RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA*

INTRODUCTION

The Indiana Rules of Evidence ("Rules") went into effect in 1994. Each year since that time, court decisions and statutory changes have refined, defined, and changed the interpretation of most of these Rules in many minor and major ways. This year was no exception, with several clarifying or new interpretations of the existing language of the Rules.

This Article explains developments in Indiana evidence law during the period between October 1, 2006, and September 30, 2007. The discussion topics are arranged in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. In General

Rule 101(a) states that 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."[1] If the Rules do not "cover a specific evidence issue, common or statutory law shall apply."[2] This interaction of authorities leaves room for debate on some aspects of the Rules.

According to the Indiana Supreme Court, Rule 101(a) provides that any conflicting statute yields to the Rules.[3]

B. Rules Do Not Apply in Probation Proceedings

In *Carden v. State*,[4] Carden appealed the revocation of his probation, based in part on the lack of trustworthiness of the State's testimony.[5] Carden argued that the only evidence that he had violated the terms of his probation was testimony by his probation officer that the address of Carden's girlfriend was near a child care facility.[6]

Rule 101(c) states that the rules, "other than those with respect to privileges, do not apply in . . . [p]roceedings relating to . . . probation,"[7] and prior case law

---

* Chief of Staff/Chief Legal Counsel, Indiana State Senate. B.S., Rose-Hulman Institute of Technology; M.A., Ball State University; J.D., Indiana University School of Law—Indianapolis.

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

2. *Id.*

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

4. 873 N.E.2d 160 (Ind. Ct. App. 2007).

5. *Id.* at 161.

6. *Id.* at 162.

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

provides that "[t]here is no right to probation."[8] However, the court noted that "'[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing.'"[9] The court held that the probation officer's testimony did "not have a substantial . . . [degree] of trustworthiness."[10] The admission of this evidence at the probation hearing was found to have been "fundamental error," and "so prejudicial" that the court reversed the revocation of Carden's probation.[11]

C. Rules Do Not Apply in Sentencing Proceedings

In *Hines v. State*,[12] Hines argued that the court improperly enhanced his sentence by considering a statement Hines had made regarding uncharged molestation he had perpetrated on his own daughter.[13] Because this was uncharged conduct admitted during a pretrial psychosexual analysis, Hines claimed using this information to enhance his sentence violated Rule 404(b).[14]

Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[15] However, the court pointed out that Rule 101(c) states that the Rules do not apply in sentencing proceedings.[16] Thus, the court found it was not improper for the trial court to consider Hines's admission of uncharged molestation as an aggravating factor.[17]

D. Timeliness of Objections

In *Rich v. State*,[18] Rich objected at trial during the testimony of Detective Daniel.[19] Rich contended that police officers had stopped him without "reasonable suspicion . . . [of] criminal activity," and therefore the evidence should have been suppressed under the Fourth Amendment.[20] The trial court held that Rich waived this argument because he failed to raise the objection prior to the beginning of Deputy Gray's testimony.[21]

---

8. *Carden*, 873 N.E.2d at 163 (citing Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007)).
9. *Id.* (alteration in original) (quoting *Reyes*, 868 N.E.2d at 440).
10. *Id.* at 164.
11. *Id.* at 164-65; *accord* Lightcap v. State, 863 N.E.2d 907, 910 (Ind. Ct. App. 2007) (holding that the court need not determine applicability of Rule 804(b)(1) because the matter in question was a probation proceeding and the normal rules against hearsay did not apply).
12. 856 N.E.2d 1275 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).
13. *Id.* at 1278 n.2.
14. *Id.* at 1281.
15. IND. R. EVID. 404(b).
16. *Hines*, 856 N.E.2d at 1281 (citing IND. R. EVID. 101(c)).
17. *Id.*
18. 864 N.E.2d 1130 (Ind. Ct. App. 2007).
19. *Id.* at 1131.
20. *Id.* at 1132.
21. *Id.*

The court disagreed with this interpretation.[22] It noted that Rule 103(a)(1) provides that a party must make "'a timely objection . . . , stating the specific ground of objection,'"[23] and that an objection is normally considered timely if it is given prior to the answer being given.[24] Because "Rich objected before Deputy Gray testified about the elements of the crime charged," the objection was timely.[25] The court could find no supporting authority for the State's contention that an objection is untimely "just because a witness has begun testifying,"[26] and held that the remainder of the Deputy's testimony should be suppressed under Rich's Fourth Amendment argument.[27]

E. Formal Offer of Proof

In *Catt v. Skeans*,[28] Catt was asked by his attorney on direct examination about his educational background.[29] The trial court sustained an objection by Skeans to this line of questioning after Catt's attorney stated that he anticipated Skeans would ask for a substantial verdict.[30] Catt's attorney continued the direct examination of Catt without making a formal offer of proof regarding Catt's finances.[31]

On appeal, Catt contended a formal offer of proof was not necessary because the content of his attempted testimony was obvious "from the context of the question."[32] The court noted that the only relevant question in the record was one inquiring about Catt's educational background, which gives the court no indication of his financial status at the time of trial.[33] The court held that Catt had failed to make a formal offer of proof, and therefore waived this argument.[34]

---

22. *Id.*

23. *Id.* (omission in original) (quoting IND. R. EVID. 103(a)(1)).

24. *Id.* (citing Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995)).

25. *Id.*

26. *Id.*

27. *Id.* at 1133; *see also* Espinoza v. State, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006) (relying on IND. R. EVID. 103(a) to hold that an objection which is not specific enough does not preserve the issue upon appeal).

28. 867 N.E.2d 582 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

29. *Id.* at 586.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 586-87.

34. *Id.* at 587; *see also In re* Commitment of A.W.D., 861 N.E.2d 1260, 1263 n.2 (Ind. Ct. App.) (noting that failure to object at trial normally results in waiver of appeal under Rule 103(a), but examining the issue raised because it could have implicated A.W.D.'s "fundamental right to a fair trial"), *trans. denied*, 869 N.E.2d 460 (Ind. 2007).

F. Judicial Notice

In *Rosendaul v. State*,[35] Rosedaul claimed the trial court had abandoned its neutral role in the proceedings and gave him an unfair trial.[36] A letter claiming responsibility for a crime had been delivered to local law enforcement authorities, using a civilian style of dating.[37] At trial, Rosendaul claimed that since leaving the military, he never under any circumstances deviated from using the military style of dating.[38]

The trial court took judicial notice of the fact that Rosendaul had submitted letters and filings with the court that did not use the military style of dating.[39] On appeal, the court noted that Rule 201 allows a court to take judicial notice of a fact, whether or not requested by a party.[40] It also noted that a trial court can take judicial notice of facts in a current case, and those facts create a rebuttable presumption which the defendant must dispute.[41] Here, the court properly took notice of both Rosendaul's filings, as well as the style of dating he used.[42] The court also noted that Rule 614(b) states that the "court may interrogate witnesses, whether called by itself or by a party."[43]

II. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

In *Kelley v. Tanoos*,[44] Tanoos asked the supreme court to review a decision in which the Indiana Court of Appeals had decided that even though one of the required elements of defamation, damages, was missing, granting summary judgment in favor of Tanoos was proper.[45] In defamation actions, "damages are presumed and . . . even rebutted presumptions are given continuing effect."[46]

---

35. 864 N.E.2d 1110 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

36. *Id.* at 1115.

37. *Id.* at 1112.

38. *Id.*

39. *Id.* at 1116.

40. *Id.* (citing IND. R. EVID. 201).

41. *Id.*; *see also* City of Crown Point v. Misty Woods Props., LLC, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (noting that a court may take judicial notice of law under Rule 201(b), including "ordinances of municipalities"). Rule 201(b) states that "[a] court may take judicial notice of law. Law includes . . . codified ordinances of municipalities." IND. R. EVID. 201(b).

42. *Rosendaul*, 864 N.E.2d at 1116. Rule 201(c) states that a "court may take judicial notice, whether requested or not." IND. R. EVID. 201(c). Rule 201(a) states:

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

IND. R. EVID. 201(a).

43. *Id.* at 1115 (quoting IND. R. EVID. 614(b)).

44. 865 N.E.2d 593 (Ind. 2007).

45. *Id.* at 597.

46. *Id.* (citing IND. R. EVID. 301). Rule 301 states that "[a] presumption shall have continuing

III. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

A. Irrelevant Evidence

In *Schumm v. State*,[47] Schumm argued that the trial court had improperly allowed irrelevant evidence when it allowed the State to cross-examine Schumm regarding its allegation that Schumm had asked a Deputy Prosecutor how to make the matter "go away."[48]

Schumm argued that regardless if he made the statement, that information was irrelevant to deciding his case.[49] According to Rule 401, "[e]vidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence.'"[50] The court also noted that Rule 403 states that "'[e]vidence which is not relevant is not admissible.'"[51] The court agreed with Schumm that his statement made it no more or less probable that he operated his vehicle without a working taillight.[52]

In *Stowers v. Clinton Central School Corp.*,[53] Stowers argued an athletic release form that did not mention the word negligence should not have been admitted at trial because it was not relevant evidence under Rule 401.[54] The court held that even without the word negligence, the form was relevant to the issue of incurred risk, and therefore admissible.[55]

B. Probative Value Versus Unfair Prejudice

In *Baer v. State*,[56] Baer appealed his murder conviction in part based on his contention that the trial court had improperly admitted excerpts of two phone calls Baer made to his sister from jail.[57] Baer argued that the unfair prejudice of allowing the calls "outweighed the probative value," and therefore violated Rule

---

effect even though contrary evidence is received." IND. R. EVID. 301; *see also* Schultz v. Ford Motor Co., 857 N.E.2d 977, 986 (Ind. 2006) (holding that the Rule 301 "judicial exception" does not permit a court to make a decision contrary to Rule 301, and that to the extent previous cases "may be read to hold that it is improper to give a jury instruction regarding the statutory presumption after that presumption is rebutted, they are disapproved").

47. 866 N.E.2d 781 (Ind. Ct. App.), *aff'd on reh'g*, 868 N.E.2d 1202 (Ind. Ct. App. 2007).

48. *Id.* at 797-98.

49. *Id.* at 798.

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

51. *Id.* (quoting IND. R. EVID. 403).

52. *Id.* The court also noted that Rule 608(b) prohibits attacking the witness's credibility by inquiring into specific instances or using extrinsic evidence. *Id.* (citing IND. R. EVID. 608(b)).

53. 855 N.E.2d 739 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 454 (Ind. 2007).

54. *Id.* at 748.

55. *Id.* at 748-49.

56. 866 N.E.2d 752 (Ind. 2007), *cert. denied*, 128 S. Ct. 1869 (2008).

57. *Id.* at 761-62.

403,[58] which states that "'evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'"[59]

After noting that Baer had ample notice that such calls might be recorded by the authorities,[60] the court reiterated that the content of the calls included discussions of what fabrications Baer should present at his psychological examination to bolster his case that he was mentally ill.[61] Because the calls involved his efforts to create a case for the defense of guilty but mentally ill, the calls were highly probative and relevant.[62] They were also prejudicial, but not "unfairly prejudicial."[63] The court held that the high probative value of the calls was not outweighed by the resulting prejudice.[64]

In *Cox v. State*,[65] Cox argued that the trial court had violated Rules 403 and 404(b) when it allowed a witness to testify that Cox had lost physical custody of two children in the past.[66] Although Rule 404(b) provides generally that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith," this rule contains an exception allowing admissibility if used "for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[67]

The State's theory of the case had been that Cox murdered the victim in order to prevent him from gaining custody of a child she had with the victim.[68] Because the evidence was offered to prove motive, rather than action in conformity with past behavior, it did not violate Rule 404(b).[69] Furthermore, Cox's ex-husband had testified, without objection, on cross-examination that he had custody of the children.[70]

---

58. *Id.* at 763.

59. *Id.* (quoting IND. R. EVID. 403).

60. *Id.* at 762.

61. *Id.* at 763.

62. *Id.*

63. *Id.*

64. *Id.*; *see also* Dixson v. State, 865 N.E.2d 704 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007). In *Dixson*, the court held that testimony regarding the defendant's potential infidelity was at most harmless error in his murder trial. *Id.* at 710. Dixson's location on the night in question was relevant to the murder charge, and the probative value of this information was not clearly outweighed by the prejudicial nature of the evidence. *Id.*

65. 854 N.E.2d 1187 (Ind. Ct. App. 2006).

66. *Id.* at 1196.

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

68. *Cox*, 854 N.E.2d at 1197.

69. *Id.*

70. *Id.*

C. Use of Related Extrinsic Evidence

In *Matthews v. State*,[71] Matthews appealed based on his contention that the trial court had violated Rule 404(b) when it admitted testimony from two witnesses who each stated that Matthews had claimed to have killed the victim, advised the witness to keep quiet, and fired shots at their vehicle.[72] Matthews claimed this evidence should have been prohibited by Rule 404(b), which states that "'[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes.'"[73]

In order to determine whether such evidence was admissible under Rule 404(b), the court considered whether the evidence of other crimes, wrongs, or bad acts was relevant to an issue other than Matthews's propensity to commit the charged act. The court then balanced the probative value of the evidence against its prejudicial effect pursuant to [Rule] 403."[74] The court found that threats by the accused against prosecution witnesses are attempts to conceal or suppress relevant evidence, and therefore the threats in this case were properly admitted for a purpose other than merely to show Matthews's propensity to commit crime.[75]

In *McDowell v. State*,[76] McDowell appealed her conviction for manslaughter, claiming that recordings of phone messages she had left for the victim were evidence of unrelated prior bad acts and should have been excluded under Rule 404.[77] McDowell's defense at trial had been that she was afraid of the victim and he had abused her for years.[78]

On the recordings, however, McDowell repeatedly threatened the victim and seemed unafraid of him.[79] She also suggested in the recordings that the victim should adopt her daughter because he was a good father figure to her.[80] The court found that the tapes had probative value because they questioned the truth of McDowell's claims that the victim had abused her, and that the prejudicial effect of their admission did not outweigh this probative value.[81]

In *Burnside v. State*,[82] Burnside argued that the evidence showing that he was not licensed to carry the handgun with which he killed the victim was evidence of another crime, wrong, or act and should have been excluded under Rule

---

71. 866 N.E.2d 821 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

72. *Id.* at 824.

73. *Id.* (quoting IND. R. EVID. 404(b)).

74. *Id.* (citing Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003)).

75. *Id.* (citing Johnson v. State, 472 N.E.2d 892, 910 (Ind. 1985)).

76. 872 N.E.2d 689 (Ind. Ct. App. 2007), *trans. granted*, 878 N.E.2d 218 (Ind. 2007), *and vacated*, 885 N.E.2d 1260 (Ind. 2008).

77. *Id.* at 692-93.

78. *Id.* at 693.

79. *Id.*

80. *Id.*

81. *Id.*

82. 858 N.E.2d 232 (Ind. Ct. App. 2006).

404(b).[83] The court, however, pointed out that Rule 404(b) does not bar evidence of intrinsic uncharged criminal acts.[84] Because Burnside's use of an unlicensed handgun was an integral part of the charged offense, Rule 404(b) did not bar use of this evidence.[85]

D. Reverse 404(b) Evidence

In *Kien v. State*,[86] Kien challenged the judgment of a postconviction court, which had denied his request for postconviction relief.[87] Kien argued that the trial court had improperly excluded his offered evidence that his former girlfriend acted in vindictive ways against other former romantic interests.[88] Kien's theory was that his former girlfriend had conspired with her children to fabricate the child molesting charges against him.[89] The court noted that while 404(b) is normally used by defendants to exclude evidence of their own prior bad acts, prior bad acts of another party may be admitted under a "reverse 404(b)" if evidence of those acts tend to negate the guilt of the defendant and one of the 404(b) exceptions applies.[90]

In this case, Kien's former girlfriend was not the one who made the accusations of child molestation, and she did not testify at Kien's trial or postconviction relief hearing.[91] Even if one of the exceptions applied, the Rule 403 balancing test must still be applied.[92] The court noted that evidence of an extrinsic act that is too remote or unrelated may be rendered inadmissible by the 403 balancing test.[93] In this case, the court found that the prior acts of Kien's former girlfriend were too remote (more than ten years earlier) and too unrelated to survive the Rule 403 balancing test.[94]

E. Rule 608 Exception to Rule 404(a)

In *Beaty v. State*,[95] Beaty argued that he should have been allowed to introduce evidence at his trial for theft that another defendant, Hohler, had previously stolen from the same company.[96] The court held that Beaty was

---

83. *Id.* at 236.

84. *Id.* at 242 (citing Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997)).

85. *Id.*

86. 866 N.E.2d 377 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 207 (Ind. 2007).

87. *Id.* at 379.

88. *Id.* at 382.

89. *Id.*

90. *Id.*

91. *Id.* at 383.

92. *Id.*

93. *Id.* at 383-84 (citing 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 404.212 (2d ed. 1995)).

94. *Id.* at 384.

95. 856 N.E.2d 1264 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).

96. *Id.* at 1268.

simply trying to introduce this evidence in order to demonstrate that it was likely Hohler also committed this theft.[97] Rule 404(a) prohibits such evidence, "'except . . . [e]vidence of the character of a witness, as provided in Rules 607, 608 and 609.'"[98]

The court examined these exceptions to Rule 404(a) in turn.[99] Rule 607 simply states that any party may attack the credibility of a witness.[100] Rule 609 deals with impeachment of a witness by evidence the witness has been convicted of certain crimes, and there was no evidence that the accused prior conduct had resulted in convictions.[101]

Rule 608(a) allows attack upon the credibility of a witness in the form of an opinion or reputation, subject to certain limitations.[102] The proffered evidence in this case was not offered in the form of an opinion or reputation, and therefore Rule 608(a) did not provide any exception to the general prohibition of 404(a) against introducing evidence of prior bad acts.[103]

The court also examined whether the testimony should have been allowed under the Rule 608(b) exception to Rule 404(a).[104] Rule 608(b) holds that a witness's credibility may not be attacked by extrinsic evidence "other than conviction of a crime as provided in Rule 609," but may be examined in certain circumstances of cross-examination regarding the truthfulness of the witness being cross-examined.[105] Because Hohler did not testify regarding the truthfulness of another witness, the Rule 608(b) exception would also not apply.[106]

F. Mediation Confidentiality and Rule 408

In *Gast v. Hall*,[107] the plaintiffs argued that the trial court improperly refused

---

97. *Id.*

98. *Id.* (omission and alteration in original) (quoting IND. R. EVID. 404(a)).

99. *See id.* at 1268-69.

100. *Id.* at 1268 (citing IND. R. EVID. 607). Rule 607 states: "The credibility of a witness may be attacked by any party, including the party calling the witness." IND. R. EVID. 607.

101. *Beaty*, 856 N.E.2d at 1268 (citing IND. R. EVID. 609). Rule 609 states that for attacking the credibility of a witness, evidence of *conviction* of a "crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement." IND. R. EVID. 609(a).

102. *Beaty*, 856 N.E.2d at 1268 (citing IND. R. EVID. 608(a)).

103. *Id.* at 1269.

104. *Id.*

105. IND. R. EVID. 608(b). Rule 608(b) states that specific instances may be inquired into "on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." *Id.*

106. *Beaty*, 856 N.E.2d at 1269.

107. 858 N.E.2d 154 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

evidence of an affidavit.[108] The trial court based its exclusion of this evidence on Alternative Dispute Resolution Rule 2.11, which is in turn based on Rule 408.[109] The trial court had held that the prohibited portions of the affidavit would have violated the privilege of confidentiality of mediation if introduced.[110] Alternative Dispute Resolution Rule 2.11 states that "'[m]ediation shall be regarded as settlement negotiations as governed by Ind[iana] Evidence Rule 408.'"[111]

Rule 408 provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in . . . attempting to [settle] a claim," as well as conduct or statements made in compromise negotiations, are not admissible.[112] However, Rule 408 goes on to state that it does not require exclusion where "the evidence is offered for another purpose."[113] The court held that because the proffered evidence was to be used to prove the testamentary capacity of a witness for a later will contest, rather than the validity or invalidity of the claim in the first will contest, the evidence related to an entirely different claim, and "'Rule 408 did not bar this evidence because it related to settlement discussions that involved a different claim than the one at issue in the current trial.'"[114]

G. Admissibility of Pretrial Statement to Police Officers

In *Green v. State*,[115] Green argued that the trial court should have excluded evidence of his attempt to reach a deal with police officers on his punishment prior to Green being charged with any crime.[116] Green did make a deal with police officers and was the beneficiary of that bargain, but this was done prior to Green being charged.[117] Rule 410 provides that "[e]vidence of a plea of guilty or admission of the charge which was later withdrawn, . . . or of an offer so to plead to the crime charged or any other crime . . . is not admissible in any civil or criminal action."[118]

The court noted that while statements made by defendants during plea negotiations are generally inadmissible,[119] in order "to qualify as a privileged communication, a statement must meet two requirements: (1) the defendant must

---

108. *Id.* at 160.

109. *Id.* at 161.

110. *Id.*

111. *Id.* (quoting IND. R. A.D.R. 2.11).

112. IND. R. EVID. 408.

113. *Id.*

114. *Gast*, 858 N.E.2d at 161-62 (quoting Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183, 1194 (10th Cir. 1992)).

115. 870 N.E.2d 560 (Ind. Ct. App.), *opinion vacated*, 878 N.E.2d 215 (Ind.), *and order vacated*, 877 N.E.2d 467 (Ind. 2007).

116. *Id.* at 565.

117. *Id.* at 566.

118. IND. R. EVID. 410.

119. *Green*, 870 N.E.2d at 565 (citing Chase v. State, 528 N.E.2d 784, 786 (Ind. 1988)).

have been charged with a crime at the time of the statement, and (2) the statement must have been made to someone with authority to enter into a binding plea agreement."[120] Green's statement was not privileged because he had not yet been charged with a crime, and therefore was not engaged in plea negotiations.[121]

H. Rape Shield Issues

In *McVey v. State*,[122] McVey challenged his child molestation conviction, in part because the trial court had excluded the victim's prior sexual history with another man and therefore violated McVey's Sixth Amendment rights.[123] Rule 412 prohibits introduction of the victim's past sexual conduct, with a few narrow exceptions: "'[E]vidence of the victim's or of a witness's past sexual conduct with the defendant'" or evidence that someone other than the defendant committed the charged act.[124]

In order to show a violation of the Sixth Amendment, a defendant must show he was prohibited from "otherwise appropriate cross-examination."[125] While Rule 412 allows for evidence of the victim's or witness's past sexual conduct to show someone other than the defendant committed the charged acts, the evidence McVey sought to offer did not meet this requirement.[126] McVey had been accused of molesting the victim between 1998 and 2001.[127] The victim had a physical exam in February 2002, which led to McVey's convictions.[128] The evidence of the victim's sexual contact with a third party which McVey sought to introduce regarded occurrences in June 2002, well after the physical exam and McVey's alleged molestation of the victim.[129] Therefore, the proffered evidence would not have had a bearing on the physical exam or occurrences for which McVey was convicted.[130]

In *In re D.H.*,[131] a mother challenged the determination by the trial court that her children were Children in Need of Services ("CHINS").[132] At trial, several pieces of potential evidence had been barred from exploration under Rule 412's prohibition on evidence regarding the victim's past sexual history.[133]

On appeal, the court noted that the Rape Shield Statute and Rule 412 both

---

120. *Id.* at 565-66 (citing Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995)).
121. *Id.* at 566.
122. 863 N.E.2d 434 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).
123. *Id.* at 443.
124. *Id.* (quoting IND. R. EVID. 412).
125. *Id.* (citing Davis v. State, 749 N.E.2d 552, 554 (Ind. Ct. App. 2001)).
126. *Id.* at 445.
127. *Id.* at 444.
128. *Id.*
129. *Id.*
130. *Id.*
131. 859 N.E.2d 737 (Ind. Ct. App. 2007).
132. *Id.* at 738.
133. *Id.* at 740-41.

"expressly appl[y] to prosecutions for sex crimes."[134] The court noted that previous authority held that criminal proceedings and parental termination proceedings are very different in nature and one is based upon guilt or innocence, while the other is based upon the best interests of the child.[135] The trial court abused its discretion in excluding this evidence, but the error was found to be harmless.[136]

I. Proof of Medical Expenses

In *Wolfe v. Estate of Custer*,[137] Wolfe claimed that the evidence against him was insufficient to support the judgment because the plaintiffs did not present evidence showing the medical expenses in question were necessary.[138] Rule 413 states that "'[s]tatements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable.'"[139]

In this case, a summary of medical expenses had been admitted into evidence.[140] Rule 413 generates some presumption that the expenses were reasonable, normal, and necessary.[141] If a party opposes this data, he or she may offer evidence to the contrary, including expert testimony.[142] Wolfe did not present any evidence in opposition to the medical summary, and therefore the evidence was not insufficient to support the verdict against Wolfe.[143]

J. Admission of Observed Driving Prior to Reckless Homicide Accident

In *Wages v. State*,[144] the court examined whether a defendant's erratic driving immediately preceding an accident can be considered when deciding whether the defendant's driving was reckless or merely negligent.[145] The court determined that the defendant's final maneuver does not necessarily have to be considered in complete isolation.[146] The court further stated that Rule 404(b) permits the

---

134. *Id.* at 741 (citing IND. CODE § 35-37-4-4 (2004); IND. R. EVID. 412).

135. *Id.* (citing *In re* J.Q., 836 N.E.2d 961, 964 n.1 (Ind. Ct. App. 2005)).

136. *Id.*

137. 867 N.E.2d 589 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

138. *Id.* at 595.

139. *Id.* at 600 (quoting IND. R. EVID. 413).

140. *Id.*

141. *See* IND. R. EVID. 413 ("Such statements shall constitute prima facie evidence that the charges are reasonable.").

142. *Wolfe*, 867 N.E.2d at 600 (citing Cook v. Whitsell-Sherman, 796 N.E.2d 271, 277-78 (Ind. 2003)).

143. *Id.* at 601.

144. 863 N.E.2d 408 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

145. *Id.* at 409.

146. *Id.* at 411.

admission of such evidence in reckless homicide prosecutions.[147]

IV. IMPEACHMENT

A. Use of Document to Refresh Memory

In *Gault v. State*,[148] Gault appealed his conviction in part because his defense counsel had not been allowed to review a police report used by a testifying officer to refresh his recollection during cross examination.[149] Defense counsel had asked for, and been denied, a few minutes to review the report.[150] The court agreed with the State that the document was not discoverable, and therefore Gault had no right to review it.[151]

On appeal, Gault argued that he should have been allowed to review the document based on Rule 612.[152] Rule 612 states that if "a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying."[153] The Rule goes on to say that a party entitled to such production is also "entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."[154]

Gault argued that because the police officer was serving as the State's witness, Gault was the adverse party and therefore should have been entitled to inspect the report.[155] The court disagreed, holding that because this was cross-examination, the State was an adverse party.[156] Because Gault was not adverse for purposes of Rule 612, he had no right to review the document.[157]

The most recent development, a ruling by the Indiana Supreme Court handed down outside this survey period, however, held otherwise.[158] In its opinion the court held that Gault *was* an adverse party and should have been allowed to see the report.[159]

---

147. *Id.*

148. 861 N.E.2d 728 (Ind. Ct. App. 2007), *trans. granted*, 869 N.E.2d 457 (Ind. 2007), *and aff'd in part and vacated in part*, 878 N.E.2d 1260 (Ind. 2008).

149. *Id.* at 733.

150. *Id.*

151. *Id.*

152. *Id.*

153. IND. R. EVID. 612(a).

154. IND. R. EVID. 612(c).

155. *Gault*, 861 N.E.2d at 733.

156. *Id.* at 734.

157. *Id.*

158. Gault v. State, 878 N.E.2d 1260, 1266 (Ind. 2008).

159. *Id.*

B. Impeachment with Evidence of Prior Conviction

In *Outback Steakhouse v. Markley*,[160] Outback claimed that opposing counsel had made material misrepresentations at trial which warranted relief from judgment.[161] Bruce McLaren appeared as a witness at trial.[162] Trial counsel for Markley, Alexander, informed the court and Outback's counsel prior to this testimony that McLaren had been indicted for federal wire fraud two weeks earlier and that Alexander was representing McLaren in that case.[163] The trial court determined that, although wire fraud is a crime of dishonesty, a mere indictment is not an impeachable event under Rule 609(a) because 609(a) requires an actual conviction.[164]

After conclusion of the trial, Outback discovered that McLaren had pled guilty to the charges prior to testifying in the Outback case.[165] Outback claimed that a guilty plea is the same as a conviction for purposes of Rule 609(a).[166] However, the court agreed with the Markleys that a guilty plea may be withdrawn at any time before it is accepted by the court, and since McLaren's plea had not yet been accepted, it was not the equivalent of a conviction under Rule 609(a).[167]

C. Use of Leading Questions on Direct Examination

In *Vance v. State*,[168] Vance contended that the trial court had improperly allowed the prosecutor to ask a leading question on direct examination.[169] Rule 611(c) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."[170]

The court pointed out that while leading questions are not generally allowed on direct examination, a trial court may allow such questioning and such a use is reviewable only for abuse of discretion.[171] The court also noted that a leading question may be an assertion of fact which the questioner would like confirmed or may embody a material fact and solicit a conclusive yes or no answer.[172]

At trial, the prosecutor asked the victim if she had lost consciousness due to

---

160. 856 N.E.2d 65 (Ind. 2006).

161. *Id.* at 83.

162. *Id.* at 84.

163. *Id.*

164. *Id.* at 84-85 (citing IND. R. EVID. 609(a)). Rule 609(a) states that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted." IND. R. EVID. 609(a).

165. *Markley*, 856 N.E.2d at 84.

166. *Id.*

167. *Id.* at 84-85.

168. 860 N.E.2d 617 (Ind. Ct. App. 2007).

169. *Id.* at 618.

170. IND. R. EVID. 611(c).

171. *Vance*, 860 N.E.2d at 619 (citing Doerner v. State, 500 N.E.2d 1178, 1182 (Ind. 1986)).

172. *Id.* (citing Cook v. State, 133 N.E. 137 (Ind. 1921)).

the defendant's actions.[173] Vance's objection to this leading question was overruled.[174] The court found that while this questioning did embody a material fact and require a yes or no answer, the testimony was merely cumulative of other testimony that she had been choked unconscious by the defendant.[175] Any error was found to be cumulative and harmless.[176]

V. Opinions and Expert Testimony

In *Meister v. State*,[177] Meister's mother appealed the forfeiture of her truck due to its involvement in a drug arrest of her son, Meister.[178] Police Captain Smith had administered a field test and found that a substance in the vehicle was methamphetamine.[179] Meister objected to the use of the field test to prove the identity of the substance and claimed the test was just a presumptive field test.[180]

Captain Smith had testified that he had drug enforcement training, including drug recognition training.[181] He explained that he had been trained in the use of the field test and he explained how the test functioned.[182] He also testified that he had used this test on many previous occasions and the results had been accurate.[183] He concluded his testimony by stating that the test on the substance found in the vehicle was positive for methamphetamine.[184]

The trial court relied upon its finding that the field test was reliable as required by Rule 702.[185] Rule 702 states:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.[186]

The court noted that in *Burkett v. State*, a field test administered by an officer had been found reliable because the officer testified that "(1) he had been trained

---

173. *Id.* at 620.

174. *Id.*

175. *Id.*

176. *Id.*

177. 864 N.E.2d 1137 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 214 (Ind. 2007), *and petition for cert. filed*, 76 U.S.L.W. 3512 (U.S. Jan. 7, 2008) (No. 07-1167).

178. *Id.* at 1139.

179. *Id.* at 1140.

180. *Id.* at 1146.

181. *Id.*

182. *Id.* at 1147.

183. *Id.*

184. *Id.*

185. *Id.* at 1146.

186. IND. R. EVID. 702.

to administer the field test; (2) he followed the proper procedures for the test; (3) explained how the field test worked . . . ; and (4) the field test was used routinely by the Sheriff's Department."[187] Based on the similar testimony offered by Captain Smith, the court found that the trial court had not abused its discretion in allowing the results of the field test as evidence.[188]

In *Randles v. Indiana Patient's Compensation Fund*,[189] a key issue at trial had been at what point in time (and in which order) a mother and her new child had died around the time of childbirth.[190] Dr. Ballard had testified that the mother was likely alive at the time the baby was delivered.[191]

On appeal, Randles argued that the determination by the court that the baby was born before the mother died was clearly erroneous.[192] However, the court noted that "Dr. Ballard is a board certified obstetrician gynecologist who has delivered several thousand babies. Dr. Ballard is an expert qualified to give an opinion as to whether her patient was dead or alive,"[193] and found the trial court's determination had not been clearly erroneous.[194]

In *Shady v. Shady*,[195] Samer Shady appealed the decision of the trial court which granted custody of his child to the child's mother and allowed for only supervised visitation based on the trial court's finding that Samer Shady posed a potential risk of abducting the child to Egypt.[196] At trial, Maureen Dabbagh had testified as an expert witness on the subject of international child abduction.[197] On appeal, Samer Shady argued that Dabbagh was not qualified to serve as an expert witness because she possessed only two years of formal education.[198]

The court noted that Rule 702(a) states that a witness may be qualified as an expert by virtue of "knowledge, skill, experience, training, or education," and that a witness may qualify as an expert on the basis of practical experience alone.[199] Dabbagh owned a consulting firm specializing in "recovery of abducted children and the assessment of the risk of future abduction," and had personally worked on more than 400 such cases.[200] She had testified before Congress, and founded a non-profit organization involved in international child abduction

---

187. *Meister*, 864 N.E.2d at 1146 (citing Burkett v. State, 691 N.E.2d 1241, 1245 (Ind. Ct. App. 1998)).

188. *Id.* at 1147; *see also* Lumberman's Mut. Cas. Co. v. Combs, 873 N.E.2d 692 (Ind. Ct. App. 2007).

189. 860 N.E.2d 1212 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

190. *Id.* at 1222.

191. *Id.* at 1226.

192. *Id.*

193. *Id.* (citing IND. R. EVID. 702(a)).

194. *Id.* at 1228.

195. 858 N.E.2d 128 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 451 (Ind. 2007).

196. *Id.* at 137.

197. *Id.* at 138.

198. *Id.*

199. *Id.* (citing Hobson v. State, 795 N.E.2d 1118, 1122-23 (Ind. Ct. App. 2003)).

200. *Id.*

issues.[201] She had testified as an expert witness on this topic in at least twelve other states, served as a board member of several related organizations, and had written several papers on the topic.[202] The court held that Dabbagh was clearly qualified to serve as an expert witness on this topic.[203]

Samer Shady also claimed that Dabbagh's testimony did not comport with Rule 702(b)'s requirement that expert scientific testimony may only be offered if the court is satisfied the scientific principles behind the testimony are sufficiently reliable.[204] The court held, however, that Dabbagh was not a scientific expert and the subject matter of her testimony was not scientific.[205]

In *Estate of Dyer v. Doyle*,[206] the trial court allowed an expert witness to testify regarding "Faked Left Syndrome."[207] Faked Left Syndrome is where a vehicle is traveling on the wrong side of the center line and a vehicle coming the opposite direction swerves to its left to avoid a collision.[208] When the vehicle which was originally across the center line reacts and pulls back into its proper lane, it collides with the second vehicle and the appearance to investigators is that the second vehicle was across the center line and at fault.[209]

The expert witness for Doyle testified at trial that Faked Left Syndrome might apply in this case.[210] However, no physical evidence or testimony indicated that Dyer was ever in the wrong lane, no medical records indicated that Dyer may have been in the wrong lane, and the expert witness admitted on cross-examination that there was no evidence that Dyer had ever been in Doyle's lane.[211] The court noted that Rule 702(b) allows admission of scientific testimony only if the court is satisfied that the scientific principles used are reliable.[212] Here, the court stated that the science behind Faked Left Syndrome is dubious, and that the article written on this topic by the expert witness had not been a scientific study.[213] The trial court had abused its discretion in admitting this testimony because there must be some evidence other than the expert's conclusion in order to support a finding of Faked Left Syndrome.[214]

In *Carlson v. Sweeney*,[215] Sweeney argued that an expert witness report was irrelevant and inadmissible as it contained a legal conclusion prohibited by Rule

---

201. *Id.*
202. *Id.* at 138-39.
203. *Id.* at 139.
204. *Id.* at 139 n.6 (citing IND. R. EVID. 702(b)).
205. *Id.*
206. 870 N.E.2d 573 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 221 (Ind. 2007).
207. *Id.* at 580.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 581.
212. *Id.* at 581 n.2.
213. *Id.*
214. *Id.* at 581. In other words, no matter how smart you are, you can't make stuff up.
215. 868 N.E.2d 4 (Ind. Ct. App.), *corrected on reh'g*, 872 N.E.2d 626 (Ind. Ct. App. 2007).

704(b).[216] Rule 704(b) provides that witnesses may not testify concerning legal conclusions.[217]

The court found that Sweeney had waived this issue, but went on to discuss the merits.[218] While the court agreed that Rule 704(b) generally prohibits a witness from testifying as to legal conclusions, it noted that expert testimony may be required in cases involving legal malpractice which demonstrate the appropriate standard of care to be given by attorneys.[219] The court held that "to the extent [the expert witness report] discusse[d] the standard of care expected of an attorney, it [was] admissible and relevant."[220]

V. HEARSAY

A. A Party's Own Statement

In *Dorman v. Osmose, Inc.*,[221] the Dormans argued that the trial court erred when it excluded language from Osmose contained in a previous appellate brief.[222] The excluded language contained assertions that Dorman knew the wood treatment in question had caused his injuries because a Dr. Eccles had told him so.[223] The Dormans contended that these statements were admissions that Mark Dorman's injuries were caused by the wood treatment and were not hearsay.[224]

The court discussed the typical hearsay analysis. It noted that hearsay is generally not admissible under Rule 802,[225] and that "[h]earsay is 'a statement, other than one made by the declarant . . . at . . . trial . . . , offered in evidence to prove the truth of the matter asserted.'"[226] The court also noted that a statement can consist of an oral or written assertion or nonverbal conduct intended as an assertion.[227]

The Dormans argued that the statements were not hearsay pursuant to Rule 801(d)(2), which states in relevant part that a statement is not hearsay if it is offered against a party and is the party's own statement, or it is a statement in

---

216. *Id.* at 22.

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

218. *Carlson*, 868 N.E.2d at 22.

219. *Id.* at 23 (quoting Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376, 383 (Ind. Ct. App. 1999)).

220. *Id.*; *see also* Stumpf v. Hagerman Constr. Corp., 863 N.E.2d 871, 880 (Ind. Ct. App. 2007) (holding that an affidavit was properly excluded by the trial court because it discussed whether a duty to exercise care arose, and this is an issue of law).

221. 873 N.E.2d 1102 (Ind. Ct. App. 2007).

222. *Id.* at 1107.

223. *Id.* at 1108.

224. *Id.* at 1107-08.

225. *Id.* at 1108 (citing IND. R. EVID. 802).

226. *Id.* (quoting IND. R. EVID. 801(c)).

227. *Id.* (citing IND. R. EVID. 801(a)).

which the offeror has manifested belief.[228] The Dormans also cited *Indiana State Highway Commission v. Vanderbur*, for its proposition that any statement "'made or attributed to a party which constitutes an admission against his or her interest and tends to establish or disprove a material fact in the case is competent evidence against that party.'"[229]

The court noted that it agreed in general with the proposition of *Indiana State Highway Commission*, but noted that the Dormans' earlier case was regarding a summary judgment motion premised on the statute of limitations, and that Osmose's earlier brief in question had denied the wood treatment was the cause of the injuries and denied all material allegations in the Dormans' complaint.[230] The court held that the portions of Osmose's earlier brief in question did not contain assertions of fact, and were therefore not admissible under Rule 801(d)(2).[231]

B. Invited Error Doctrine

In *Boyd v. State*,[232] the trial court held that Boyd had forfeited his Sixth Amendment right to confront the witness against him because he had murdered the witness prior to her statement to police being offered at trial.[233] Boyd also argued that the victim's statement constituted inadmissible hearsay.[234]

The court noted that "[t]he Federal Rules of Evidence specifically provide that the hearsay rule does not exclude '[a] statement offered against a party that has engaged in or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'"[235] Although the Indiana Rules of Evidence do not contain a similar provision, the court saw no reason not to apply this rule of forfeiture as a matter of common law.[236]

C. Conspiracy Evidence Not Hearsay

In *Hightower v. State*,[237] Hightower argued that the trial court had improperly allowed hearsay testimony during pretrial testimony.[238] The trial court had determined that "the State had laid a proper foundation to support the existence of a conspiracy," and therefore the testimony was not hearsay pursuant to Rule

---

228. *Id.* (citing IND. R. EVID. 801(d)(2)).

229. *Id.* (quoting Ind. State Highway Comm'n v. Vanderbur, 432 N.E.2d 418, 422 (Ind. Ct. App. 1982)).

230. *Id.* at 1108-09.

231. *Id.* at 1109.

232. 866 N.E.2d 855 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007).

233. *Id.* at 856.

234. *Id.* at 857.

235. *Id.* (quoting FED. R. EVID. 804(b)(6)).

236. *Id.* (citing IND. R. EVID. 101(a); IND. R. EVID. 802). The court further noted that this result is similar to applying the doctrine of invited error. *Id.*

237. 866 N.E.2d 356 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

238. *Id.* at 364.

801(d)(2).[239] Rule 801(d)(2) states that a statement is not hearsay if it is "offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."[240] Because the trial court had heard extensive testimony which laid foundation for the existence of a conspiracy prior to this evidence being offered, the court held that the trial court had not abused its discretion by allowing the testimony.[241]

D. Excited Utterance

In *Mathis v. State*,[242] Mathis appealed his convictions for battery and interfering with the reporting of a crime.[243] The trial court had allowed the responding police officer to testify as to what the victim told him because the trial determined that the statements made by the victim were excited utterances.[244] The court noted that Rule 803(2) allows admission of an excited utterance if three conditions are met: a startling event, a statement made by the declarant while under stress from the startling event, and that the statement related to the startling event.[245]

The responding police officer stated that he had arrived within fifteen minutes of the 911 call, that the victim was upset and crying and her clothing was disheveled.[246] The trial court had found this sufficient to allow the officer to testify as to the victim's statement as an excited utterance.[247] Mathis argued that the statements were not close enough in time to the event to qualify as excited utterances.[248] The court held that Mathis's argument was moot because the evidence revealed by those statements was merely cumulative and therefore no harm could have come from their admission.[249]

E. Present Sense Impression

In *Truax v. State*,[250] Truax appealed his convictions for attempted murder, in part based on his contention that the trial court improperly admitted the negotiation notes of State Trooper Sorrell.[251] The trial court had not indicated

---

239. *Id.* at 365.

240. IND. R. EVID. 801(d)(2).

241. *Hightower*, 866 N.E.2d at 366.

242. 859 N.E.2d 1275 (Ind. Ct. App. 2007).

243. *Id.* at 1277.

244. *Id.* at 1278.

245. *Id.* at 1279 (citing IND. R. EVID. 803(2); Fowler v. State, 829 N.E.2d 459, 463 (Ind. 2005)).

246. *Id.* at 1278.

247. *Id.*

248. *Id.* at 1279.

249. *Id.* at 1280.

250. 856 N.E.2d 116 (Ind. Ct. App. 2006).

251. *Id.* at 124.

upon what basis it had admitted the notes.[252]

On appeal, Truax argued that the notes should have been barred from admission as an investigative report under Rule 803(8).[253] Truax cited *Tate v. State* for its holding that Rule 803(8)(a) makes investigative police reports inadmissible hearsay unless offered by a defendant.[254] The court held that even if the notes are inadmissible hearsay under Rule 803(8)(a), they were admissible under Rule 803(1), which allows the admission of present sense impression evidence.[255] Rule 803 states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness. (1) Present Sense Impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter."[256]

The court noted that previous case law finding this type of information admissible under the present sense impression rule dealt with verbal statements.[257] The court stated that while it was not bound by interpretation of the Federal Rules of Evidence, Federal Rule of Evidence 803(1) has been interpreted to apply to such written reports.[258] The court concluded that since Trooper Sorrell took the notes contemporaneously with his investigation, they qualified as present sense impressions, and the trial court had not abused its discretion by allowing admission of this evidence.[259]

F. Recorded Recollection and Prior Inconsistent Statement

In *Kubsch v. State*,[260] Kubsch appealed his murder convictions based in part upon the trial court's refusal to admit a videotaped statement of a witness or to allow impeachment of that witness at trial.[261] A nine-year-old witness had given a videotaped statement that she had seen one of the victims enter his house at a certain time.[262] At trial, she instead claimed she did not see the victim on that day and that she had no memory of the police interview.[263]

On appeal, Kubsch argued that the trial court should have allowed the testimony as a recorded recollection exception to hearsay or should have allowed

---

252. *Id.*

253. *Id.*

254. *Id.* (citing Tate v. State, 835 N.E.2d 499, 508-09 (Ind. Ct. App. 2005)).

255. *Id.* at 124-25.

256. IND. R. EVID. 803.

257. *Truax*, 856 N.E.2d at 125.

258. *Id.* (citing FED. R. EVID. 803(1); United States v. Santos, 201 F.3d 953, 963-64 (7th Cir. 2000)).

259. *Id.*

260. 866 N.E.2d 726 (Ind. 2007).

261. *Id.* at 734.

262. *Id.*

263. *Id.*

Kubsch to impeach the witness with her prior inconsistent testimony.[264] Rule 803(5) allows for an exception to the general prohibition on hearsay evidence if a document containing knowledge that the witness was once familiar with (but cannot now recall) can be shown to have been adopted or made by the witness when it was fresh in his or her memory and reflects the knowledge correctly.[265] Because the witness did not recall the police interview, she could not vouch for the accuracy of the document, and therefore the evidence was properly not admitted as a recorded recollection.[266]

Kubsch argued in the alternative that he should have been allowed to impeach the witness with her prior inconsistent testimony.[267] Because she stated she could not remember the police interview, the trial court ruled that the witness had made no substantive statement that could be impeached.[268] The court disagreed because the witness had also testified it was unlikely she would have seen the victim as she normally goes straight to daycare.[269] Because this was directly opposed to her earlier statement that she had seen the victim, the court stated that her testimony should have been impeached.[270] However, other testimony would have supported her testimony had she been impeached and therefore the error was held to be harmless.[271]

G. Business Records

In *Richardson v. State*,[272] Richardson appealed her conviction for dealing in methamphetamine based in part on her argument that a third party's medical records had been admitted into evidence by the trial court over Richardson's Confrontation Clause objection and that such records are testimonial.[273]

The court noted that the U.S. Supreme Court in *Crawford v. Washington* had decided that testimonial evidence may not be admitted where the witness is unavailable as such evidence would violate the Sixth Amendment's Confrontation Clause.[274] However, the court noted that business records are non-testimonial in nature and therefore the trial court had not erred by admitting the records under Rule 803(6).[275]

---

264. *Id.*
265. IND. R. EVID. 803(5).
266. *Kubsch*, 866 N.E.2d at 734-35.
267. *Id.* at 735.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. 856 N.E.2d 1222 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).
273. *Id.* at 1229.
274. *Id.* (citing Crawford v. Washington, 541 U.S. 36, 42 (2004)).
275. *Id.* at 1230. Rule 803(6) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . (6) Records of Regularly Conducted Business Activity. A

In *In re Paternity of H.R.M.*,[276] Gaddie argued on appeal that evidence, which had been admitted under the business records exception to the hearsay rule, was improperly admitted because it did not indicate that it had been filed under oath.[277] Rule 902(9) requires that the affiant certify the records under oath.[278]

The document had stated that the affiant, "being duly sworn, state as follows."[279] The court held that this does not indicate before whom the affiant swore, to what she swore, that an oath was taken, or that the statements were made under penalty of perjury.[280] The court therefore ruled the evidence inadmissible on the basis that the Rule 902(9) certification requirement had not been met.[281]

CONCLUSION

The Rules continue to develop in their second decade of utilization. Understanding of how the various Rules interact and compare with their federal counterparts progresses, as well as understanding of how the Rules interact with prior common law and statutory law. New theories and scientific advancements continue to develop the Rules regarding expert testimony.

The Rules have now been in effect long enough that new cases begin to reinterpret or refine previous holdings regarding the Rules. It is clear that one cannot become an expert in the Rules based on reading the text of the Rules alone; regular review of the interpretation of the Rules will be required of all persons utilizing these Rules.

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

IND. R. EVID. 803(6).

276. 864 N.E.2d 442 (Ind. Ct. App. 2007).

277. *Id.* at 448.

278. *Id.* (citing IND. R. EVID. 902(9)).

279. *Id.* at 449.

280. *Id.*

281. *Id.* at 450.