been sent to the party’s correct address by

64. *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 982 (Ind. 2006).

65. 918 N.E.2d 292 (Ind. 2009).

66. *Id.* at 293.

67. *Id.* at 294.

68. *Id.* at 293.

69. *Id.* at 295 (citing *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000); *Smith v. Diamond*, 421 N.E.2d 1172, 1179 (Ind. Ct. App. 1981)).

70. *Clay City Consol. Sch. Corp.*, 918 N.E.2d at 296 (quoting *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)).

71. 110 N.E. 977 (Ind. 1916).

72. *Clay City Consol. Sch. Corp.*, 918 N.E.2d at 297.

73. 927 N.E.2d 945 (Ind. Ct. App. 2010).

U.S. mail. In addressing this question, the court of appeals first noted the general rule that “[w]here an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received; however, that presumption is rebuttable.”⁷⁴

The court then turned to appellant Value World’s contention that it had presented to the Indiana Department of Workforce Development (“review board”) evidence sufficient to rebut the presumption of receipt. The evidence presented by Value World consisted primarily of a Value World district manager denying that the company had received notice of the hearing by mail.⁷⁵ The court explained that since the adoption of Rule 301, presumptions “shall have continuing effect even though contrary evidence is received.”⁷⁶ Moreover, the court noted that the Indiana Supreme Court’s decision in *Schultz v. Ford Motor Co.* clarified that once “the opponent of the presumption meets the burden imposed,” the presumption “does not drop” from the case.⁷⁷

Applying these rules to the case at hand, the court turned to the question of whether Value World presented sufficient evidence to prove that it had not received notice of the hearing. Citing *KLR*, the court explained that the question of whether a party has overcome the presumption of receipt of notice is properly analyzed as a question of fact.⁷⁸ The court concluded that the review board had properly considered the issue as a question of fact and had relied on sufficient evidence—including the fact that Value World had consistently received mail without incident—in determining that Value World had failed to rebut the presumption of receipt.⁷⁹

IV. RELEVANCY AND ITS LIMITS (RULES 401-413)

A. Irrelevant Evidence—Rules 401 and 402

Pursuant to Rule 401, 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.”⁸⁰ In *In re S.W.*,⁸¹ S.W. contended that the evidence of her drug test was irrelevant to the question of whether or not she was a “Child In Need of Services” (CHINS) pursuant to Indiana Code section 31-34-1-1.⁸² The Indiana Court of Appeals disagreed with S.W. (thereby agreeing with DCS), holding that “[a]lthough an

74. *Id.* at 948 (citing *KLR Inc. v. Ind. Unemployment Ins. Review Bd.*, 858 N.E.2d 115, 117 (Ind. Ct. App. 2006)).

75. *Id.* at 947.

76. *Id.* at 949 (quoting IND. R. EVID. 301).

77. *Id.* (citing *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)).

78. *Id.* at 949-50 (citing *KLR Inc.*, 858 N.E.2d at 119).

79. *Id.* at 950.

80. IND. R. EVID. 401.

81. 920 N.E.2d 783 (Ind. Ct. App. 2010).

82. *Id.* at 788.

adequately supervised teenager may find ways in which to experiment with illicit drugs, a child's drug use can be a direct product of a lack of parental supervision" and thereby relevant in a CHINS proceeding.⁸³

In *Chest v. State*,⁸⁴ Chest appealed his conviction for carrying a handgun without a license and other crimes, alleging in part that the trial court abused its discretion when it admitted evidence obtained during a warrantless police search of his vehicle following his arrest for refusing to provide identification.⁸⁵ The court explained, "Historically, there are two rationales for the search incident to arrest exception to the warrant requirement: 1) 'the need to disarm the suspect' or officer safety; and 2) 'the need to preserve evidence for later use at trial.'"⁸⁶ The police officer had taken Chest, the sole occupant of his vehicle, into custody.⁸⁷ Chest refused to identify himself, which is a criminal act itself.⁸⁸ "Therefore, only evidence of Chest's refusal to give his identity . . . [was] relevant evidence as defined by Evidence Rule 401."⁸⁹ In other words, there was no reason for police to search Chest's vehicle. Consequently, the Indiana Court of Appeals held that the search of Chest's vehicle, leading to the discovery of the gun, violated article 1, section 11 of the Indiana Constitution, resulting in the abrogation of Chest's conviction for carrying a handgun without a license.⁹⁰

B. Probative Value Versus Unfair Prejudice—Rule 403

In *Miller v. State*,⁹¹ Miller appealed his conviction of armed robbery. The Indiana Court of Appeals held that the trial court committed reversible error when it allowed the State to use an internet video (not entered into evidence) as a demonstrative aid in closing argument, which was created for school administrators to show how easy it was to conceal a weapon inside clothing.⁹² However, all three judges on the panel issued separate written opinions.⁹³ Although all three judges agreed on the application of Rule 403, i.e., that error occurred when the trial court allowed the use of video in the State's closing argument, they disagreed on whether it was reversible error. In the majority opinion, Judge May articulated that the "general rule" in Indiana is that "only

83. *Id.*

84. 922 N.E.2d 621 (Ind. Ct. App. 2010).

85. *Id.* at 622-23.

86. *Id.* at 625 (quoting *State v. Moore*, 796 N.E.2d 764, 767 n.5 (Ind. Ct. App. 2003)).

87. *Id.*

88. See IND. CODE § 34-28-5-3.5 (2011) (defining the crime of refusal to provide identification).

89. *Chest*, 922 N.E.2d at 625 n.5.

90. *Id.* at 626. Chest's convictions for driving with a suspended license and refusing to provide identification were affirmed. *Id.*

91. 916 N.E.2d 193 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 782 (Ind. 2010).

92. *Id.* at 194.

93. Judge May wrote for the majority, with Judge Barnes concurring and Chief Judge Baker writing in dissent.

exhibits that are properly admitted into evidence may be shown to the jury during final arguments.”⁹⁴ Judge May further rejected the State’s attempt to extend the holding in *Andrews v. State*⁹⁵ that the prosecutor merely used the video as a “courtroom demonstration,” which is “admissible subject to the trial court’s discretion.”⁹⁶ The *Miller* court cited *Andrews* in noting that “[c]harts and diagrams may be received into evidence after laying a proper foundation, *if the fact to be evidenced by the chart or diagram is itself otherwise relevant, material and competent* . . . [t]hus, the use of *admitted evidence in different forms* during summation has been permitted for demonstrative purposes.”⁹⁷ Here, and unlike in the *Andrews* case, the facts evidenced in the video had not been admitted into evidence in a different form at trial. Therefore, Judge May held the video inadmissible and reversed Miller’s conviction because of the video’s “obviously prejudicial effect.”⁹⁸ Judge Barnes agreed with the result reached in Judge May’s majority opinion but wrote a separate opinion to emphasize his stance that the video was the “proverbial evidentiary harpoon that skewed the ability of the jury to fairly and impartially decide the case.”⁹⁹ Chief Judge Baker agreed with “the majority’s conclusion that it was error for the trial court to permit the State to show the jury the video”; however, he did not agree that the error “was reversible error” because Miller, in his opinion, was not prejudiced by the introduction of the video.¹⁰⁰

In *Lainhart v. State*,¹⁰¹ Lainhart, appealing his conviction of misdemeanor intimidation, alleged that the trial court erred, at least in part, when it excluded a text message and accompanying testimony.¹⁰² The Indiana Court of Appeals reversed Lainhart’s conviction on other grounds and remanded the case. On this evidentiary issue, the Indiana Court of Appeals found the offer of proof made by Lainhart “sorely lacking” because “[t]he text message itself was never placed in the record,” leaving the court to speculate as to its content.¹⁰³ The court provided the following admonition to all parties: “We caution parties that this [c]ourt cannot review the propriety of evidentiary rulings if we are not furnished with the evidence in dispute.”¹⁰⁴ The court gleaned from the accompanying testimony that the text message “involved some sort of threat”¹⁰⁵ by the sender of the text message to Lainhart’s former girlfriend. The defense offered the message

94. *Miller*, 916 N.E.2d at 197 (citing *White v. State*, 541 N.E.2d 541, 548 (Ind. Ct. App. 1989)).

95. 532 N.E.2d 1159 (Ind. 1989).

96. *Id.* at 1165.

97. *Miller*, 916 N.E.2d at 198 (quoting *Andrews*, 532 N.E.2d at 1165).

98. *Id.*

99. *Id.* at 199 (Barnes, J., concurring).

100. *Id.* (Baker, C.J., dissenting).

101. 916 N.E.2d 924 (Ind. Ct. App. 2009).

102. *Id.* at 944.

103. *Id.*

104. *Id.*

105. *Id.*

pursuant to Rule 616 in an attempt to show bias on the part of the sender against Lainhart.¹⁰⁶ However, the Indiana Court of Appeals held that the trial court did not abuse its evidentiary discretion when, after weighing the probative value of the evidence against its prejudicial effect pursuant to Rule 403, it excluded the text message.¹⁰⁷ The text message had been sent to Lainhart's former girlfriend, not to Lainhart, "so its probative value in showing animosity from . . . [the sender] toward . . . [Lainhart] was already attenuated. . . . Contextualizing the message would have involved explanation of a number of collateral circumstances in an already convoluted case."¹⁰⁸ Ultimately, the proffered evidence was properly excluded pursuant to Rule 403 because it "posed dangers of confusing the jury and creating undue delay."¹⁰⁹

In *Rice v. State*,¹¹⁰ Rice appealed his conviction of reckless homicide, arguing in part that the trial court committed reversible error when it admitted autopsy photographs of the victim. At trial, the State introduced the autopsy photographs through the testimony of the pathologist. The pathologist used the photos to illustrate his testimony about the path of the bullet, an issue that both sides emphasized at trial.¹¹¹ In reviewing the admission of the photographs, the court of appeals pointed out that "[r]elevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice."¹¹² Affirming Rice's conviction, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it admitted the photographs—which, per Rice's request, included minimal blood, the covering of the victim's breasts, and a surgical opening—holding that the photographs were not "unnecessarily gruesome, such that their probative value . . . [was] outweighed by the danger of unfair prejudice."¹¹³

*McGaha v. State*¹¹⁴ involved a defendant who challenged his sixty-year murder sentence on the basis that the trial court erred in refusing to admit evidence that a third party was the true killer.¹¹⁵ A jury convicted Curtis McGaha of murdering his friend Brandon Stock when Stock came to McGaha's home to "front" McGaha an ounce of "high-quality" marijuana.¹¹⁶ Police recovered Stock's body in McGaha's backyard and found other physical evidence suggesting that Stock was killed inside McGaha's home.¹¹⁷ McGaha proposed the theory that an unknown third party, likely a drug supplier whom Stock had not

106. *Id.* at 944-45.

107. *Id.* at 945.

108. *Id.*

109. *Id.* (citing *Wood v. State*, 804 N.E.2d 1182, 1188-89 (Ind. Ct. App. 2004)).

110. 916 N.E.2d 962 (Ind. Ct. App. 2009).

111. *Id.* at 966-67.

112. *Id.* at 966 (quoting *Swingley v. State*, 739 N.E.2d 132, 133 (Ind. 2000)).

113. *Id.* (citing IND. R. EVID. 403).

114. 926 N.E.2d 1050 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

115. *See id.* at 1055-57.

116. *Id.* at 1052.

117. *Id.* at 1053.

paid for his product, had murdered Stock and placed his body in McGaha's backyard in order to frame McGaha. The trial court, however, granted the State's motion to exclude McGaha's references to a "[t]hird-[p]arty [m]otive," as well as testimony regarding a supposed drug supplier named "Sam," who was a Mexican living in Evansville.¹¹⁸

The Indiana Court of Appeals found no error in the trial court's exclusion of McGaha's proffered evidence, which contained information compiled by investigators for the sheriff's department.¹¹⁹ Three interview subjects told the investigators that someone named "Sam" had supplied Stock with his marijuana. Also, the investigators documented a phone call in which the caller stated that an acquaintance told her that a Mexican man named Sam had killed Stock,¹²⁰ but neither the interview subjects nor the caller possessed firsthand knowledge of any conduct or statements of Sam or of any dealings between Sam and Stock. Moreover, at trial, Zachary Howard testified that he had grown the marijuana at issue, supplied it to Stock, and invented the fictitious persona of "Sam," a Mexican drug supplier, to pressure Stock when Stock did not pay Howard promptly after Stock's (apparently ill-fated) transaction with McGaha.¹²¹ Because McGaha did not provide any evidence connecting "Sam" to Stock's murder, the court concluded that the trial court properly excluded the third-party evidence under Rule 403.¹²²

The Indiana Court of Appeals addressed two Rule 403 issues in *Hatter v. Pierce Manufacturing, Inc.*:¹²³ the exclusion of cumulative (in this case, expert) testimony and the exclusion of rebuttal evidence due to undue delay.¹²⁴ The plaintiff, a firefighter injured when pressurized air propelled a cap on the rear intake pipe of a fire truck into his face, offered expert testimony regarding safer alternative designs that the defendant manufacturer could have employed.¹²⁵ The trial court sustained the defendant's relevance objection to a portion of this testimony. The court of appeals upheld the lower court's ruling, noting that although such evidence was relevant to the plaintiff's case generally, he had already presented testimony on the issue, and the excluded testimony would have been needlessly cumulative.¹²⁶ The court of appeals also found that the trial court had not abused its discretion in excluding the plaintiff's rebuttal evidence, which the plaintiff would have used to further impeach a defense expert he had already cross-examined.¹²⁷ Because the testimony was only "marginally relevant" and the plaintiff had unduly delayed its presentation, the court concluded that the trial

118. *Id.*

119. *Id.* at 1053-55.

120. *Id.* at 1054.

121. *Id.*

122. *Id.* at 1055.

123. 934 N.E.2d 1160 (Ind. Ct. App. 2010).

124. *Id.* at 1173-75.

125. *Id.* at 1165.

126. *Id.* at 1174.

127. *Id.* at 1174-75.

court acted within its discretion in excluding it.¹²⁸

C. Intent Exception to Rule 404(b)

In *Clark v. State*,¹²⁹ the Indiana Supreme Court for the first time addressed the limits of Rule 404(b) in the social networking context. Clark appealed his conviction for murder, alleging that the trial court should not “have permitted the State to offer into evidence Clark’s entry from the social networking website MySpace[.]”¹³⁰ Clark posted the following description of himself on his MySpace page:

Society labels me as an outlaw and criminal and sees more and more everyday how many of the people, while growing up, and those who judge me, are dishonest and dishonorable. Note, in one aspect I’m glad to say I have helped you people in my past who have done something and achieved on the other hand, I’m sad to see so many people who have nowhere. To those people I say, if I can do it and get away. B . . . sh And with all my obstacles, why the f . . . can’t you.¹³¹

“Clark . . . [contended that] the trial court abused its discretion when it admitted evidence of his MySpace posting,” asserting that it amounted to inadmissible character evidence under Rule 404(b).¹³² The MySpace statements made by Clark contained only statements about himself, not of prior criminal acts.¹³³ As a result, the Indiana Supreme Court held this electronic evidence admissible, ultimately holding that Rule 404(b) did not apply because the evidence dealt with “Clark’s words and not his deeds.”¹³⁴ Additionally, the court held the evidence relevant to rebut Clark’s defense in this case that he acted recklessly and not criminally, thus making his character a central issue in the case.¹³⁵

In *Prairie v. State*,¹³⁶ Prairie appealed his conviction of identity deception,¹³⁷ claiming in part that the trial court committed reversible error when it admitted “other bad acts evidence” under Rule 404(b) of his prior relationship with the victim (and prior identify theft).¹³⁸ The State properly filed a motion under Rule 404(b) prior to trial seeking to admit the 404(b) evidence. The trial court granted the motion, determining that “it was probative on the question of the relationship

128. *Id.* at 1175.

129. 915 N.E.2d 126 (Ind. 2009), *reh’g denied*.

130. *Id.* at 128.

131. *Id.* at 129 (citation omitted).

132. *Id.*

133. *Id.* at 130.

134. *Id.*

135. *Id.*

136. 914 N.E.2d 294 (Ind. Ct. App. 2009).

137. See IND. CODE § 35-43-5-3.5 (2011).

138. *Prairie*, 914 N.E.2d at 295.

between Prairie and . . . [the victim].”¹³⁹ The State contended that

the challenged evidence was not introduced to show Prairie’s propensity to engage in crime or that his behavior was in conformity with a character trait. Instead, it was introduced to show that by giving . . . [the victim’s] name and identifying information as a billing address to the hospital, and by indicating on the form that he, as . . . [the victim], was self-insured and would pay for the treatment himself, Prairie intended thereby not to avoid arrest [on outstanding warrants], but to defraud . . . [the victim].¹⁴⁰

The Indiana Court of Appeals, agreeing with the trial court, held that the victim’s testimony on his prior relationship with Prairie—and, by extension, Prairie’s prior bad acts—was probative on the question of Prairie’s intent to deceive the hospital and avoid paying the hospital bill and that the probative value of the evidence outweighed the potential prejudicial effect.¹⁴¹

In *Lafayette v. State*,¹⁴² Lafayette was convicted by jury of rape and related charges “based in part on evidence of a ten-year-old conviction for attempted rape of another woman.”¹⁴³ Indiana law only allows the introduction of Rule 404(b) evidence of prior crimes “to prove the character of a person in order to show action in conformity therewith”¹⁴⁴ under certain circumstances, e.g., as in this case, to show intent.¹⁴⁵ The Indiana Supreme Court reversed and remanded Lafayette’s conviction because the State failed to show that the Rule 404(b) intent exceptions applied.¹⁴⁶ The facts most favorable to the conviction indicated the following:

[I]n July, 2007, C.E. told the police that Defendant had raped her. Defendant admitted that he and C.E. had had sexual intercourse but claimed that it had been consensual. Prior to trial, the State filed notice that it intended to introduce . . . [Defendant’s] 1997 conviction for the attempted rape of another woman as evidence of Defendant’s intent to rape C.E.¹⁴⁷

In this case, “the State was required to prove beyond a reasonable doubt that . . . [Lafayette] ‘knowingly or intentionally [had] sexual intercourse with [C.E.] when [C.E. was] . . . compelled by force or imminent threat of force.’”¹⁴⁸

139. *Id.* at 296.

140. *Id.* at 298. Intent to defraud is an element of the offense of identity deception. See IND. CODE § 35-43-5-3.5(a)(2)(A).

141. *Prairie*, 914 N.E.2d at 299.

142. 917 N.E.2d 660 (Ind. 2009).

143. *Id.* at 662.

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

145. *Lafayette*, 914 N.E.2d at 662.

146. *Id.*

147. *Id.*

148. *Id.* (quoting IND. CODE § 35-42-4-1(a)(1) (2011)).

Lafayette admitted that he had had sexual intercourse with C.E.; therefore, “neither the fact that he had had intercourse with C.E. nor his intent to do so were at issue.”¹⁴⁹ Instead, “the dispute was over whether C.E. had been ‘compelled by force or imminent threat of force[,]’” not the mens rea at the time of the commission of the alleged crime.¹⁵⁰ The Indiana Court of Appeals ultimately held that “the intent exception is available when a defendant goes beyond merely denying the charged culpability and alleges a particular contrary intent.”¹⁵¹ Furthermore, “questioning a prosecuting witness’s credibility[, even the alleged victim’s,] should not open the door to prior misconduct evidence.”¹⁵² “[A] defendant’s use of the defense of consent in a rape prosecution is not, standing alone, enough to trigger the availability of the intent exception.”¹⁵³

In *Embry v. State*,¹⁵⁴ Embry appealed his conviction of domestic battery (beating his ex-wife) by asserting that the trial court erred when it admitted evidence of his prior bad acts towards the victim as a means to rehabilitate her testimony.¹⁵⁵ Embry claimed that he acted in self-defense when he battered his ex-wife. Embry’s attorney impeached Embry’s ex-wife on cross-examination by eliciting evidence of her animosity towards Embry, thereby attacking her credibility pursuant to Rules 607 and 616 (showing evidence of bias).¹⁵⁶ The State attempted to rehabilitate the ex-wife on redirect by offering evidence of five prior acts of violence perpetrated by Embry towards his ex-wife in order to explain the hostility.¹⁵⁷ The Indiana Court of Appeals agreed that a party “may not offer evidence of prior misconduct committed by the defendant against the witness solely to explain the witness’s disposition[,]”¹⁵⁸ departing from those jurisdictions that allow such rehabilitative testimony.¹⁵⁹ However, the court, affirming Embry’s conviction, went on to find the evidence “admissible to prove motive and negate . . . [Embry’s] self-defense claim.”¹⁶⁰

149. *Id.* (citation omitted).

150. *Id.* (citing *Bryant v. State*, 644 N.E.2d 859, 860-61 (Ind. 1994) (making a similar argument)).

151. *Id.* at 663.

152. *Id.* at 665.

153. *Id.*

154. 923 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

155. *Id.* at 6.

156. *Id.* at 7.

157. *Id.* at 3, 7 (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE § 6098 (2d ed. 2007) (“Evidence offered to explain or justify an admitted bias does not logically refute the effect of bias on credibility.”)).

158. *Id.* at 3.

159. *Id.* at 8 (“Offering the defendant’s prior bad acts to explain a witness’s animosity only reinforces—rather than disproves—the witness’s disposition.”).

160. *Id.* at 3, 9 (“[N]umerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant’s prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime.” (citation omitted)).

In *Wilson v. State*,¹⁶¹ defendant Wilson appealed his conviction for receiving stolen auto parts and driving while suspended, asserting in part that the trial court erred in admitting his complete Bureau of Motor Vehicles (BMV) record, which contained prejudicial evidence of prior bad acts.¹⁶² The state offered Wilson's BMV record to corroborate testimony that he was driving on a suspended license, as Wilson had previously been convicted of the same offense.¹⁶³

At trial, Wilson objected to the evidence, but only on the ground that it was not properly certified.¹⁶⁴ Thus, the court of appeals concluded that Wilson had waived any argument that the evidence was inadmissible under Rule 404(b).¹⁶⁵ Notwithstanding such waiver, the defendant argued that the admission of his complete BMV record constituted fundamental error, relying in part on the holding of *Rhodes v. State*.¹⁶⁶ In *Rhodes*, the trial court committed fundamental error in admitting a "flood of irrelevant and prejudicial [character] evidence."¹⁶⁷ Wilson, however, faced no such "flood" of irrelevant character evidence,¹⁶⁸ even though his BMV record should have been redacted before admission. Specifically, the State had not highlighted "any unrelated character evidence"¹⁶⁹ contained in Wilson's record. Thus, its admission failed to qualify as "so prejudicial that it made it impossible for Wilson to receive a fair trial" and did not rise to the level of fundamental error.¹⁷⁰

D. Motive Exception to Rule 404(b)

In *Wilkes v. State*,¹⁷¹ Wilkes appealed his conviction of a triple murder and the death sentence imposed as the penalty for said crimes, asserting in part that the trial court violated the *corpus delicti* rule and committed reversible error when it admitted evidence of his confession to molesting Avery, his thirteen-year-old murder victim.¹⁷² The Indiana Supreme Court found the *corpus delicti* rule inapplicable because it "does not apply to evidence of crimes offered under Rule 404(b) to establish motive or intent because there is no danger of conviction for those crimes."¹⁷³ Here, the State offered Wilkes's admission to molesting Avery to prove his motive for killing her.¹⁷⁴ In affirming Wilkes's conviction and death

161. 931 N.E.2d 914 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

162. *Id.* at 919.

163. *Id.* at 916.

164. *Id.*

165. *Id.* at 918.

166. *Id.* at 920 (citing *Rhodes v. State*, 771 N.E.2d 1246 (Ind. Ct. App. 2002)).

167. *Rhodes*, 771 N.E.2d at 1256.

168. *Wilson*, 931 N.E.2d at 920.

169. *Id.*

170. *Id.* at 920-21.

171. 917 N.E.2d 675 (Ind. 2009), *reh'g denied, cert. denied*, 131 S. Ct. 414 (2010).

172. *Id.* at 684.

173. *Id.*

174. *Id.*

sentence, the Indiana Supreme Court held that the trial court properly admitted this evidence.¹⁷⁵

In *Allen v. State*,¹⁷⁶ Allen stood convicted of three counts of murder and felony arson.¹⁷⁷ Allen started a fire in the apartment complex where he lived with his wife, Christy Gipson, and infant daughter, Javonae.¹⁷⁸ The fire resulted in the deaths of Christy, Javonae, and a neighbor, Prabhat Singhal—as well as severe burns to another neighbor, Manoj Rana.¹⁷⁹ At trial, the State introduced evidence that Allen was engaged in an affair with a former co-worker at the time of the fire.¹⁸⁰ Allen objected on the ground that the evidence was barred by Rule 404(b). On appeal, the State argued that the trial court properly admitted the evidence as proof of Allen's motive to kill his wife and daughter.¹⁸¹

The Indiana Court of Appeals agreed, distinguishing the case at bar from its 2004 decision in *Camm v. State*, where it ruled that the trial court erred in admitting similar evidence.¹⁸² Like Allen, the defendant in *Camm* faced charges that he killed his wife and children. The State presented “extensive evidence of . . . [Camm's] extramarital affairs and attempts to engage in extramarital affairs.”¹⁸³ The *Camm* court found that the trial court had erred in admitting the evidence and held that in order for such evidence to be admissible, either (1) it needed to “be accompanied by evidence that such activities had precipitated violence or threats between the victim in the past” or (2) the defendant must have been “involved in an extramarital relationship at the time of the completed or contemplated homicide.”¹⁸⁴

Allen's case stood readily distinguishable from *Camm*'s. Unlike *Camm*, Allen was having an affair at the time he allegedly killed his wife. Additionally, Allen had stated that he was going to kill a member of his family, was angry the night before the murders because his wife had bought clothing for the baby, and had called his wife a “monster” and his daughter “a hollering, greedy mother fu* *er.”¹⁸⁵ Thus, Allen's extramarital affair was relevant to his motive.¹⁸⁶

175. *Id.* at 684, 693.

176. 925 N.E.2d 469 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

177. *Id.* at 471.

178. *Id.* at 471-76.

179. *Id.* at 475.

180. *Id.* at 477.

181. *Id.*

182. *Id.* at 477-78 (citing *Camm v. State*, 812 N.E.2d 1127, 1131-33 (Ind. Ct. App. 2004)).

183. *Id.*

184. *Id.* at 478 (quoting *Camm*, 812 N.E.2d at 1133).

185. *Id.* (citation omitted).

186. *Id.* at 478-79. Without citing a specific rule, the court of appeals also held that Allen was not prejudiced by the trial's court's admission of photographs (which contained descriptive captions) during the testimony of a fire investigator. *Id.* at 477. The court found that any error in admitting the captioned photographs was harmless, as the captions were at worst cumulative of previous testimony. *Id.*

E. Plan Exception to Rule 404(b)

In *Akard v. State*,¹⁸⁷ Jeffrey Akard appealed his convictions for rape, criminal deviate conduct, criminal confinement, and battery on several grounds, including his contention that the trial court erred in admitting certain pornographic images that police found on his laptop and in his apartment.¹⁸⁸ Akard's victim, A.A., testified that during her confinement, Akard had bound and gagged her, and he had urinated in her mouth.¹⁸⁹

Pornographic images recovered from Akard's laptop depicted women bound and gagged in a similar fashion to what A.A. described in her testimony. Also, A.A. shared a similar body type with the women depicted in the images.¹⁹⁰ Akard had shaved A.A.'s genitalia and put stockings on A.A.'s legs while she was unconscious. All of these facts, the court of appeals explained, indicated "Akard's plan to make A.A. resemble the pictures stored on the laptop."¹⁹¹ Thus, the court determined that the images were admissible under Rule 404(b), which prohibits the admission of evidence of other crimes, wrongs or acts offered to prove the character of the person in order to show action in conformity therewith, but which in some circumstances allows the admission of such evidence as proof of a defendant's "plan."¹⁹² Additionally, due to the close connection between the images and what Akard did to A.A., the court held that the danger of unfair prejudice resulting from the admission of the exhibit did not outweigh its probative value for the purposes of Rule 403.¹⁹³

On the other hand, the court determined that the trial court erred in its admission of a magazine page found in Akard's apartment that depicted adults urinating on each other, as it clearly was offered to "demonstrate Akard's character and propensity to commit such an act."¹⁹⁴ Nevertheless, this did not constitute reversible error given "the voluminous evidence supporting the charges [for which Akard was] actually tried."¹⁹⁵

187. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in relevant part*, 937 N.E.2d 811 (Ind. 2010).

188. *Id.* at 206. In addition to the evidentiary issues presented, *Akard* is also noteworthy because the court of appeals revised the defendant's original sentence of ninety-three years *upward* to 118 years. *Id.* at 206, 212. Akard had requested that the court revise his sentences so that they ran concurrently, for an aggregate sentence of forty years. *Id.* at 211. Initially, this request backfired, to say the least. Ultimately, however, the Indiana Supreme Court overturned the revised sentence but affirmed the decision of the court of appeals in all other respects. The Supreme Court did correct the original sentence of ninety-three years to ninety-four years to address the trial court's "ministerial" error in calculating the original sentence. *Akard*, 937 N.E.2d at 812-14.

189. *Akard*, 924 N.E.2d at 205-06.

190. *Id.* at 207.

191. *Id.*

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

193. *Akard*, 924 N.E.2d at 207.

194. *Id.*

195. *Id.*

F. Compromise and Offers to Compromise—Rule 408

In *Bules v. Marshall County*,¹⁹⁶ the driver of a tractor-trailer and his passenger brought an action against the county and its highway department alleging negligent warning of a dangerous road condition and sought to recover damages for injuries sustained when the driver hit high water and lost control of his vehicle.¹⁹⁷ The trial court granted the defendants' motion for summary judgment based upon the Indiana Tort Claims Act,¹⁹⁸ which "provides governmental units immunity from liability for losses caused by temporary weather conditions."¹⁹⁹ The Indiana Supreme Court "previously held that this immunity applies during the period of reasonable response to a weather condition."²⁰⁰ In *Bules*, the court held that the "period lasts at least until the weather condition has stabilized, and [it] immunizes the governmental unit from liability for alleged flaws in its remedial steps."²⁰¹ The Buleses attempted to avoid the immunity claim by asserting that the county had either admitted liability or waived any claim of immunity through its insurance agent. The county's insurance agent sent a letter to the victims stating that "the [i]nsurance [c]arrier for Marshall County . . . has accepted liability for the accident."²⁰² The county did not dispute that the insurance agent was acting on its behalf as "part of ongoing settlement negotiations between the agent and the Buleses."²⁰³ On appeal, the Indiana Supreme Court affirmed the grant of summary judgment in favor of the defendants and held that the trial court properly excluded the insurance agent's letter from the evidence pursuant to Rule 408.²⁰⁴

G. Withdrawn Pleas and Offers—Rule 410

In *Scott v. State*,²⁰⁵ Scott appealed his conviction for two counts of possession of a firearm by a serious violent felon, one count of felony battery with a deadly weapon, one count of felony pointing a firearm, and one of resisting law enforcement, alleging in part that the trial court erred when it admitted evidence of "his *nolo contendere* plea to a Florida murder as proof that he was convicted of an offense that qualifies him as a serious violent felon under . . . [Indiana Code

196. 920 N.E.2d 247 (Ind. 2010).

197. *Id.* at 249-50.

198. IND. CODE § 34-13-3-3(3) (2011).

199. *Bules*, 920 N.E.2d at 248.

200. *Id.* at 248-49.

201. *Id.* at 249.

202. *Id.* at 252.

203. *Id.*

204. *Id.* ("A party may concede some points in an attempt to reach a compromise without waiving them if no agreement can be reached." (citing *Worman Enters., Inc. v. Boone Cnty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 376-77 (Ind. 2004))).

205. 924 N.E.2d 169 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010), *cert. denied*, 131 S. Ct. 939 (2011).

section] 35-47-4-5(a).”²⁰⁶ In this case of first impression, the Indiana Court of Appeals held that the evidence of the plea was admissible under both Rule 803(22), which specifically refers to *nolo contendere* pleas, and Rule 803(8), the more general hearsay rule exception for public records.²⁰⁷ The State merely used the evidence to establish the fact of the prior felony conviction, not the underlying facts that led to the conviction; therefore, the court held the evidence admissible under Rules 410.²⁰⁸ The court did reverse the trial court’s judgment in part (not related to this evidentiary issue) and affirmed the remainder of the trial court’s judgment. Specifically, the court found that the trial court erred in refusing to give a tendered jury instruction from the defendant pertaining to the pointing a firearm charge and remanded the case for further proceedings.²⁰⁹

In *Gonzalez v. State*,²¹⁰ the defendant was convicted of criminal mischief, operating a vehicle while intoxicated, and operating a vehicle while intoxicated injuring a person after he ran a stop sign and hit a school bus. As part of his attempt to negotiate a plea, Gonzalez penned a letter apologizing for the incident and admitting that he had been drinking alcohol beforehand.²¹¹ Subsequently, the trial court allowed the State to admit the letter as substantive evidence of Gonzalez’s guilt. The court of appeals held that the letter constituted a privileged communication made in connection with the plea negotiation process that the trial court should have excluded under Rule 410, and that the error was not harmless.²¹² Granting transfer, the Indiana Supreme Court agreed with the court of appeals that admitting the letter was error.²¹³ The court set forth the following test for determining when statements made in connection with plea agreements are inadmissible under Rule 410:

[F]or a statement to be a privileged communication, the defendant must have been charged with a crime at the time of the statement and the prosecutor and the defendant must have initiated discussions related to a plea agreement. Second, the statement must have been made with the intent of seeking a plea agreement or in contemplation of a proposed agreement. Third, the statement is privileged if made to someone who has the authority to enter into or approve a binding plea agreement or

206. *Id.* at 172, 177.

207. *Id.* at 177-79. Unlike in a civil case, where this evidence would have been offered to prove the underlying facts of the crime, the evidence of the *nolo contendere* plea was “offered only to prove that . . . [Scott] was convicted of murder,” therefore making it admissible under Rule 803(22). *Id.* at 177 (citation omitted).

208. *Id.* at 178 n.3.

209. *Id.* at 176-77.

210. 929 N.E.2d 699 (Ind. 2010).

211. *Id.* at 700.

212. *Gonzalez v. State*, 908 N.E.2d 313, 315, 317 (Ind. Ct. App. 2009), *vacated by Gonzalez*, 929 N.E.2d 699 (Ind. 2010).

213. *Gonzalez*, 929 N.E.2d at 702.

who has a right to object to or reject the agreement.²¹⁴

However, the supreme court found the error to be harmless in light of the “overwhelming” evidence against Gonzalez.²¹⁵

H. Liability Insurance—Rule 411

Rule 411 provides as follows:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.²¹⁶

“The purpose of Rule 411 and its federal counterpart is to prevent juries from inferring fault or calculating damages based on parties’ liability coverage or lack thereof.”²¹⁷ In *Spaulding v. Harris*, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it redacted the words “Department of Insurance” from the medical review panel’s certified opinion pursuant to Rule 411 because it found that the probative value of bolstering the opinion’s authenticity was outweighed by the prejudicial effect of indicating that the hospital was insured pursuant to Rule 403.²¹⁸

In *Brown-Day v. Allstate Insurance Co.*,²¹⁹ the Indiana Court of Appeals accepted an interlocutory appeal to resolve certain issues related to Rule 411 (and other evidentiary issues).²²⁰ Brown-Day, insured by Allstate (with \$100,000 in underinsured benefits) was involved in a motor vehicle accident with Lobdell, who was insured by American Family Insurance (with a \$50,000 liability limit). Originally, Brown-Day sued Lobdell, who admitted liability, and the parties settled the lawsuit for Lobdell’s policy limit of \$50,000.²²¹ Brown-Day, with permission from the trial court, then filed an amended complaint naming Allstate as the defendant and seeking the additional \$50,000 available under her underinsured policy.²²² Allstate denied that Brown-Day sustained damages in excess of \$50,000 and filed a motion seeking to substitute Lobdell as the named defendant in this case and prohibit Brown-Day from making any reference to insurance, citing Rule 411. The trial court granted Allstate’s motion, ordering

214. *Id.*

215. *Id.* at 703.

216. IND. R. EVID. 411.

217. *Spaulding v. Harris*, 914 N.E.2d 820, 830 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

218. *Id.* at 831.

219. 915 N.E.2d 548 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

220. *Id.* at 551.

221. *Id.* at 550.

222. *Id.*

that “Lobdell be identified as the sole designated defendant ‘for purposes of the trial of this action’ and that the parties ‘shall not mention or refer to the fact [that] this is an underinsured motorist claim’” or make any other reference that illustrated that Lobdell or Brown-Day were insured.²²³ Brown-Day argued that under Rule 411, excluding all reference to insurance or insurers was not justifiable in this case because liability had been admitted.²²⁴

The Indiana Court of Appeals, in reversing the trial court’s decision, found that “Rule 411 speaks [only] to the admissibility of evidence . . . offered to show that a party acted negligently or wrongfully so that a jury is not induced to decide a case on improper grounds,” not the exclusion of all references to insurance in a case.²²⁵ In this case, where liability had been conceded, the only issue that remained was the amount of damages. The court rejected Allstate’s argument in its entirety, stating:

Regardless of academic argument as to whether a jury is likely to assess greater damages against a deep-pocket insurance company, Evidence Rule 411 simply is not a mechanism providing for an outright substitution of parties so that the identity of a party as an insurer may be shielded. It does not contemplate the creation of a fiction to avoid possible prejudicial effects from a reference to insurance or an insurer.²²⁶

Allstate stood as the real party in interest. Brown-Day directly sought benefits for which she had contracted with Allstate. Therefore, the Indiana Court of Appeals held that the trial court erred when it substituted Lobdell for Allstate as the named party in this case.²²⁷

Similarly, in *Howard v. American Family Mutual Insurance Co.*, the Indiana Court of Appeals followed the *Brown-Day* decision and held that the trial court had erred in substituting the uninsured motorist who caused the accident with the insured as the sole named defendant in insured’s uninsured motorist coverage

223. *Id.* at 550-51 (citation omitted).

224. *Id.* at 551.

225. *Id.*

226. *Id.* (citation omitted).

227. *Id.* at 553. The court rejected Allstate’s citation to the case of *Wineinger v. Ellis*, 855 N.E.2d 614 (Ind. Ct. App. 2006), noting that unlike in the *Wineinger* case, Allstate did not make an “offer of full payment in order to ‘step into the shoes’ of . . . [the] tortfeasor.” *Brown-Day*, 918 N.E.2d at 552. The court further clarified its opinion in *Wineinger*, stating,

Wineinger does not prohibit all references to insurers or insurance; rather, it addressed very specific circumstances. [In *Wineinger*, a]n insurer otherwise liable only for its contract obligations chose to forego a right of subrogation and contract limitations and agreed to total liability for any damages caused by a tortfeasor, as if the insurer were the tortfeasor. As such, the claim tried before the jury in *Wineinger* was substantively a tort claim.

Id. at 552-53. Here, the case to be tried sounded solely in contract, a contract between Brown-Day and Allstate. *Id.* at 553.

lawsuit.²²⁸ The court of appeals also instructed the court below, on remand, to deny the insurer's motion in limine to the extent it sought to prevent exclusion of any reference to the insurer, though the trial court retained authority to exclude other evidence of the dealings between the insured and his insurer under Rules 402, 403, and 411.²²⁹

I. Rape Shield Issues—Rule 412

Indiana's Rape Shield Rule, Rule 412, "incorporates the basic principles" of Indiana's Rape Shield Act.²³⁰ In addition to the exceptions enumerated in Rule 412(a), "a common-law exception has survived the 1994 adoption of the . . . [Rules]."²³¹ The common-law exception provides that "evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that his or her prior accusation of rape is false; or (2) the victim's prior accusation is demonstrably false."²³²

In *State v. Luna*,²³³ the trial court acquitted the defendant, Genaro Luna, of eight counts of child molesting. Luna was accused of molesting T.P., his stepdaughter, at the time of the alleged crimes.²³⁴ The State appealed on a reserved question of law under Indiana Code section 35-38-4-2(4), which allows the State to "obtain opinions of *law* which shall declare a rule for the guidance of trial courts on questions likely to arise again in criminal prosecutions."²³⁵ Specifically, the State asserted that the trial court had erred in admitting evidence that T.P. had made prior allegations of child molesting against another person, where the only evidence that her previous allegations were false was the fact that the other alleged perpetrator never faced criminal charges.²³⁶ The Indiana Court of Appeals declined to reach the merits of the State's appeal, as the State itself had presented evidence of T.P.'s prior allegation, and the State did not object when the issue was raised by defense counsel on cross-examination.²³⁷ Thus, the State's objection was waived. Moreover, because the question of whether T.P.'s prior allegation was demonstrably false and was factual in nature, the issue was inappropriate as a question of *law*.²³⁸

228. *Howard v. Am. Family Mut. Ins. Co.*, 928 N.E.2d 281, 283-85 (Ind. Ct. App. 2010).

229. *Id.* at 285.

230. *State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999) (confirming Rule 412's incorporation of the principles of Indiana Code section 35-37-4-4, Indiana's Rape Shield Act).

231. *Oatts v. State*, 899 N.E.2d 714, 720 (Ind. Ct. App. 2009) (citing *Walton*, 715 N.E.2d at 826-28).

232. *Id.* (citation omitted).

233. 932 N.E.2d 210 (Ind. Ct. App. 2010).

234. *Id.* at 211.

235. *Id.* at 212 (citing *State v. Overmyer*, 712 N.E.2d 506, 507 (Ind. Ct. App. 1999)) (emphasis added).

236. *Id.*

237. *Id.* at 213.

238. *Id.* at 214-15.

V. PRIVILEGES (RULE 501)

In *Shell v. State*,²³⁹ the Indiana Court of Appeals held that Officer Early, who testified for the State, had not waived the confidentiality of the identity of his informant, C.I. The court of appeals noted that the general policy under Indiana law is to prevent the disclosure of a confidential informant's identity unless the defendant demonstrates that "disclosure is relevant and helpful to his defense or is necessary for a fair trial."²⁴⁰ The court cited Rule 501(b), which provides that a privilege against disclosure is waived if the party holding the privilege "voluntarily discloses or consents to disclose any significant part of the privileged matter."²⁴¹ The defendant pointed to a portion of the suppression hearing transcript in which defense counsel questioned Early about C.I. The transcript revealed that the State had objected to a direct question about C.I.'s name.²⁴² While Early mentioned C.I. with reference to an earlier case, he did not identify C.I. by name in the present case or with reference to the earlier case. The court of appeals concluded that there was no evidence that the State had disclosed the identity of C.I. in the earlier case. Thus, the privilege remained intact.²⁴³

VI. WITNESSES (RULES 601-617)

A. Lack of Personal Knowledge and Opinion Testimony—Rules 602 and 701

In *Dunn v. State*,²⁴⁴ Dunn appealed his conviction of battery causing serious bodily injury, in part asserting that the trial court committed reversible error when it admitted a voicemail message from his girlfriend ("Mathys") to the victim ("Rollins").²⁴⁵ Mathys testified on direct that she did not witness the incident between Dunn and Rollins. On cross, when the State asked Mathys whether she apologized to Rollins for Dunn's behavior, Mathys testified that she did not remember. The State then asked Mathys "whether she remembered making a phone call to Rollins about an hour after the incident and leaving a voicemail message"; she again stated that she did not remember.²⁴⁶ The State then asked that the voicemail message be admitted. Dunn's counsel objected, asserting that a proper foundation had not been laid for admission of the voicemail message.²⁴⁷ The State responded that Rollins had testified on redirect that he received a phone call from Mathys about an hour or an hour and a half after the incident. Outside

239. 927 N.E.2d 413 (Ind. Ct. App. 2010).

240. *Id.* at 420 (citing *Mays v. State*, 907 N.E.2d 128, 131 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009)).

241. IND. R. EVID. 501(b).

242. *Shell*, 927 N.E.2d at 421.

243. *Id.* at 420-21.

244. 919 N.E.2d 609 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 790 (Ind. 2010).

245. *Id.* at 610-11.

246. *Id.* at 611.

247. *Id.*

the presence of the jury, the State played the voicemail message to Mathys to refresh her recollection. After the jury was brought back into the courtroom, the State asked Mathys whether it was her voice on the voicemail message, and she said yes.²⁴⁸ The trial court then admitted the voicemail message over Dunn's objection, and it was played to the jury. The message was the following:

[Rollins] . . . it's . . . [Mathys]. I'm so sorry for what . . . [Dunn] did to you. There's no reason for him to do that. He's just—just jealous and there's no point. I really do apologize for the way that he treated you and he owes you an apology, too. But hopefully you're all right. I'm really sorry about what he did. I'm so sorry.²⁴⁹

At trial, Dunn admitted to hitting Rollins but claimed self-defense as a justification. Dunn argued that the voicemail message was inadmissible pursuant to Rules 602 and 701, ultimately asserting that the State failed to lay a proper foundation.²⁵⁰

Rule 602 provides:

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. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.²⁵¹

Rule 701 states:

If 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 the clear understanding of the witness's testimony or the determination of a fact in issue.²⁵²

The court held that a proper foundation had been laid by the State because "Rule 602 does not require that personal knowledge be established by the witness's testimony. Here, other evidence establishe[d] that Mathys had personal knowledge of the incident."²⁵³ Additionally, "Mathys testified that she had dated Dunn 'off and on for a couple of years'", and as a result, the trial court did not abuse its discretion when it determined that Mathys held the requisite Rule 701 personal knowledge to render the opinion that Dunn was "just jealous."²⁵⁴

248. *Id.*

249. *Id.*

250. *Id.* at 612.

251. IND. R. EVID. 602.

252. IND. R. EVID. 701.

253. *Dunn*, 919 N.E.2d at 612.

254. *Id.* at 612-13. Although not challenged, the Indiana Court of Appeals also held that the voicemail message was helpful to determine if Dunn acted in self-defense. *Id.* at 613.

In *Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.*,²⁵⁵ Indiana Farmers Mutual Insurance Company (“insurer”) brought a declaratory judgment action against its insureds seeking a declaration that it had no duty to defend them in a third-party, multi-count action regarding contaminated dirt fill obtained from the insured’s steel forge.²⁵⁶ The trial court granted the insured party’s summary judgment motion based in part on the affidavit of the insured forge owner that he did not know the dirt was contaminated.²⁵⁷ The Indiana Court of Appeals affirmed in part and reversed in part the trial court’s summary judgment entry for the insureds, holding that:

(1) the forge owner’s affidavit testimony may be considered along with the underlying complaint when assessing the insurer’s duty to defend, (2) the factual allegations sufficiently disclose an unintended “occurrence” requiring the insurer to defend in the underlying suit, (3) coverage is not foreclosed by the policy’s intentional acts exclusion, (4) the insurer was not prejudiced by untimely notice of occurrence, and (5) the trial court erroneously ordered indemnification before the conclusion of the underlying litigation.²⁵⁸

The insureds alleged that the trial court improperly considered the forge owner’s affidavit in resolving the case. As to the affidavit, the court of appeals found that the owner

submitted his affidavit in support of the . . . [insureds’] motion for summary judgment. . . . [He] testified to his understanding of the underlying events, and he claimed that he did not know . . . [the] fill dirt was contaminated. The purpose of the affidavit was to show that the alleged wrongdoing in the case was an “accident” within the purview of . . . [the] insurance policy.²⁵⁹

The insureds objected in part to the affidavit on various evidentiary grounds, arguing that it contained “both inadmissible hearsay and unfounded statements as to the intent of other persons.”²⁶⁰ As to the Rule 602 issue, the Indiana Court of Appeals agreed with the insureds that the affiant lacked the requisite personal knowledge “to testify . . . [as to other] employees’ intentions.”²⁶¹ However, the court went on to hold the statements in the affidavit were not inadmissible hearsay because they merely provided the trial court with the affiant’s knowledge and beliefs with regards to the fill dirt when the insureds provided it to the third party—the affidavit was to show that he “believed there was nothing wrong with it” and that he “had no idea at the time . . . that allowing . . . [the insureds’] fill

255. 917 N.E.2d 1258 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

256. *Id.* at 1262-63.

257. *Id.* at 1263.

258. *Id.*

259. *Id.* at 1267.

260. *Id.* at 1269.

261. *Id.* at 1270.

dirt being placed upon . . . [the third party's] property would violate the law."²⁶²

In *Capital Drywall Supply, Inc. v. Jai Jagdish, Inc.*,²⁶³ defendant and cross-claimant Old Fort Building Supply Company ("Old Fort") moved for summary judgment, seeking to foreclose on a mechanic's lien.²⁶⁴ In response to a cross-motion for summary judgment by co-defendants Jai Jagdish, Inc. ("JJI") and Ranjan Amin ("Amin"), Old Fort designated the affidavit of employee Pamela Hartman. Paragraphs 6 and 7 of the affidavit stated that records of the St. Joseph County Auditor's office indicated that Amin was the record owner of the real estate at issue and that Hartman had "verified that information with the Area Plan Commission because the [r]eal [e]state was in the process of being annexed."²⁶⁵ In fact, JJI, not Amin, was the true record owner at the time that Old Fort filed the lien. The trial court declined to grant JJI and Amin's motion to strike paragraphs 6 and 7 of the affidavit as inadmissible hearsay. But the court did limit the paragraphs to serving as evidence that Hartman had made the contacts alleged, not as evidence of the information the contacts allegedly provided.²⁶⁶

On appeal, Old Fort argued that while the affidavit could not be admitted as proof that Amin was the owner, the court below should have admitted it as evidence that Old Fort acted "reasonably and diligently" in obtaining the record owner's name.²⁶⁷ The court of appeals, however, concluded that such evidence would not have aided Old Fort in complying with the statutory requirement that the lien notice contain the true record owner's name. Thus, even if the trial court erred in limiting the use of the affidavit, this error had no effect on the court's ultimate denial of Old Fort's summary judgment motion.²⁶⁸

B. Requirement of Oath or Affirmation—Rule 603

Rule 603 governs the oath or affirmation requirement to be satisfied before a witness testifies. Rule 603 provides:

Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered.²⁶⁹

This rule "embodies a pre-existing Indiana statute," Indiana Code section 34-45-1-2.²⁷⁰ Section 34-45-1-2 provides: "Before testifying, every witness shall be

262. *Id.*

263. 934 N.E.2d 1193 (Ind. Ct. App. 2010).

264. *Id.* at 1195.

265. *Id.* at 1195-96, 1198 (citation omitted).

266. *Id.* at 1198.

267. *Id.* at 1198-99.

268. *Id.* at 1199.

269. IND. R. EVID. 603.

270. ROBERT L. MILLER, JR., 13 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 603.101, at

sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered.”²⁷¹ Indiana’s trial courts have consistently held that a witness’s failure to adhere to the statutory requirement that testimony be given under oath or affirmation may be waived by failing to object.²⁷² Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

C. *Inquiry as to Validity of Verdict—Rule 606*

Under Rule 606(b), a juror may testify to the validity of a verdict to determine “whether any outside influence was improperly brought to bear upon” a member of the jury.²⁷³ Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

D. *Evidence of Character and Conduct of Witness—Rule 608*

In *Nunley v. State*, Nunley appealed his conviction of four counts of felony child molesting and one count of felony dissemination of matter harmful to minors, claiming in part that the trial court committed reversible error when it excluded evidence that the six-year-old victim “made a false accusation to the police on another occasion.”²⁷⁴ Nunley asserted that this evidence should be admissible to impeach the victim’s testimony of the alleged actions at issue in his case. The Indiana Court of Appeals held that “Nunley sought to impeach . . . [the victim] by a specific act of misconduct that did not result in a criminal conviction, and therefore, the trial court correctly excluded the evidence under . . . [Rule 608(b)].”²⁷⁵

70 (3d ed. 2007).

271. IND. CODE § 34-45-1-2 (2011).

272. *See Sweet v. State*, 498 N.E.2d 924, 926 (Ind. 1986) (holding that the statutory requirement under Indiana Code section 34-1-14-2 that “every witness be sworn to testify the truth, the whole truth, and nothing but the truth . . . can be waived by the parties . . . if no objection is made” and holding that there was no objection), *superseded by rule as stated in Wrinkles v. State*, 749 N.E.2d 1179 (Ind. 2001); *Pooley v. State*, 62 N.E.2d 484, 485 (Ind. Ct. App. 1945) (en banc) (holding that “[t]he statutory requirement that . . . ‘every witness shall be sworn’ . . . can be waived by the parties and if no objection is made to a witness testifying without being so sworn such waiver will be presumed” (internal citation omitted)).

273. IND. R. EVID. 606(b)(3).

274. *Nunley v. State*, 916 N.E.2d 716, 720 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 787 (Ind. 2010) (noting that the victim’s mother “had been the victim of a domestic altercation with her boyfriend” and that the six-year-old “initially told the police . . . [that the boyfriend] had also attacked her, but she later recanted this statement”).

275. *Id.* The Indiana Court of Appeals ultimately reversed Nunley’s conviction in part and reversed it in part on other grounds. *Id.* at 722-23.

E. Impeachment by Evidence of Conviction of Crime

In *Allied Property & Casualty Insurance Co. v. Good*,²⁷⁶ Good alleged that Allied breached her homeowner's policy by failing to pay her insurance claim following a fire that destroyed her home and violated its duty to act in good faith regarding her claim. Before trial, the trial court granted Good's motion in limine to limit testimony at trial as to her husband's criminal history.²⁷⁷ The trial court granted Good's motion for mistrial and sanctioned Allied for violating the order in limine and causing the mistrial.²⁷⁸ On this interlocutory appeal, the Indiana Court of Appeals affirmed the trial court's decision—by extension, the propriety of the order in limine excluding testimony at trial of Good's husband's criminal history because the husband's conviction for at least one theft thirty years prior to the fire was inadmissible pursuant to the time limit enumerated in Rule 609(b).²⁷⁹

F. Prior Inconsistent Statements—Rule 613

In *Jackson v. State*,²⁸⁰ defendant Jackson was convicted of battery resulting in serious bodily injury. On appeal, he argued that the trial court erred in excluding the testimony of a paramedic. The paramedic reported that a bystander offered an alternative account of how Jackson's alleged victim, Roberts, had suffered the fatal injuries attributed to Jackson.²⁸¹ Rule 613 allows the use of a prior inconsistent statement which would otherwise qualify as hearsay to impeach a witness.²⁸² Critically, the rule allows the admission of prior inconsistent statement made *by the witness*. In the case at bar, Jackson attempted to use the paramedic's testimony of the bystander's statement to impeach Smith, who provided eyewitness testimony that Jackson had beaten Roberts. Thus, Rule 613 did not apply, as the "prior inconsistent statement" was not Smith's.²⁸³

G. Jury Questions of Witnesses—Rule 614

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

276. 919 N.E.2d 144 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

277. *Id.* at 146-47.

278. *Id.* at 146.

279. *Id.* at 150-51.

280. 925 N.E.2d 369 (Ind. 2010), *reh'g denied*.

281. *Id.* at 374-75. The court of appeals also held that the paramedic's account of the bystander's statement failed to qualify as a statement made for purposes of medical diagnosis or treatment under Rule 803(4). *Id.* at 375.

282. IND. R. EVID. 613(b).

283. *Jackson*, 925 N.E.2d at 375.

H. Separation of Witnesses—Rule 615

In *Williams v. State*,²⁸⁴ Williams appealed his conviction of strangulation and battery, in part asserting that the trial court erred when it denied his motion for separation of witnesses.²⁸⁵ Affirming the convictions, the Indiana Court of Appeals held that the rebuttable presumption of prejudice mandated by Rule 615 had been overcome. Nothing in the record even suggested that Williams actually suffered prejudice from the trial court's denial of his motion for separation of witnesses.²⁸⁶ "Williams'[s] defense [at trial], that he was not . . . [the victim's] attacker, was addressed by the 9-1-1 tape, [the victim's] . . . extensive testimony, and a supplementary offense report prepared by one of the FWPD detectives and offered by Williams as a defense exhibit."²⁸⁷ Thus, the violation of Rule 615 denying Williams's motion was harmless error.²⁸⁸

I. Bias of Witness—Rule 616

In *Brown-Day v. Allstate Insurance Co.*, the Indiana Court of Appeals held that the trial court erred when limiting the scope of cross-examination to be conducted by Brown-Day of Allstate's expert on the issue of damages.²⁸⁹ The result was to eliminate any reference to insurance or the fact that the defending insurance company paid the expert's fees. The trial court limited the scope of the examination, citing Rule 616.²⁹⁰ Rule 616 provides: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."²⁹¹ The Indiana Court of Appeals rejected the trial court's expansion of Rule 616, holding that "evidence of bias, prejudice, or interest of a witness for or against a party is admissible, and the rule may not be disregarded on grounds that the party involved is an insurance carrier."²⁹²

In *Tolliver v. State*,²⁹³ Tolliver appealed his conviction of murder and the finding that he was a habitual offender, asserting in part that the trial court erred by "prohibiting defense counsel from inquiring into certain State's witnesses' possible bias or ulterior motives on cross-examination."²⁹⁴ Tolliver's counsel wanted to impeach two of the State's witness, Henry and Bailey, using their recent arrest and conviction records, respectively, in order to illuminate their

284. 924 N.E.2d 121 (Ind. Ct. App. 2009), *trans. denied*, 940 N.E.2d 825 (Ind. 2010).

285. *Id.* at 125.

286. *Id.* at 126.

287. *Id.* at 127.

288. *Id.* at 127.

289. *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548, 553-54 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

290. *See id.* at 553.

291. IND. R. EVID. 616.

292. *Brown-Day*, 915 N.E.2d at 554.

293. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

294. *Id.* at 1275.

“potential motivations for testifying, especially given both witnesses’ recent arrests and the possibility of an accompanying deal for testifying.”²⁹⁵ The record did not include any evidence of deals being provided to Henry or Bailey in exchange for their testimony. As a result, affirming Tolliver’s conviction, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it excluded the potential cross-examination because Tolliver failed to introduce any evidence “that charges were being withheld or used in consideration for testimony in the instant trial.”²⁹⁶

VII. OPINIONS AND EXPERT TESTIMONY (RULES 701-705)

A. *Opinion Testimony by Lay Witness—Rule 701*

Rule 701 limits lay opinion testimony to opinions that 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.”²⁹⁷ Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

B. *“Skilled Witness” Testimony—Rule 701*

Pursuant to Rule 701, a skilled witness may provide an opinion or inference that is “(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.”²⁹⁸ “A skilled witness is a person with ‘a degree of knowledge short of that sufficient to be declared an expert under . . . Rule 702, but somewhat beyond that possessed by the ordinary jurors.’”²⁹⁹

In *Tolliver v. State*,³⁰⁰ Tolliver asserted that the trial court committed reversible error when it allowed a police officer to testify as a “skilled witness” about another witness’s “body language at the time he made certain statements.”³⁰¹ On this issue of first impression, the Indiana Court of Appeals joined with the Seventh Circuit and the Illinois Court of Appeals, stating,

We are similarly skeptical of body language testimony and join those courts in expressing our disapproval of such evidence. We must therefore conclude that the trial court’s finding . . . [of the police officer] to be a “skilled witness” who was somehow “uniquely qualified” to assess . . . [another witnesses’s] truthfulness [akin to a human lie

295. *Id.* at 1285.

296. *Id.* at 1285-86 (citation omitted).

297. IND. R. EVID. 701.

298. *Id.*

299. *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quoting ROBERT L. MILLER, JR., 13 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 701.105, at 318 (2d ed. 1995)).

300. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

301. *Id.* at 1278 (citation omitted).

detector] was error.³⁰²

Yet the Indiana Court of Appeals also found the error to be harmless and affirmed Tolliver's conviction.³⁰³

In *Romo v. State*,³⁰⁴ the Indiana Court of Appeals held that the trial court did not err in admitting a police detective's opinion testimony regarding narcotics trafficking. The court rejected the defendant's assertion that the State failed to establish a proper foundation for the detective's testimony as a skilled witness or as an expert witness.³⁰⁵ To the contrary, the detective satisfied the requirements of Rule 701 in that his testimony was "rationally based" on his general experience and training and experience as a police officer and member of the drug task force and because "he possesse[d] knowledge beyond that of the average juror with regard to the dealing of narcotics."³⁰⁶

C. Reliability of Scientific Principles Underlying Opinion—Rule 702(b)

Under Rule 702(b), expert scientific testimony is admissible where the court is satisfied that the scientific principles underlying the testimony are reliable.³⁰⁷ In *Spaulding v. Harris*,³⁰⁸ prior to trial, the estate of deceased plaintiff Spaulding had obtained an opinion from an Indiana Department of Insurance medical review panel under the Indiana Medical Malpractice Act.³⁰⁹ Pursuant to Indiana Code section 34-18-10-23 and Rule 702, a doctor on the panel testified as an expert for Spaulding. The trial court excluded portions of the doctor's testimony based upon a medical article that she had reviewed.³¹⁰ The court noted that

[a]n expert witness can draw upon all sources of information coming to his knowledge or through the results of his investigation in order to reach a conclusion. An expert may rely on hearsay when she uses other experts and authoritative sources of information like treatises to aid her in rendering an opinion.³¹¹

As a result, the Indiana Court of Appeals held that the trial court erred when it excluded this evidence. Nevertheless, the court held the trial court's error to be harmless because the excluded testimony was cumulative.³¹² The court ultimately affirmed the trial court's entry of judgment on the verdict in favor of the

302. *Id.* at 1279.

303. *Id.* at 1286.

304. 929 N.E.2d 805 (Ind. Ct. App. 2010), *aff'd*, 941 N.E.2d 504 (Ind. 2011).

305. *Id.* at 812.

306. *Id.*

307. IND. R. EVID. 702(b).

308. 914 N.E.2d 820 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

309. *Id.* at 825, 828.

310. *Id.* at 825.

311. *Id.* at 829 (citations omitted).

312. *Id.* at 829-30.

defendants in this case.³¹³

*Bennett v. Richmond*³¹⁴ addressed the extent to which a psychologist is qualified to present expert testimony regarding the medical cause of a brain injury. In 2004, plaintiff Richmond suffered neck and back injuries when defendant Bennett rear-ended the plaintiff's van.³¹⁵ Later the same year, the plaintiff suffered a work injury that exacerbated the injuries he sustained in the accident with Bennett. After his 2006 neuropsychological examination of the plaintiff, Dr. McCabe, a psychologist, concluded that Richmond suffered from a traumatic brain injury and that the injury had resulted from Richmond's accident with Bennett.³¹⁶ Over the defendant's objection that Dr. McCabe failed to qualify as competent to testify as to medical diagnosis, the trial court allowed Dr. McCabe's testimony as to the existence and medical causation of Richmond's alleged brain injury. Specifically, the trial court cited Rule 702(b), which provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."³¹⁷ The trial court found that McCabe's lack of a medical degree "in itself . . . [did] not undermine the scientific principles upon which McCabe might offer an opinion" and that the plaintiff had "presented a good case that McCabe's testimony could be based upon sound scientific principles and aid the trier of fact in assessing the case."³¹⁸

The court of appeals disagreed. While it refused to issue a blanket rule that psychologists stand as unqualified to offer testimony as to the etiology of brain injuries, it noted that there was no evidence that Dr. McCabe had the requisite education or training to make such determinations.³¹⁹ Although Dr. McCabe appeared qualified to testify that Richmond had "sustained a brain injury from an unknown cause . . . Dr. McCabe's testimony went too far in identifying the May 2004 accident as the cause of Richmond's alleged brain injury."³²⁰ Moreover, "even if Dr. McCabe were qualified to give causation testimony in this case, his testimony was lacking in probative value" because it failed to explain how the impact of the particular accident "might have resulted in Richmond's brain damage."³²¹ Instead, McCabe based his conclusion regarding causation on an inferential analysis—namely, that Richmond's symptoms of brain injury arose after the accident. Thus, his opinion was not the proper subject of expert testimony. And because there was no admissible evidence establishing the

313. *Id.* at 833.

314. 932 N.E.2d 704 (Ind. Ct. App. 2010), *trans. granted, opinion vacated*. The Indiana Supreme Court has granted transfer; therefore, the court of appeals' decision has been vacated. The supreme court's ruling is forthcoming.

315. *Id.* at 706.

316. *Id.* at 706-07.

317. *Id.* at 707 (citing IND. R. EVID. 702).

318. *Id.* at 708.

319. *Id.* at 710 n.3.

320. *Id.* at 710.

321. *Id.* at 711.

accident as the cause of the plaintiff's injury, the remainder of McCabe's testimony was irrelevant under Rule 402.³²² Finally, the admission of McCabe's testimony establishing causation was not harmless error and thus warranted reversal.³²³

Similarly, in *Nasser v. St. Vincent Hospital & Health Services*,³²⁴ the Indiana Court of Appeals held that summary judgment for the defendant on the plaintiff's medical malpractice claim was warranted, as the only evidence the plaintiff designated on the issue of causation was the affidavit of Margaret Busacca, a registered nurse.³²⁵ Bussaca served on the medical review panel charged with evaluating Nasser's proposed complaint; she was the lone member of the panel to find that the defendant "failed to meet the applicable standard of care."³²⁶

In determining whether Bussaca's affidavit created a genuine issue of material fact on the issue of causation, the court looked closely at the Indiana Medical Malpractice Act, which provides for the establishment of medical review panels to review proposed medical malpractice complaints.³²⁷ Under the Act, "[a] medical review panel consists of one (1) attorney and three (3) health care providers"—including physicians, dentists, registered nurses, licensed practical nurses, physician assistants, mid-wives, psychologists, and chiropractors, among other professionals.³²⁸ The panel's "sole duty" is to provide an "expert" opinion on "whether the evidence supports the conclusion that the defendant(s) acted or failed to act within the appropriate standard(s) of care as charged in the . . . [proposed] complaint."³²⁹

The court noted that under its 1998 decision in *Long v. Methodist Hospital of Indiana, Inc.*,³³⁰ to which the trial court paid great deference in granting summary judgment to defendants, nurses "are not qualified to offer expert testimony as to the medical cause of injuries."³³¹

Though the *Long* court did not base its holding on Rule 702 explicitly, its holding implied that nurses fail to satisfy the requirements of Rule 702(a)—specifically, that expert witnesses are qualified by "*knowledge, skill, experience, training, or education*"³³²—to offer specialized testimony. The court then resolved the conflict between Rule 702 (and the *Long* decision) and Indiana Code section 34-18-10-23, under which the opinion of a nurse who serves on a medical review panel and offers a minority opinion is sufficient to create a

322. *Id.* at 711-12.

323. *Id.* at 712.

324. 926 N.E.2d 43 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010).

325. *Id.* at 48.

326. *Id.* at 46.

327. *Id.* at 49.

328. IND. CODE §§ 34-18-10-3 (2011); *see also id.* § 34-18-2-14(1).

329. *Nasser*, 926 N.E.2d at 43 (citing IND. CODE § 34-18-10-22(a)).

330. 699 N.E.2d 1164 (Ind. Ct. App. 1998).

331. *Nasser*, 926 N.E.2d at 46, 50-52 (citing *Long*, 699 N.E.2d at 1169).

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

genuine issue of material fact on summary judgment.³³³ It explained that “[w]hen there is a conflict between a statute and a rule of evidence, the rule of evidence prevails.”³³⁴ Thus, in the case at bar, the trial court was correct in granting summary judgment, as the plaintiff designated no evidence other than Busacca’s affidavit on the issue of causation.

A different Indiana Court of Appeals panel reached a similar holding in *Clarian Health Partners, Inc. v. Wagler*,³³⁵ reversing the trial court’s decision to deny summary judgment to defendant Clarian. It held that a nurse’s affidavit was inadmissible as expert opinion on the issue of causation.³³⁶ The court found no conflict between its holding in *Long*—that nurses lack the requisite qualifications to provide expert opinions on the issue of medical causation—and its holding in *Harlett v. St. Vincent Hospitals & Health Services*,³³⁷ where it concluded that “*Long* could not be *expanded* to the issue of whether a nurse could be a member of a medical review panel.”³³⁸

E. Rule 702(b) Challenges in the Midst of Trial

In *Wilkes v. State*,³³⁹ Wilkes appealed his conviction of a triple murder and the death sentence imposed as the penalty for said crimes asserting in part that the trial erred when it admitted phenolphthalein test results—“a stain from Wilkes’s shoe . . . tested ‘presumptive’ for blood using a phenolphthalein test”—asserting that “the State did not lay a foundation explaining the test’s reliability.”³⁴⁰ Rule 702(b), governing “the admissibility of expert scientific testimony . . . provides that expert scientific testimony is admissible only if ‘the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.’”³⁴¹ The Indiana Supreme Court held that the trial court did not abuse its discretion in admitting this evidence because Wilkes’s argument that the stain was not definitively identified as blood was meritless, stating:

Whether . . . [the stain] was from blood or another source, [the victim] . . . died from over twenty blows that left not only her blood but also other tissue on a weapon found at this horrific scene. Second, and equally important, to the extent there was any significance to whether the stain was blood rather than some other biological material bearing . . . [the victim’s] DNA, the State’s witness explained that the test was only presumptive and required confirmation to establish conclusively that the

333. See IND. CODE § 34-18-10-23.

334. *Nasser*, 926 N.E.2d at 52 (citing *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996)).

335. 925 N.E.2d 388 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010).

336. *Id.* at 398-99.

337. 748 N.E.2d 921 (Ind. Ct. App. 2001).

338. *Id.*

339. 917 N.E.2d 675 (Ind. 2009), *reh’g denied*, *cert. denied*, 131 S. Ct. 414 (2010).

340. *Id.* at 685.

341. *Id.* (quoting *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003) (stating that reliability of a test may be established by judicial notice or by a sufficient foundation to establish reliability)).

stain was in fact blood.³⁴²

Accordingly, affirming Wilkes's conviction and death sentence, the Indiana Supreme Court held that the trial court properly admitted this evidence.³⁴³

In *Lees Inns of America, Inc. v. William R. Lee Irrevocable Trust*,³⁴⁴ after minority shareholders dissented to a merger in which they were bought out, the corporation filed a petition for determination of fair value. The minority shareholders counterclaimed for breach of fiduciary duty and fraud, and after the trial court entered judgment in their favor, cross-appeals ensued.³⁴⁵ The Indiana Court of Appeals affirmed the judgment entered by the trial court, holding in part that Lees Inns failed to preserve for appeal the trial court's ruling on the admissibility of the minority shareholders' experts' opinion in accordance with Rule 702(b).³⁴⁶ Lees Inns failed to object to the admissibility of the testimony and "extensively cross-examined the expert witnesses about . . . [their expert] report at trial"; therefore, "Lees Inns . . . [was] precluded from asserting for the first time on appeal that the trial court should have disregarded the report and expert testimony on the basis that the . . . [experts'] appraisal was merely speculative."³⁴⁷

In *Bond v. State*,³⁴⁸ the defendant challenged his conviction for car theft and altering a vehicle's original identification number on several bases, including that the trial court erred in admitting expert testimony regarding the presence of the defendant's fingerprints on the vehicle in question. The defendant did not attack the expert's qualifications or assert that the fingerprint identification method she used—"Analyze, Compare, Evaluate, and Verify (ACE-V)"—did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁴⁹ Instead, he claimed that police failed to follow the ACE-V method and that the State failed to present the testimony of the verifying print examiner. The State presented the testimony of the technician ("Frick") who found the defendant's prints in the car and the examiner ("Klosinski") who determined that the prints were the defendant's, thereby violating his confrontation rights. As to the Rule 702 issue, whether the method was followed, the court of appeals found that the issue was a preliminary question for the trial court under Rule 104(a), and therefore, Klosinski's testimony regarding the steps involved in ACE-V and her adherence to them stood sufficient to render her opinion on the defendant's prints admissible.³⁵⁰ The court also held that the Confrontation Clause did not demand

342. *Id.* at 686.

343. *Id.*

344. 924 N.E.2d 143 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).

345. *Id.* at 147-48.

346. *Id.* at 155 (citing *Franciose v. Jones*, 907 N.E.2d 139, 145 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009)).

347. *Id.*

348. 925 N.E.2d 773 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 823 (Ind. 2010).

349. *Id.* at 778 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

350. *Id.* at 780-81.

that the “verifier” who analyzed the defendant’s latent prints be called to testify.³⁵¹

F. Opinions as to Legal Conclusions—Rule 704

In *Wilkes v. State*,³⁵² the Indiana Supreme Court held that the trial court erred under Rule 704(b) when it allowed a police officer to testify at trial regarding his opinion as to Wilkes’s guilt for the triple murder at issue in this case. Yet the Indiana Supreme Court found the error to be harmless in light of the forensic evidence and confessions supporting Wilkes’s guilt.³⁵³

VIII. HEARSAY (RULES 801-806)

A. Out-of-Court Statements Generally—Rule 801

In *Treadway v. State*,³⁵⁴ the Indiana Supreme Court held that the trial court had properly overruled the defendant’s hearsay objection to its admission of portions of a transcript of the defendant speaking to police in Minnesota while he was under arrest for a separate crime.³⁵⁵ Specifically, the defendant objected to the fact that the transcribed statement was admitted without the redaction of questions asked by one of the Minnesota police officers whom interviewed him. The court noted that the officer’s questions were made to elicit a response from the defendant and were not offered for the truth of the matter asserted; thus, they fell outside the definition of hearsay provided by Rule 801(c).³⁵⁶ Similarly, in *Williams v. State*,³⁵⁷ in which the defendant challenged his conviction for a variety of drug crimes on Confrontation Clause grounds, the Indiana Court of Appeals held that recorded statements made by a confidential informant as part of a conversation with the defendant did not constitute hearsay, as they were offered to provide context, not for the truth of the matter asserted.³⁵⁸

In *Diaz v. State*,³⁵⁹ during a post-conviction evidentiary hearing, defendant Diaz presented the expert testimony of Christina Courtright, an interpreter for the Indiana courts, to demonstrate that the interpreting during Diaz’s guilty plea hearing was flawed.³⁶⁰ Courtright intended to use a chart comparing what the court had said during Diaz’s hearing and the English equivalent of what the interpreter said in Spanish. The post-conviction court sustained the State’s

351. *Id.* at 781.

352. 917 N.E.2d 675 (Ind. 2009), *reh’g denied, cert. denied*, 131 S. Ct. 414 (2010).

353. *Id.* at 686.

354. 924 N.E.2d 621 (Ind. 2010).

355. *Id.* at 635-36.

356. *Id.*

357. 930 N.E.2d 602 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

358. *Id.* at 608.

359. 934 N.E.2d 1089 (Ind. 2010).

360. *Id.* at 1093-94.

hearsay objection to the chart, and the Indiana Court of Appeals affirmed.³⁶¹ The Indiana Supreme Court, however, held that the post-conviction court erred in excluding Courtright's chart, which was a demonstrative exhibit, not hearsay, and remanded to the trial court for a determination of whether Diaz's plea was voluntary.³⁶²

B. Indiana's Protected Person Statute³⁶³ and Rule 802

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

C. Prior Consistent Statements—Rule 801(d)(1)(B)

Ordinarily, an out-of-court statement offered for the truth of the matter asserted would qualify as inadmissible hearsay under Rule 801(c). Rule 801(d)(1)(B), however, provides an exception from this general rule where

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose.³⁶⁴

In *Lovitt v. State*,³⁶⁵ Lovitt appealed his felony convictions of maintaining a common nuisance, possession of marijuana, possession of paraphernalia, and operating a vehicle while intoxicated, asserting in part that the trial court abused its discretion when it excluded a witness's testimony at trial. Lovitt proffered the following testimony, which the trial court excluded:

Lovitt's girlfriend[] was a passenger in Lovitt's vehicle during the . . . [traffic stop that led to Lovitt's arrest]. At trial, both Lovitt and . . . [his girlfriend] testified that Officer Smith initiated the traffic stop immediately after Lovitt passed the officer's vehicle, and the officer could not have observed any erratic driving behavior or traffic violations. Over the State's objection, Lovitt offered the testimony of . . . [Crouch], who would have testified that . . . [his girlfriend] told her that Officer Smith pulled Lovitt's vehicle over immediately after Lovitt passed the officer.³⁶⁶

Lovitt offered Crouch's testimony to bolster his girlfriend's testimony concerning the events that led to his arrest. Relying on Rule 801(d)(1)(B), "Lovitt claim[ed] that '[n]ot allowing Crouch's testimony bolstered the State's case, leading the

361. *Id.* at 1093.

362. *Id.* at 1094.

363. IND. CODE § 35-37-4-6 (2011).

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

365. 915 N.E.2d 1040 (Ind. Ct. App. 2009).

366. *Id.* at 1042 (internal citation omitted).

jury to believe [Officer] Smith over . . . [his girlfriend], and caused prejudice to Lovitt.”³⁶⁷ The Indiana Court of Appeals ultimately decided that it could not

conclude that it [was] likely that Crouch’s testimony would have led the jury to find Lovitt’s and . . . [his girlfriend’s] version of events credible. Furthermore, Lovitt admits that he cannot deny “that because of the damaging statements that Lovitt chose to make against himself, that many of the counts would result in a guilty finding.” Even if the jury believed Lovitt and . . . [his girlfriend], the evidence was still sufficient to convict Lovitt of possession of marijuana, possession of paraphernalia, and operating while intoxicated. Therefore, any error in the exclusion of Crouch’s testimony was harmless.³⁶⁸

D. Excited Utterance—Rule 803(2)

In *Boatner v. State*,³⁶⁹ the defendant asserted that the trial court had erred in admitting an officer’s hearsay testimony. The officer testified that the defendant’s girlfriend, “A.J.,” told him that Boatner had pushed her down and hit her.³⁷⁰ The trial court overruled Boatner’s objection, finding the statement admissible under the “excited utterance” exception contained in Rule 803(2). The court of appeals noted that under existing precedent, three conditions were required for a hearsay statement to fall within the purview of Rule 803(2): “(1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3), the statement relates to the event.”³⁷¹ Although the court noted that the closer in time the statement is made to the startling event, the more likely it is to be considered an excited utterance for Rule 803(2) purposes, the temporal relationship between the two is not necessarily dispositive.³⁷² In the present case, even though the record did not reveal the precise amount of time that elapsed between the alleged battery and A.J.’s statement to the officer, the facts and circumstances (A.J. was crying and disoriented when she told the officer about the battery) indicated that she was still under the stress of the incident when she made her statement to the officer. Thus, the trial court did not abuse its discretion in admitting the statement.³⁷³

367. *Id.* at 1043 (citation omitted).

368. *Id.* at 1044 (internal citation omitted).

369. 934 N.E.2d 184 (Ind. Ct. App. 2010).

370. *Id.* at 185.

371. *Id.* at 186 (citing *Jones v. State*, 800 N.E.2d 624, 627-28 (Ind. Ct. App. 2003)).

372. *Id.* at 186-87 (citing *Jones*, 800 N.E.2d at 627-28).

373. *Id.* at 187.

E. Statement Made for Purpose of Medical Diagnosis or Treatment—Rule 803(4)

In *Sibbing v. Cave*,³⁷⁴ Sibbing appealed the verdict for Cave in this automobile rear-end collision personal injury case, asserting that the trial court erred, at least in part, when it permitted the plaintiff to testify about what she was told by her treating physician and her own beliefs about the cause of her pain. Sibbing claimed that the same did not qualify as an exception to the hearsay rule under Rule 803(4) “since the statements at issue were made by Dr. Saquib to Cave and not by Cave to Dr. Saquib for purposes of receiving a diagnosis or treatment.”³⁷⁵ Rule 803(4) states:

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.³⁷⁶

The Indiana Supreme Court, disapproving of the Indiana Court of Appeals’s holding in *Coffey v. Coffey*,³⁷⁷ held that the trial court erred when it admitted Sibbing’s hearsay testimony, noting that:

[it did not comport with t]he rationale for the [Rule] 803(4) hearsay exception[, which] is that a declarant has a personal interest in obtaining a medical diagnosis and treatment, and this interest motivates the patient to provide truthful information. Stated another way, a patient’s personal interest in receiving medical treatment supplies significant indicia of reliability that the patient’s statements are true, thus reducing the need for exclusion of hearsay evidence not subject to cross-examination. Declarations made by a physician or other health care provider to a patient do not share this enhanced indicia of reliability. . . . While Rule 803(4) does not expressly identify which declarants’ medical statements are intended to be treated as a hearsay rule exception, we hold that the Rule is intended and should apply only to statements made by persons who are seeking medical diagnosis or treatment.”³⁷⁸

374. 922 N.E.2d 594 (Ind. 2010).

375. *Id.* at 597 (citation omitted). The Indiana Supreme Court also held that Sibbing’s opinion testimony about the source of her pain merely stated “her own personal belief about the source of her pain . . . [which] was permissible as testimony by a lay witness pursuant to . . . [Rule] 701.” *Id.* at 599.

376. IND. R. EVID. 803(4).

377. 649 N.E.2d 1074 (Ind. Ct. App. 1995).

378. *Sibbing*, 922 N.E.2d at 598 (citing *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996)).

Regardless of the error in admitting this evidence, the court found the error to be harmless and not a basis for reversal of the jury's verdict.³⁷⁹

F. Business Records—Rule 803(6)

Records of regularly conducted business activities may be authenticated through the use of an affidavit from an appropriate person, rather than by a witness's in-court testimony, through the combination of Rule 803(6) and Rules 902(9) or 902(10). Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

G. Public Records and Reports—Rule 803(8)

Fowler v. State involved Stacey Fowler's appeal of her conviction for Class B misdemeanor battery on the ground that the trial court erred in admitting her husband's booking card from a previous, unrelated arrest.³⁸⁰ The State alleged that Stacey committed battery against her husband, Ricky Fowler, in the presence of two police officers. Ricky did not appear at Stacey's trial, and the State admitted Ricky's booking card to help establish Ricky's identity as the victim. Stacey objected to the admission of the booking card on the grounds that it constituted inadmissible hearsay under Rule 801(c) and that it violated her constitutional right to confrontation.³⁸¹

The Indiana Court of Appeals disagreed that the booking card constituted inadmissible hearsay. It found that the card fell within the hearsay exception for public records, Rule 803(8).³⁸² The court quoted the text of the rule, which does not provide an exception for, among other documents, "investigative reports by police and other law enforcement personnel, except when offered by the accused in a criminal case . . ."³⁸³ The court explained that this aspect of the Rule does not "bar admission of police records pertaining to 'routine, ministerial, objective nonevaluative matters made in non-adversarial settings.'"³⁸⁴ More specifically, the court noted that other courts have held that routine police booking records fall within the ambit of the public records exception.³⁸⁵ As the court detailed, courts and commentators distinguish between investigative police reports, which are less reliable than other public records because of the "adversarial" relationship

379. *Id.* at 599.

380. *Fowler v. State*, 929 N.E.2d 875, 877 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010).

381. *Id.*

382. *Id.* at 879.

383. *Id.* at 878 (quoting IND. R. EVID. 803(8)).

384. *Id.* at 879 (quoting MICHAEL H. GRAHAM, 30B FEDERAL PRACTICE & PROCEDURE § 7049 (interim ed. 2006)).

385. *Id.* (citing *United States v. Dowdell*, 595 F.3d 50, 70-72 (1st Cir. 2010); *United States v. Koontz*, 143 F.3d 408, 411-13 (8th Cir. 1998)).

between the police and the accused, and booking records, for which there is little motivation other than to “mechanically register an unambiguous factual matter.”³⁸⁶

With respect to the booking information at issue in the case at bar, the court noted that the “information on the printout was obtained and recorded in the course of a ministerial, nonevaluative booking process.”³⁸⁷ Thus, it did not raise the same concerns as a police investigative report, and its admission was properly within the exception created by Rule 803(8).

H. Defining Unavailability—Rule 804(a)(3)

In *McGaha v. State*,³⁸⁸ the defendant, convicted of murdering a friend with whom he had been involved in a drug deal, argued that the trial court denied him his confrontation rights under the Indiana and United States Constitutions by admitting the deposition testimony of a medical examiner who was not present to testify at trial. The State conceded that the medical examiner was not “unavailable” under Rule 804(a)(5).³⁸⁹ The examiner was out of state attending his child’s graduation from college. Though the court concluded that this did not render the medical examiner unavailable for Confrontation Clause purposes, the State did not subpoena the medical examiner or attempt to continue the trial date; rather, it found the error harmless in light of the other evidence against McGaha.³⁹⁰

I. Dying Declaration—Rule 804(b)(2)

In *Wright v. State*,³⁹¹ the Indiana Court of Appeals examined the dying declaration exception to the hearsay rule in its review of Wright’s conviction of three counts of murder.³⁹² Wright appealed his conviction, asserting in part that the trial court erred when it allowed the introduction into evidence of one of his victim’s statements identifying him as his assailant via the dying declaration exception; he claimed that it violated his Sixth Amendment right to confrontation under *Crawford v. Washington*.³⁹³ R.A., one of Wright’s victims, dragged himself across the street to seek assistance after having been stabbed by Wright sixteen times. As he lay dying on his neighbor’s doorstep, R.A. indicated to the police that Wright had stabbed him.³⁹⁴ Pursuant to Rule 804(b), “[a]lthough generally inadmissible, hearsay is admissible under the ‘dying declaration’

386. *Id.* (quoting S. REP. No. 93-1277, at 17 (1974); *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985)).

387. *Id.*

388. 926 N.E.2d 1050 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

389. *Id.* at 1055-57.

390. *Id.* at 1057.

391. 916 N.E.2d 269 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

392. *Id.* at 272.

393. 541 U.S. 36 (2004).

394. *Wright*, 916 N.E.2d at 273.

exception if a declarant makes a statement ‘while believing that . . . [his] death was imminent, concerning the cause or circumstances of what . . . [he] believed to be impending death.’”³⁹⁵ The Indiana Court of Appeals affirmed Wright’s conviction and held that the trial court did not abuse its discretion when it found R.A.’s statement to be an admissible *in extremis* dying declaration. The court went on to state that even if R.A.’s statement was not a dying declaration, it did not “run afoul of . . . [Wright’s] Sixth Amendment right to confrontation” because R.A.’s statements were not testimonial.³⁹⁶

J. Admissions Against Interest—Rule 804(b)(3)

In *Tolliver v. State*,³⁹⁷ Tolliver asserted that the trial court committed reversible error when it allowed into evidence the victim’s statements to other witnesses identifying Tolliver as the shooter. The trial court allowed into evidence the following statements of the victim to his mother, father, and sister, respectively, as admissions against interest because, according to the court, the statements implied that the declarant (victim) would “take care of it,” i.e., “that he would act out in violence, either committing a battery or worse”.³⁹⁸

- Victim’s Mother: Victim identified Tolliver as the shooter and said he was “going to get” Tolliver.
- Victim’s Father: Victim “identified Tolliver as the shooter”—he did not make any accompanying statements to his father.
- Victim’s Sister: Victim identified Tolliver as the shooter and said he would “handle it [him]self.”³⁹⁹

Regarding the hearsay exception, the court noted:

Statements against interest are admissible if, at the time they were made, they tended to subject the declarant to criminal liability such that a reasonable person in the declarant’s position would not have made them if he did not believe in their truth. The State concedes that, as a general matter, to qualify under this hearsay exception, the statement against interest must be incriminating on its face.⁴⁰⁰

The Indiana Court of Appeals held that the trial court committed an abuse of discretion when it admitted the testimony because (1) the testimony did not implicate the victim in a crime and (2) even if it did implicate the victim in a crime, the implicating statements “merely *accompanied* the disputed identification’ statements. Under the plain language of Rule 804(b)(3), the identification statements themselves must have been against . . . [the victim’s]

395. *Id.* at 275 (quoting IND. R. EVID. 804(b)(2)).

396. *Id.* at 276.

397. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

398. *Id.* at 1279-80.

399. *Id.* (citations omitted).

400. *Id.* (internal citations omitted).

interest in order to be admissible.”⁴⁰¹ Yet the Indiana Court of Appeals also found the error to be harmless and affirmed Tolliver’s conviction.⁴⁰²

IX. AUTHENTICATION AND IDENTIFICATION (RULES 901-903)

In *Lee v. State*,⁴⁰³ Lee appealed his conviction of two counts of invasion of privacy, asserting that the trial court “abused its discretion by admitting hearsay evidence regarding the identity of the woman he was prohibited from contacting.”⁴⁰⁴ Over Lee’s objection, the trial court allowed Lee’s investigating officer to testify about the telephone conversation he had with the victim because the State argued that it “offer[ed] the evidence only to establish identity [of the victim].”⁴⁰⁵ Rule 901(a) provides that “[t]he requirement of . . . identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁴⁰⁶ Subsection 6 of Rule 901(b) provides an illustrative example of how to establish the condition precedent: “[t]elephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person . . . if . . . circumstances, including self-identification, show the person answering to be the one called”⁴⁰⁷ may suffice. The Indiana Court of Appeals held

that calling the number which initiated the 911 call and was shown by both the CAD system and the original police report as belonging to . . . [the victim] was the functional equivalent of establishing that it was the number assigned at the time by the telephone company to . . . [the victim]. . . . [The victim’s] response that she was . . . [the victim] and providing details concerning her four children and what had occurred with Lee satisfied the requirements of . . . [Rule] 901(b)(6) to establish her identity as being . . . [the victim].⁴⁰⁸

Moreover, Rule 901(b)(5) provides for the admission of “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker.”⁴⁰⁹ Thus, the Indiana Court of Appeals found it proper for the investigating officer “to testify on the basis of his familiarity with . . . [the victim’s] voice, that she was the person whom Lee

401. *Id.* at 1281.

402. *Id.* at 1286.

403. 916 N.E.2d 706 (Ind. Ct. App. 2009).

404. *Id.* at 706.

405. *Id.* at 707.

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

407. IND. R. EVID. 901(b)(6).

408. *Lee*, 916 N.E.2d at 707.

409. IND. R. EVID. 901(b)(5).

called and was speaking to from the jail."⁴¹⁰

X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
(RULES 1001-1008)

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

CONCLUSION

During the survey period, the Indiana appellate courts addressed a number of important evidentiary issues and continued to shape the rules of evidence in the State of Indiana. The fruits of these decisions will be invaluable in guiding practitioners over the coming year.

410. *Lee*, 916 N.E.2d at 707.