SURVEY OF RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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INTRODUCTION

This survey nominally covers cases decided between October 1, 1996, and October 1, 1997. However, some of the cases discussed will fall outside of that period. Indiana appellate courts handed down many important decisions this past year. As in past years, the organization of this survey will mirror that of the Indiana Rules of Evidence.

I. MISCELLANEOUS EVIDENCE ISSUES

A. Circumstantial Evidence in Criminal Cases

In the space of a little over a year, the Indiana Supreme Court issued two inconsistent opinions concerning circumstantial evidence and the burden of proof in criminal cases. In *Lloyd v. State*,[1] the court determined that a defendant is entitled to a jury instruction "requiring [the jury to find] the exclusion of every reasonable hypothesis of [the defendant's] innocence when the evidence is purely circumstantial" before convicting the defendant.[2] In *Saylor v. State*,[3] the court stated, "When a verdict rests on circumstantial evidence, this Court need not find that the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but only that inferences may reasonably be drawn to enable the jury to find guilt beyond a reasonable doubt."[4] These cases are irreconcilable,[5] and they have the potential to cause confusion, particularly because *Saylor* (the later decided of the two) does not mention *Lloyd*. In the

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1. 669 N.E.2d 980 (Ind. 1996).

2. *Id*. at 985 (citing Nichols v. State 591 N.E.2d 134 (Ind. 1992)); *see also* Cox v. State, 475 N.E.2d 664, 667 (Ind. 1985); Cantrell v. State, 673 N.E.2d 816, 819 (Ind. Ct. App. 1996); McDonald v. State, 547 N.E.2d 294, 296-97 (Ind. Ct. App. 1989).

3. 686 N.E.2d 80 (Ind. 1997).

4. *Id.* at 84; *see also* Fox v. State, 560 N.E.2d 648, 654 (Ind. 1990); Washington v. State, 685 N.E.2d 724, 728 (Ind. Ct. App. 1997); Jernigan v. State, 612 N.E.2d 609, 613 (Ind. Ct. App. 1993).

5. The cases do have a somewhat different posture. *Lloyd* involved a claim that a defense attorney's failure to request the instruction constituted ineffective representation of counsel, and *Saylor* involved the defendant's claim that the evidence did not support the verdict. The difference is of no consequence. A defendant is only entitled to an instruction that accurately states the law. *See* Battles v. State, 688 N.E.2d 1230, 1232 (Ind. 1997); Abdul-Musawwir v. State, 674 N.E.2d 972, 974 (Ind. Ct. App. 1996). Therefore, the question posed to both courts was the same.

author's opinion, the rule in *Saylor* is sounder because it better reflects an appellate court's deference to the jury's role as the finder of fact.[6] Regardless of whether the evidence supporting the verdict of guilt is direct, circumstantial or both, the test for whether the evidence is sufficient to support the conviction should be: Could the jury have reasonably found guilt beyond reasonable doubt from the evidence and all reasonable inferences drawn therefrom?[7] Circumstantial evidence is not inherently less or more reliable than direct evidence;[8] therefore, appellate courts should review verdicts supported solely by circumstantial evidence by the same standard as verdicts supported by direct evidence.

B. Admissibility of Evidence that "Another Guy Did It" in Criminal Cases

In *Joyner v. State*,[9] the court evaluated a defendant's claim that the trial court improperly excluded evidence tending to show that another person committed the murder for which the defendant was on trial. Under the rule established in *Burdine v. State*,[10] evidence demonstrating that a third party committed the charged crime must "directly connect the third party to the crime."[11] Rather than following *Burdine*, the *Joyner* court declared, "[O]ur review is guided by the Indiana Rules of Evidence. . . ."[12] The court then found that the proffered evidence met the logical relevance test of Rule 401: "Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] In *Joyner*, a good deal of evidence suggested that

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6. Some jurisdictions follow the rule espoused in *Lloyd*. *See, e.g.*, Roper v. State, 429 S.E.2d 668, 669 (Ga. 1993); State v. Moore, 880 P.2d 238, 241 (Idaho 1994); State v. Duguay, 698 A.2d 5, 8 (N.H. 1997) (applying the rule to each *element* of offense); State v. Breed, 399 N.W.2d 311, 312-13 (S.D. 1987) (holding failure to give instruction *fundamental* error). Other jurisdictions follow the rule in *Saylor*. *See, e.g.*, United States v. Armstrong, 16 F.3d 289, 292 (8th Cir. 1994); Commonwealth v. Merola, 542 A.2d 249, 252-53 (Mass. 1989); State v. Jenks, 574 N.E.2d 492, 498 (Ohio 1991). *See generally* Carroll J. Miller, Annotation, *Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trial—State Cases*, 36 A.L.R.4TH 1046 (1981 & Supp. 1997).

7. *See* Holland v. United States, 348 U.S. 121, 139-40 (1954); Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964). *But cf.* United States v. Braxton, 877 F.2d 556, 562-63 (7th Cir. 1989) (instruction similar to that in *Lloyd* permissible but not required).

8. *See* United States v. O'Brien, 119 F.3d 523, 533 (7th Cir. 1997); Broecker v. State, 314 N.E.2d 428, 431 (Ind. App. 1974); State v. Sanborn, 564 N.W.2d 813, 816 (Iowa 1997); Commonwealth v. Dostie, 681 N.E.2d 282, 284 (Mass. 1997); Sutherland v. State, 944 P.2d 1157, 1161 (Wyo. 1997).

9. 678 N.E.2d 386 (Ind. 1997).

10. 515 N.E.2d 1085 (Ind. 1987).

11. *Id*. at 1094 (citing Brown v. State, 416 N.E.2d 828 (Ind. 1981)).

12. *Joyner*, 678 N.E.2d at 389.

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

another person committed the murder in question. The trial court improperly excluded this evidence.[14] Because this was not harmless error, the *Joyner* court remanded for a new trial.

C. Standard of Review

In general, Indiana appellate courts review the admissibility of evidence on an abuse of discretion standard. This standard is used even when the question is a purely legal one.[15] One case, *Stahl v. State*,[16] broke from that general rule. In *Stahl*, the Indiana Supreme Court evaluated the admissibility of certain hearsay evidence. The *Stahl* court rejected the abuse of discretion standard of review.[17]

Stahl is interesting because the court examines the nature of the question before the appellate court in determining the admissibility of evidence. Where legal questions are at issue, no deference should be afforded to the trial court. Often, evidentiary issues are questions of law. Consequently, the "one size fits all" abuse of discretion standard of review may be inappropriate in many cases.

D. Polygraph Evidence

In *Sanchez v. State*,[18] the court reviewed the defendant's contention that the trial court failed to instruct the jury on its consideration of polygraph evidence. At trial, the defendant did not tender an instruction on this subject. In evaluating

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14. *Id*. at 390.

15. *See, e.g.*, Heavrin v. State, 675 N.E.2d 1075, 1083 (Ind. 1996) (Rule 404(b)); State v. Eaton, 659 N.E.2d 232, 236 (Ind. Ct. App. 1995) (determination of logical relevance); Bates v. State, 650 N.E.2d 754, 757 (Ind. Ct. App. 1995). *See also* Tammy J. Meyer & Dina M. Cox, *Recent Developments in Indiana Tort Law*, 30 IND. L. REV. 1317, 1319 (1997) (criticizing *Eaton*); Edward F. Harney & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887, 891 n.41 (1996) (criticizing *Bates*). *Heavrin* merits additional discussion. Obviously, evidence admitted under Rule 404(b) will have to satisfy Rule 403. A trial court's decision under Rule 403 is reviewed for an abuse of discretion. However, the question of whether evidence violates Rule 404(b) (without reference to Rule 403) is a question of law. *See* United States v. Merriweather, 78 F.3d 1070, 1074 (6th Cir. 1996). As a practical matter, though, the *Heavrin* approach causes little difficulty.

16. 686 N.E.2d 89 (Ind. 1997).

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> Our standard of review of a trial court's findings as to the essential elements of admissibility is sometimes described as an abuse of discretion. Because the predicates or foundational requirements to admissibility often require factual determinations by the trial court, these findings are entitled to the same deference on appeal as any other factual finding, whether that is described as a "clearly erroneous" or abuse of discretion standard. However, the ultimate question in this case is the interpretation of the language of a rule of evidence that presents a question of law for this Court.

Id. at 91 (citations omitted).

18. 675 N.E.2d 306 (Ind. 1996).

the defendant's contention, the court first reiterated four prerequisites for the admission of polygraph evidence.[19] The court then focused on the failure to instruct the jury. The court held that, because the defendant had waived the issue by not tendering an instruction and the failure to instruct was not fundamental error, reversal was not warranted.[20]

Sanchez is significant for two reasons: 1) it reaffirms prior case law (i.e., pre-Rules case law) on this issue, and 2) it applies a fundamental error standard to at least one of the prerequisites to the admission of polygraph evidence. Therefore, in most cases, procedural missteps with respect to this evidence likely will not be deemed fundamental error. *Sanchez* also provides an excellent discussion of the difference between fundamental errors and errors that require objection to be preserved for appeal.[21]

E. The Doctrine of Completeness

In *Stanage v. State*,[22] the court dealt with the doctrine of completeness as incorporated into Rule 106.[23] In *Stanage*, redacted portions of the defendant's videotaped statement were admitted as impeachment evidence. The defendant moved to admit the entire videotaped statement. The trial court denied the defendant's request because the videotape contained portions prejudicial to the defendant. The *Stanage* court held that the trial court properly denied the defendant's request because "[i]mmaterial, irrelevant or prejudicial material must be redacted from the portions of the statements which are admitted."[24]

As a general rule, the holding in *Stanage* is unobjectionable, but in this case it seems to be at odds with traditional notions of the adversarial system. Usually, a trial court should not be concerned with the possibility of prejudice to the party seeking to admit evidence. In this case, it was for the defendant's attorney to

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> 1) that the prosecutor, defendant, and defense counsel all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results; 2) that notwithstanding the stipulation, the admissibility of the test results is at the trial court's discretion regarding the examiner's qualifications and the test conditions; 3) that the opposing party shall have the right to cross-examine the polygraph examiner if his graphs and opinions are offered into evidence; and 4) that the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination and that it is for the jury to determine the weight and effect to be given such testimony.

Id. at 308 (citing Davidson v. State, 558 N.E.2d 1077, 1085 (Ind. 1990)).

20. *Id.* at 308-09.

21. *Id*.

22. 674 N.E.2d 214 (Ind. Ct. App. 1996).

23. "When a writing or a 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." IND. R. EVID. 106.

24. *Stanage*, 674 N.E.2d at 216 (citing Evans v. State, 643 N.E.2d 877, 881 (Ind. 1994)).

calculate the prejudice to his client when he asked the trial court to admit the rest of the videotape. Also, the defendant would not have been able to claim prejudice on appeal—a party who invites error will not be heard to complain of that error on appeal. The defendant therefore should have been allowed to have the jury pass on the redacted portions of the videotape.[25]

II. JUDICIAL NOTICE

In *Mayo v. State*, [26] a defendant argued that there was no evidence from which the jury could conclude that one of his prior convictions (for escape) was a felony for purposes of Indiana's habitual offender statute.[27] In finding that there was "no error on this issue,"[28] the court took judicial notice that the escape conviction constituted a felony under Indiana's habitual offender statute. This was incorrect.

First, the court treated the issue of whether the escape conviction constituted a felony as one of law.[29] Although this is a natural conclusion (after all, a person can simply look up the sentence for escape in the Alabama Code), it is not a correct one. In order to adjudge a person a habitual offender, a trier of fact must find that the person committed two previous felonies.[30] Therefore, the issue of whether the convictions constituted felonies was a question of fact, not a question of law.

Second, the court ignored Rule 201(g), which provides: "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."[31] A habitual offender proceeding is clearly "a criminal case." This means that the taking of judicial notice of adjudicative facts (but not legislative facts[32]) is improper on appeal because the jury, discharged after the trial, would have no opportunity to pass on the fact judicially noticed.[33] The jury has the power to refuse to find indisputable facts.

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25. *Cf.* Humphrey v. State, 680 N.E.2d 836, 839-40 (Ind. 1997) (decision whether to request limiting admonition is best left to party against whom evidence is offered).

26. 681 N.E.2d 689 (Ind. 1997).

27. IND. CODE § 35-50-2-1(b) (1993) (defining felony conviction for purposes of the statute).

28. *Mayo*, 681 N.E.2d at 693.

29. *Id.* (citing IND. R. EVID. 201(b), which allows a court to take judicial notice of the law of any state).

30. IND. CODE § 35-50-2-8(d) (Supp. 1997).

31. IND. R. EVID. 201(g).

32. *See* United States v. Gould, 536 F.2d 216 (8th Cir. 1976). In *Gould*, the court held that a court may take judicial notice of a legislative fact in a criminal case without instructing the jury that it could reject that fact. *Id.* at 221; *see also* United States v. Hernandez-Fundora, 58 F.3d 802, 811-12 (2d Cir. 1995) (discussing difference between legislative and adjudicative facts).

33. *See* United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (holding that the appellate court could not cure a lack of proof that telephone company was a common carrier engaged in interstate commerce by taking judicial notice on appeal).

It is of no consequence that the jury in *Mayo* adjudged the defendant a habitual offender. It did so on insufficient evidence; therefore, that adjudication cannot stand. The jury's determination cannot subsequently be made valid by the taking of judicial notice on appeal. Defendants have a statutory right to have a jury pass on whether they are habitual offenders.[34] This means that the prosecution must put forth sufficient evidence from which the jury can determine beyond a reasonable doubt that a particular defendant is a habitual offender. If the prosecution does not (and just like any other criminal case where there is insufficient evidence to support a verdict of guilt) do so, the defendant cannot be adjudged a habitual offender. Restated, the prosecution has to make the proper case to the jury, and an appellate court should not make the prosecution's case on appeal.

It is very unlikely that anyone will be too troubled by this result. The defendant in *Mayo* was convicted of a brutal crime. Moreover, had the court vacated the habitual offender adjudication, it would have done so on a so-called technicality. That said, the *Mayo* decision is contrary to law and ought not stand.

III. ARTICLE IV

A. Rule 404(b)

Because Rule 404(b) is so often an issue (particularly in criminal cases) there are many appellate decisions construing the rule. This has unfortunately produced a lack of uniformity in the rule's application.

At the end of the survey period, the Indiana Supreme Court decided *Goodner v. State*,[35] which effectively overruled a line of court of appeals decisions. In *Goodner*, the Indiana Supreme Court reaffirmed *Wickizer v. State*[36] and its approach to evidence admitted under the "intent exception" to Rule 404(b).[37] However, the *Goodner* court rejected the *Wickizer* approach to evidence admitted under other "exceptions" to Rule 404(b).[38]

In *Wickizer*, the court held that "[t]he intent exception in Evid.R.404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent."[39] Various panels of the court of appeals had applied this approach to *all* of Rule 404(b)'s listed purposes.[40] *Goodner* has put an end to the application of the

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34. IND. CODE § 35-50-2-8(d) (Supp. 1997).

35. 685 N.E.2d 1058 (Ind. 1997).

36. 626 N.E.2d 795 (Ind. 1993).

37. *Goodner*, 685 N.E.2d at 1061.

38. *Id*. at 1061 n.3.

39. *Wickizer*, 626 N.E.2d at 799; *see also* Smith v. State, 678 N.E.2d 1152, 1157 (Ind. Ct. App. 1997) (following *Wickizer*).

40. *See* Sundling v. State, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997); Reynolds v. State, 651 N.E.2d 313, 316 (Ind. Ct. App. 1995); Bolin v. State, 634 N.E.2d 546, 550 (Ind. Ct. App. 1994); *cf.* Carson v. State, 659 N.E.2d 216, 219 (Ind. Ct. App. 1995) (rejecting broad interpretation of

Wickizer approach to the other listed purposes in Rule 404(b). Accordingly, cases doing so should not be considered accurate statements of the law.

However, the *Goodner* opinion contains some errors in its analysis. First, the court refers to an "intent exception."[41] This is incorrect.[42] There are no exceptions to Rule 404(b): the rule flatly bars the use of other acts evidence to prove action in conformity therewith.[43] Inasmuch as courts admit other acts evidence to prove intent, motive, et al., the evidence is not admitted under an exception to Rule 404(b). This, however, is not a major concern, in large part because the list of "exceptions" to Rule 404(b) is neither exclusive nor exhaustive.[44] Therefore, the admissibility of other acts evidence is not tied to the offeror's ability to shoehorn the evidence into one of Rule 404(b)'s listed purposes.[45]

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motive "exception"); Moore v. State, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995) (court distrustful of evidence offered to prove motive).

41. *Goodner*, 685 N.E.2d at 1061.

42. *See* Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049, 1051 n.14 (1997). Professor Cooper's Survey contains an excellent analysis of some Rule 404(b) cases; *see also* Lay v. State, 659 N.E.2d. 1005 (Ind. 1995). In that case, Justice Sullivan correctly observes that it is incorrect to refer to Rule 404(b) exceptions because Rule 404(b) is a rule of inclusion. *Id.* at 1010 n.5.

43. The heading of Rule 404 contains a reference to exceptions. The exceptions, however, are to Rule 404(a), not to Rule 404(b).

44. *See* Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993); *see also* Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996) (relationship between victim and defendant is a proper purpose under Rule 404(b)).

45. Focusing on the enumerated purposes may have the effect of improperly shifting the inquiry away from whether the other acts evidence constitutes character evidence. For example, if the other acts evidence is offered to prove motive, then the court may simply ask whether the evidence is probative of motive without asking whether the evidence is mere character evidence barred by Rule 404(b). In those cases, slogans may substitute for analysis.

This occurred in *Tompkins v. State*, 669 N.E.2d 394 (Ind. 1996). In *Tompkins*, the Indiana Supreme Court held that certain other acts evidence showing a white defendant's racism was probative of his motive in the brutal murder of a black victim. *Id*. at 398. There is little doubt that this conclusion was correct; certainly, this evidence demonstrated a motive for the crime. However, the court did not analyze whether the evidence was mere character evidence. (Mere character evidence may be characterized as motive—a racist and violent character can definitely show motive. That, however, does not make the evidence admissible.) In that respect, the *Tompkins* court erred. The *Tompkins* court stated that certain evidence "show[ed] a desire to engage in violence towards African-Americans." This sounds awfully close to an inference of propensity, which is barred by Rule 404(b). *Tompkins* was aptly criticized by Professor Cooper in last year's survey. Cooper, *supra* note 42, at 1052-55.

The real problem with *Tompkins* is that it confuses logical relevance with legal relevance. This exemplifies the danger of other acts evidence. Often, the inference of bad conduct from bad character is extremely obvious and compelling. Certainly, the actions of the defendant in *Tompkins* were explained by his violent racism. Rule 404(b), however, is supposed to erect a barrier to this

Second, and more importantly, the *Gardner* court should not have reaffirmed *Wickizer* because *Wickizer* is fundamentally flawed and should be abandoned. The *Wickizer* court was rightly concerned about the dangers[46] of other acts evidence, particularly other acts evidence offered as probative of intent. Accordingly, the court held that other acts evidence offered to prove intent will only be permitted if the defendant goes beyond merely denying the crime charged but claims a specific contrary intent.

This holding is problematic for two reasons. First, the plain language of the rule does not predicate the admissibility of other acts evidence on the defendant first affirmatively making a claim of a contrary intent.[47]

Second, this rule is inconsistent with the operation of Rule 404(b). Rule 404(b) excludes other acts evidence only if that evidence's sole function is to prove character and action in conformity therewith.[48] Therefore, the question is not whether the defendant makes a claim of contrary intent, but whether the evidence can prove something other than character.[49]

The rule in *Wickizer* may be the result of an empirical determination by the court.[50] Where a defendant does not dispute intent or offer evidence (or argument) of a specific contrary intent, it is unlikely that other acts evidence offered to demonstrate intent will be very probative. The defense will, in effect, concede that whoever committed the crime intended it. Identity, not intent, will be the issue. Consequently, there is little need for this evidence; its probative value is low. It would therefore be excluded by Rule 403 in almost every case. Because the rules as written already dictate the result in *Wickizer*, there was no

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inference. *See generally* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

This is not to say that all evidence that may have the effect of demonstrating a racist character should be barred. Where other acts evidence shows character but has relevance with respect to something other than character, Rule 404(b) operates to admit the evidence subject, of course, to Rule 403. *See* Cliver v. State, 666 N.E.2d 59, 62-63 (Ind. 1996). *Kimble v. State*, 659 N.E.2d 182 (Ind. Ct. App. 1995), is an excellent example of a proper analysis of Rule 404(b) and this type of evidence.

46. The two main dangers of other acts evidence are: (1) that the jury may convict the defendant out of a bare desire to punish for the uncharged misconduct and (2) that the jury will conclude that the defendant is of bad character and for that reason committed the charged crime. *Wickizer*, 626 N.E.2d at 797.

47. *See* Cooper *supra* note 42, at 1052 n.15.

48. *See* Bacher v. State, 686 N.E.2d 791, 799 (Ind. 1997) (citing Hardin v. State, 611 N.E.2d 123, 128 (Ind. 1993)).

49. The approach in *Wickizer* also tends to focus on labeling the evidence as intent, motive et al. This is problematic because the listed proper purposes are convenient reference points, not rigid classifications. Evidence that is probative of intent will usually be probative of some other proper purpose. Therefore, it really does not make sense to label the evidence for purposes of adopting a specialized rule of admissibility.

50. A court's observation that summary judgment is rarely appropriate in negligence cases is an empirical observation. In close cases, this empirical observation may have an effect on the outcome.

need to create an idiosyncratic rule.[51] Therefore, that rule ought to be abandoned.

Although *Hicks v. State*[52] was decided after the survey period, it will be discussed in this survey because of its importance. In *Hicks*, the defendant was charged with the murder of his girlfriend and the feticide of her unborn child. The trial court admitted evidence showing that the defendant had beaten the victim in the past and that the two had a violent relationship. The court concluded that evidence showing the defendant's hostility towards the victim was relevant but that some of the evidence failed the Rule 403 balancing test because of its low probative value and highly prejudicial effect.[53]

Hicks contains some excellent analysis. First, *Hicks* strongly reaffirms prior

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51. This is not to say that the defendant "making something an issue" does not affect the admissibility of evidence. Where the defendant offers evidence (or argument) on a particular issue, there will be a greater need for other acts evidence relevant to that issue. This greater need would be properly considered by a trial judge in balancing the probative value versus the danger of unfair prejudice of the proffered evidence.

An example of where the court should have considered the fact that a party made something an issue on the determination of admissibility is *Swain v. State*, 647 N.E.2d 23 (Ind. Ct. App. 1995). In *Swain*, the defendant attempted to show that the police officer who arrested him was racially biased. As a result, the prosecution introduced evidence that the defendant had four previous convictions for dealing in cocaine to explain the officer's interest in the defendant. On appeal, the court held that the evidence was inadmissible because it was "irrelevant."

This holding is problematic for two reasons. First, the conclusion that the evidence was irrelevant is wrong. The *Swain* court evaluated the relevancy of the evidence under Rule 401, which is a logical relevance test. Certainly, the fact that the defendant had been convicted of dealing cocaine previously was logically relevant to the determination of whether he possessed cocaine on the occasion in question. *See* Lannan v. State, 600 N.E.2d 1334, 1337 (Ind. 1992); *see also* United States v. Brewer, 43 M.J. 43, 48 (U.S.A.F. Ct. App. 1995) (Crawford, J., concurring) (discussing difference between logical relevance of Rule 404(b) evidence and its legal relevance); State v. Blackmon, 941 S.W.2d 526, 529 (Mo. Ct. App. 1996) (same); People v. Vandervliet, 508 N.W.2d 114, 120 (Mich. 1993). Although the evidence was logically relevant under Rule 404(b), the evidence was not admissible to show a propensity for possessing cocaine.

Second, the court did not take into consideration the fact that the defendant made the police officer's motive in arresting the defendant an issue. Certainly, the prosecution was entitled to rebut the not so subtle suggestion that the defendant was singled out because of his race. Similarly, the court's Rule 403 analysis is flawed. The court is required to evaluate the possibility of *unfair* prejudice. In *Swain*, the defendant invited the prosecution to produce evidence concerning the police officer's motive. The prosecution did so. The fact that the evidence the prosecution chose to present did create the possibility of prejudice (i.e., that the jury would convict on an improper basis, namely the defendant's propensity to possess cocaine) should not alter its admissibility. Because the defendant made the police officer's motive an issue, he should not have been heard to complain of the possibility of prejudice in the prosecution's rebuttal. *But cf.* State v. Lawton, 667 A.2d 50, 55 (Vt. 1995) (prosecution may not engage in "overkill" where defendant "opens the door").

52. 690 N.E.2d 215 (Ind. 1997).

53. *Id.* at 223.

case law holding that other acts evidence tending to show hostility between the victim and the defendant is admissible under Rule 404(b).[54] Second, *Hicks* also properly notes that "[t]he list of other purposes is illustrative not exhaustive."[55]

Third, the court's analysis in *Hicks* also correctly rejects the Seventh Circuit's four-part test for the admissibility of other acts evidence.

> Under this test, to be admissible: (1) the evidence must be directed toward establishing a matter in issue other than the defendant's propensity to commit the charged act; (2) the prior bad act must be similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence must be sufficient to support a finding by the jury that the defendant committed the prior bad act; and (4) the proponent of the evidence must show that the probative value of the prior bad act is not substantially outweighed by the prejudicial effect on the defendant.[56]

The *Hicks* court correctly concluded that dissimilarity and remoteness in time do not erect a per se bar to other acts evidence; instead, they are factors to be considered in the determination of the probative value of the evidence.[57] "In short, admissibility hinges on relevance, not a litmus test based on an isolated factor—remoteness, similarity, or anything else—that may bear on relevance."[58]

The decision is also significant because it follows *Huddleston v. United States*.[59] In all Rule 404(b) cases, it must be shown that the person against whom the evidence is offered actually committed the other act. If the person did not commit the act, the evidence is irrelevant. *Huddleston* dealt with the standard for the trial court's preliminary determination that the person committed the other act. The Court concluded that the evidence "should be admitted if there is sufficient evidence to support a finding that the [person] committed the [other] act."[60] This is to be contrasted with a court making a preliminary finding by a preponderance of evidence that the person committed the other act.[61] If a reasonable jury could find that the person committed the other act, it should be permitted to so find.

One part of the opinion is troubling. The *Hicks* court discusses relevance in the context of Rule 404(b).[62] This discussion has the possibility of causing some confusion. The court is not entirely clear about whether it means logical relevance, which is defined by Rule 401, or legal relevance.[63] The distinction is

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54. *Id.* at 222 (citing Ross v. State, 676 N.E.2d 346 (Ind. 1996)).

55. *Id*. at 219 (citing Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993); United States v. Russell, 971 F.2d 1098, 1106 (4th Cir. 1992)).

56. *Id*. at 219.

57. *Id.* at 220.

58. *Id*.

59. 485 U.S. 681 (1988).

60. *Id.* at 685.

61. *See* IND. R. EVID. 104(a).

62. *Hicks*, 690 N.E.2d at 219.

63. Legal relevance is undefined by the Rules of Evidence. The term, "relevant evidence,"

vitally important to an understanding of Rule 404(b). Character evidence barred by Rule 404(b) is often logically relevant.[64] However, it is not legally relevant.

Consequently, it is difficult to determine exactly what the court means when it says, "The Rule [i.e. 404(b)] says that 'other crimes, wrongs, or acts' not offered to prove character 'may be admissible.' This throws the analysis back to Rule 402, which states that 'all relevant evidence is admissible.'"[65] If the analysis were "thrown back" to Rule 402, then other acts evidence would only have to satisfy a logical relevance[66] test (leaving aside the Rule 403 test) to be admissible under Rule 404(b).

The *Hicks* court may have been talking about the logical relevance requirement as enforced by Rule 104(b). Obviously, it must be shown that the defendant committed the other act. If that is not shown, the evidence does not meet a bare logical relevance test, and is therefore barred by Rule 402. But proving that the "defendant did it" does not guarantee admissibility under Rule 404(b). Rule 404(b) bars logically relevant evidence that only shows propensity.[67] Consequently, it must be stressed that logical relevance is a prerequisite to the admissibility of other acts evidence, not a guarantor of its admissibility.

In *Turner v. State*,[68] the defendant was convicted of the murder of a Ball State University student. On appeal, the defendant challenged the admissibility of "prior bad acts evidence."[69] The evidence demonstrated that the defendant had previously been forcibly ejected from a Ball State party the evening before the murder. In response, the defendant fired a gun through a door where the party was being held. The court found that the evidence was properly admitted because it demonstrated the defendant's motive. His enmity towards Ball State students as a result of his ejection from a party helped explain why the defendant

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as used in the rules, means logical relevance. This is demonstrated by an evaluation of the rules. If "relevant evidence" meant legally relevant evidence, then the "except as otherwise provided" clause in Rule 402 would be superfluous.

64. *See generally* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

65. *Hicks*, 690 N.E.2d at 219.

66. The court may be thinking that Rule 402 refers to legal relevance when it uses the term "relevant evidence."

67. *See Lannan*, 600 N.E.2d at 1337 (discussing logical relevance of propensity evidence barred by Rule 404(b)).

68. 682 N.E.2d 491 (Ind. 1997).

69. "Prior bad acts" is a convenient shorthand for evidence admissible under Rule 404(b). It is the opinion of the author that the term should be discarded. First, Rule 404(b) does not require that the acts be "bad." *But see* Robinson v. State, 682 N.E.2d 806, 809 (Ind. Ct. App. 1997) (strictures of Rule 404(b) apply to "any conduct of the defendant which may bear *adversely* on the jury's judgment of his character") (quoting Kimble v. State, 659 N.E.2d 182, 185 n.5 (Ind. Ct. App. 1995) (emphasis added). *See also* Stevens v. State, 689 N.E.2d 487 (Ind. Ct. App. 1987). Second, Rule 404(b) does not require that the acts in question happen before the charged crime. *See* United States v. Bibo-Hernandez, 922 F.2d 1398, 1399-1400 (9th Cir. 1991); Moore v. State, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995).

decided to rob and kill a Ball State student.[70]

The *Turner* court also evaluated whether the evidence tended to show a plan. In concluding that it did not, the court stated, "The prior offenses '[must] tend to establish a preconceived plan by which the charged crime was committed. The crimes must, therefore, be so related in character, time and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and charged crime.'"[71]

Turner is a perfect example of the type of evidence admissible under Rule 404(b). Often, other acts evidence is extremely probative. In this case, the evidence really helped to explain why the defendant would choose to murder the victim without much danger of the "forbidden inference." The evidence showed that the defendant was angry with Ball State students. A dislike of Ball State students is not a character trait. Therefore, the inference that the defendant had a motive for murdering the victim did not come from his character.[72]

In *Hopkins v. State*,[73] the court evaluated the admissibility of testimony that the defendant had been involved in drug-dealing. The defendant contended that the testimony was admitted in violation of Rule 404(b).

In evaluating the defendant's contention, the court first announced the rule that other acts evidence must be examined to determine whether it is "offered to prove something other than the defendant's bad character or propensity to commit the charged crime."[74] In this case, the defendant attacked the credibility of the State's witness by questioning the witness about the witness' drug dealing and drug connections. On redirect examination, the State elicited the testimony about the defendant's drug dealing from that witness. The court held that this was permissible because the defendant opened the subject and because the prosecution had stipulated that the witness was a drug dealer.

This case merits some criticism. A defendant who impeaches a witness does not open the door for attacks on his own character.[75] The law allows defendants to vigorously cross-examine a State's witness. Often, this vigorous cross-examination will produce unflattering information about that witness. However, that does not give the State the license to admit evidence barred by Rule 404(b). Finally, the court's reference to the fact that the prosecution stipulated to the fact that the witness was a drug dealer is questionable. There is substantial authority for considering a defendant's stipulation to certain items in determining the admissibility of other acts evidence.[76] However, this proposition should not be

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70. *Turner*, 682 N.E.2d at 496.

71. *Id.* at 496 n.5 (quoting Malone v. State, 441 N.E.2d 1339, 1347 (Ind. 1982)).

72. There are other examples. Evidence that a defendant did not carry auto insurance would be very probative of motive in a prosecution for leaving the scene of an accident. It would explain why the defendant left the scene.

73. 668 N.E.2d 686 (Ind. Ct. App. 1996).

74. *Id.* at 690 (citing Bolin v. State, 634 N.E.2d 546, 548 (Ind. Ct. App. 1994)).

75. *Cf.* Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996) (defendant does not open door to attacks on his own character when he introduces evidence of victim's character).

76. *See* Old Chief v. United States, 117 S. Ct. 644 (1997); United States v. Crowder, 87 F.3d

extended to the State's ability to stipulate except in very limited circumstances. The defendant should not have the moral force of his evidence undermined by cold stipulations.[77]

B. Rule 405

In *Brooks v. State*,[78] the defendant argued that the trial court erred when it refused to admit evidence that a homicide victim had been charged with two counts of battery. The *Brooks* court made short work of this argument. The court started with the general proposition that where self-defense is claimed, the victim's character for violence is "pertinent."[79] However, the rules of evidence only allow evidence of character in the form of opinion or reputation testimony, unless a person's character or character trait is an "essential element of a charge, claim, or defense . . . ."[80] In this case, the victim's character was not an essential element of the self-defense claim; accordingly, it was not provable by evidence of specific instances of conduct.[81]

It must be stressed that Rule 405 only deals with proof of character. If a victim's specific instances of conduct are relevant for some other purpose, then (subject to Rule 403) the evidence should be admissible. For example, the evidence may bear on the reasonableness of the defendant's fear of the victim if self-defense is an issue in the case.[82] Of course, in those cases, it must be shown that the defendant knew of the specific instances of conduct.[83]

C. Victim's Prior Sexual History

In *Williams v. State*,[84] the court dealt with a defendant's claim that the trial court improperly excluded testimony that an alleged sex crime victim had a practice of trading sex for cocaine.[85] The *Williams* court concluded that the trial

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1405, 1409-14 (D.C. Cir. 1996) (en banc) (collecting cases); *see also* United States v. Crawford, 130 F.3d 1321, 1323 (8th Cir. 1997).

77. *See* United States v. Jemal, 26 F.3d 1267, 1273 (3d Cir. 1994) (citing United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979)).

78. 683 N.E.2d 574 (Ind. 1997).

79. *Id.* at 576; *see also* IND. R. EVID. 404(a)(2).

80. *See* IND. R. EVID. 405(b).

81. *See Brooks*, 683 N.E.2d at 576-77 (citing United States v. Keiser, 57 F.3d 847, 856 (9th Cir. 1995); Johnson v. State, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996); *see also* Cooper, *supra* note 42, at 1057 n.46 (discussing *Johnson* and *Keiser*).

82. *See* State v. Nazario, 694 A.2d 666, 668 (R.I. 1997) (victim's specific instances of conduct admissible as proof of defendant's reasonable fear).

83. *See id*.

84. 681 N.E.2d 195 (Ind. 1997).

85. Professor Cooper discusses the Indiana Court of Appeals' decision in this case (Williams v. State, 669 N.E.2d 182 (Ind. Ct. App. 1996)) in last year's survey. Cooper, *supra* note 42, at 1057-60.

court properly excluded the proffered evidence.[86]

In reaching its conclusion, the *Williams* court first discussed the purposes of Rule 412[87] and the Rape Shield law.[88] The two provisions share the same purpose: they are designed to shield the victim from "surprise, harassment, and unnecessary invasions of privacy, and importantly, to remove obstacles to reporting sex crimes."[89] The court then examined the defendant's claim of error solely with respect to the Indiana Evidence Rules. Under Rule 412, defendants may introduce evidence of their past sexual conduct with the alleged victim, "but [Rule 412] does not permit a defendant to base his defense of consent on the victim's past sexual experiences with third persons. The allegation of prostitution does not affect this calculus."[90]

The court also conditioned the admissibility of evidence of an alleged victim's past sexual conduct to that evidence satisfying Rule 401 and Rule 403.[91] In other words, even if evidence is admissible under Rule 412, it still must pass the logical relevance test of Rule 401 and the balancing test of Rule 403. In *Williams*, the court found that even if the evidence was admissible under Rule 412, it was properly excluded by the trial court.[92] According to the *Williams* court, this evidence would have improperly focused the jury on the alleged previous acts of the victim rather than the defendant's actions on the night in question.[93]

The court then examined the defendant's Sixth Amendment claims.[94] The

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86. *Williams*, 681 N.E.2d at 200.

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> In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or a witness may not be admitted, except:
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> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
>
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
>
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
>
> (4) evidence of a conviction of a crime to impeach under Rule 609.

IND. R. EVID. 412(a).

88. IND. CODE § 35-37-4-4 (1993). The court held that where this statute conflicts with Rule 412, Rule 412 controls. *Williams*, 681 N.E.2d at 200 n.6; *see also* McEwen v. State, No. 49500-9612-CR-731, slip op. at 17-20 (Ind. Apr. 30, 1998). *But see* Humbert v. Smith, 664 N.E.2d 356, 357 (deferring to legislature on foundational requirements of blood test evidence to establish paternity that conflict with Rule 803(6)).

89. *Williams*, 681 N.E.2d at 200.

90. *Id*. (citing United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991)).

91. *Id.* at 201.

92. *Id*.

93. *Id*.

94. The defendant did not raise a claim under article I, section 13 of the Indiana Constitution. Whether this provision affords defendants more protection than the Sixth Amendment in these cases

court concluded that the defendant's Sixth Amendment rights were not violated in this case because "there was no restriction on the ability of the defense to present evidence of the incident."[95] The jury was able to evaluate both accounts of the incident in question.[96] Moreover, the proffered evidence did not serve to explain any of the physical evidence.[97] Therefore, under these facts, the defendant's constitutional rights were not violated.[98] The court went on to stress that a victim's past acts of prostitution are not admissible for that reason alone and that there is no constitutional right to present evidence of a victim's sexual activity with others solely on the basis of her past sexual acts.[99]

V. WITNESSES (ARTICLE VI).

A. Competency

"Every person is competent as a witness except as otherwise provided by these rules or by act of the Indiana General Assembly."[100] In *Newsome v. State*,[101] the court faced the question of whether this new rule abrogated pre-Rules case law dealing with the competency of child witnesses. In concluding that it did not, the court stated, "[W]e think the better reading of Ind.Evidence Rule 601 is to require the trial court to conduct an inquiry into witness competency to ensure that minimum standards of competence are met."[102] Specifically, a court will have to determine whether the child "(1) understands the difference between telling a lie and telling the truth, (2) knows she is under compulsion to tell the truth, and (3) knows what a true statement is."[103]

Judge Hoffman's concurrence introduces the idea that under Rule 601, a witness is presumed competent to testify.[104] Under that proposition, the party opposing the witness's testimony would be forced to rebut the presumption of competence.[105]

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is an open question.

95. *Williams*, 681 N.E.2d at 201.

96. *Id*.

97. *Compare id*. *with* Richmond v. Embry, 122 F.3d 866, 871 (10th Cir. 1997) (The defendant's Sixth Amendment rights were not violated where the defendant's counsel attempted to introduce evidence of victim's past sexual conduct through his own witness, not by cross-examination of victim or other prosecution witness; thus, the trial court did not deny defendant an entire relevant area of cross-examination.).

98. *Williams*, 681 N.E.2d at 201-02.

99. *Id.*

100. IND. R. EVID. 601.

101. 686 N.E.2d 868 (Ind. Ct. App. 1997).

102. *Id*. at 872.

103. *Id.*; *see also* IND. R. EVID. 603.

104. *Id*. at 877 (Hoffman, J., concurring) (citing Thornton v. State, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995)).

105. *See id*.

It seems that there is little practical difference between the majority and the concurrence. In most situations, parties opposing the testimony will have to make their objections known to the court. The court will then have to determine whether the witness can offer testimony that has "minimum credibility."[106]

B. Rule 609 Impeachment

Rule 609 deals with impeachment of a witness by a prior criminal conviction. Specifically, it allows a witness to be impeached by conviction of certain enumerated crimes or crimes involving dishonesty.[107] This survey will examine three cases[108] dealing with Rule 609 evidence. In *Jenkins v. State*,[109] the court evaluated the defendant's claim that the trial court should have undertaken a Rule 403 balancing analysis before admitting evidence of the defendant's prior conviction for robbery. The *Jenkins* court properly rejected this claim. It concluded that the Indiana version of Rule 609(a)[110] embodied principles from *Ashton v. Anderson*,[111] which gave the trial court no discretion in admitting this evidence.[112] This holding is supported by the plain language of Rule 609(a), which uses the mandatory "shall."[113]

Rule 609(b) imposes a ten-year time limitation on the use of prior convictions measured either from the date of conviction or date of release from incarceration.[114] However, under that rule, the court may admit evidence of a "stale" conviction if the court determines that "in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."[115]

In *Dowdy v. State*,[116] the court evaluated a defendant's claim that the trial court improperly admitted evidence of an "aged" conviction in violation of Rule

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106. 3 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 601[01], at 601-09 to -10 (1988); *see also* United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984).

107. IND. R. EVID. 609(a).

108. One Rule 609 case decided in the survey period, *Cason v. State*, 672 N.E.2d 74 (Ind. 1996), was discussed in last year's survey and therefore will not be discussed here. Cooper, *supra* note 42, at 1060. *Kent v. State*, 675 N.E.2d 332, 338 n.1 (Ind. 1996), also mentions Rule 609. The *Kent* court noted that commentary on a defendant's *misdemeanor* convictions was permissible under Rule 609 because the defendant had testified. Unless the misdemeanors involved dishonesty or false statements, this observation was incorrect. *See* IND. R. EVID. 609.

109. 677 N.E.2d 624 (Ind. Ct. App. 1997).

110. The court noted that the rule differs from its federal counterpart in that the federal counterpart expressly makes the admissibility of the evidence subject to a Rule 403 balancing analysis. *Id.* at 626-27.

111. 279 N.E.2d 210 (Ind. 1972).

112. *Jenkins*, 677 N.E.2d. at 627.

113. IND. R. EVID. 609(a); *see also* Harney & Markavitch, *supra* note 15, at 898 n.103.

114. IND. R. EVID. 609(b).

115. *Id*.

116. 672 N.E.2d 948 (Ind. Ct. App. 1996).

609(b). The defendant in *Dowdy* was charged with robbery. On cross-examination of the defendant, the prosecution introduced evidence that the defendant had been convicted of robbery more than ten years before the trial.

At the outset of its analysis, the court properly noted that there is a bias against the admissibility of aged convictions.[117] The court went on to adopt the Seventh Circuit's five-part test to determine the admissibility of the aged convictions.[118] This test provides the following non-exclusive list of factors by which to evaluate the admissibility of an aged conviction:

(1) the impeachment value of the prior crime;
(2) the point in time of the conviction and the witness' subsequent history
(3) the similarity between the past crime and the charged crime;
(4) the importance of the defendant's testimony; and
(5) the centrality of the credibility issue.[119]

Seemingly, this test is tailored to instances where the government is impeaching a defendant who chooses to take the stand in his own defense. In determining that the prior robbery conviction was admissible to impeach the defendant, the *Dowdy* court found it significant that the defendant was charged with robbery.[120]

This conclusion is open to some criticism. Because the evidentiary value of the prior conviction is solely for its impeachment value, it would seem that the similarity between the charged crime and the prior crime would militate against admissibility; one could reasonably ask why a defendant's veracity would be influenced by the similarity of the charged crime to the prior crime. The similarity between the two crimes invites the inference that, because the defendant did it before, the defendant is guilty of the charged crime.[121] This is an impermissible inference, yet the *Dowdy* court seems to embrace just such an inference. This part of *Dowdy* ought to be reexamined in the near future.

Rule 609 allows the impeachment of defendants and ordinary witnesses. In

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117. *Id*. at 951.

118. *Id.*

119. *Id.* (citing United States v. Castor, 937 F.2d 293, 298-99 (7th Cir. 1991)).

120. *Id*. at 952 ("Here, because Dowdy was charged with two counts of robbery, the impeachment value of his 1982 robbery conviction was very significant.").

121. *See* United States v. Hernandez, 106 F.3d 737 (7th Cir. 1997) (where impeachment crime is similar to charged crime, likelihood of prejudice is higher); United States v. Causey, 9 F.3d 1341, 1344 (7th Cir. 1993) (similarity militates against admissibility but is not dispositive); State v. Kissner, 541 N.W.2d 317, 324 (Minn. Ct. App. 1995) ("In general, the greater the similarity between the prior offense and the present offense, the greater the reason for not allowing the use of the prior conviction for impeachment purposes."); State v. Gentry, 747 P.2d 1032, 1037 (Utah 1987) (similarity between charged crime and prior crime "highly likely to prejudice jurors and unduly influence their conclusion concerning defendant's guilt); State v. Gonzalez, 922 P.2d 210, 213 (Wash. Ct. App. 1996) (greater similarity between prior and current offense means greater potential for prejudice).

Schwestak v. State,[122] the court evaluated a trial court's refusal to allow the defendant to impeach a prosecution witness with evidence of a more than ten year old conviction. The *Schwestak* court held that this decision is to be reviewed for an abuse of discretion.[123] In affirming the trial court, the *Schwestak* court stated, "We cannot see why the probative value of this conviction, which is more than ten years old, is so high as to overcome the general rule that stale convictions are inadmissible."[124] It seems that after *Schwestak*, it is unlikely that Indiana appellate courts will reverse a trial court's decision to exclude evidence of stale convictions absent an extraordinary showing.

VI. Opinion Evidence

A. Lay Witness Opinions

In *Kent v. State*,[125] the Indiana Supreme Court discussed the admissibility of lay witness opinion testimony. In *Kent*, the defendant was home alone with his girlfriend's two children. When the girlfriend returned home, she found her son "lying on his bed, pale and white in color, perspiring around the hairline, and with a blue spot on his neck."[126] When questioned by his girlfriend about the boy's injuries, the defendant replied that the boy had fallen into the bathtub and that he had fallen off the toilet. At trial, the State elicited testimony from a police officer with emergency medical training that "the condition of the child is not conducive with a fall in a bath tub."[127]

The *Kent* court held that the trial court did not abuse its discretion in allowing the testimony. Citing Rule 701, the court concluded that the testimony, "though not expert, [was] "rationally based on [the officer's] perception' and [was] 'helpful to a clear understanding' of [the officer's] testimony."[128] This conclusion is certainly open to some criticism. The *Kent* court may have blurred the line between lay witness opinion testimony governed by Rule 701 and expert witness testimony governed by Rule 702.[129] Although there is ample authority

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122. 674 N.E.2d 962 (Ind. 1997).

123. *Id*. at 964.

124. *Id*.

125. 675 N.E.2d 332 (Ind. 1996).

126. *Id*. at 335.

127. *Id*. at 338.

128. *Id*. at 339.

129. *See* Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1198 (5th Cir. 1995) (discussing spectrum of Rule 701 cases). *Asplundh Manufacturing* contains an excellent discussion of the rationale behind Rule 701. Rule 701 was intended to liberalize the traditional common law strictures on lay witnesses giving "opinion" testimony. *See id*. at 1195. The Rule was designed to deal with situations where

> it is impossible or difficult to reproduce the data observed by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and

for treating the observations of skilled lay observers as falling under Rule 701, the police officer's testimony in this case seems to fall under the rubric of expert, rather than lay, testimony. The cause of injuries seems to be the province of medical experts, not lay observers. Although there are certain types of idiosyncratic injuries that lay observers may be able to adequately describe and characterize to a jury,[130] this case did not seem to be one of those. In this case, the police officer did not appear to have particularized knowledge of the type of injuries suffered in this case; consequently, allowing him to testify about what did or did not cause the injuries is problematic.

B. Rule 702

In *McGrew v. State*,[131] the Indiana Supreme Court evaluated the admissibility of hair comparison analysis. In *McGrew*, after a hearing concerning the admissibility of the hair comparison analysis, an Indiana State Police hair comparison analyst testified at trial. The defendant argued on appeal that the prosecution had failed to sustain its burden of demonstrating the reliability of the hair comparison analysis. The Indiana Supreme Court rejected that claim and determined that the trial court "exercised appropriate discretion as to the reliability of the proffered hair comparison analysis."[132]

The *McGrew* court analyzed the case as one involving Rule 702(b); however, at the end of the opinion, the court seemed to agree with the trial court judge who stated, "[W]hat we're talking about is *not the traditional scientific evaluation*.

> clearness as they appeared to the witness, the witness may state his impressions and opinions based on what he observed. It is a means of conveying to the jury what the witness has seen or heard. If the jury can be put into a position equal vantage with the witness for drawing the opinion, then the witness may not give an opinion. Because it is sometimes difficult to describe the mental or physical condition of a person, his character or reputation, the emotions manifest by his acts; speed of a moving object or other things that arise in a day to day observation of lay witnesses; things that are of common occurrence and observation, such as size, heights, odors, flavors, color, heat, and so on; witnesses may relate their opinions or conclusions of what they observed.

United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982) (as quoted in JOHN F. SUTTON, JR. & OLIN GUY WELLBORN III, CASES AND MATERIALS ON EVIDENCE (8th ed. 1992)); *see also Asplundh Manufacturing*, 57 F.3d at 1192 (Rule was designed to allow witnesses to give "shorthand renditions.").

It is an expansion of the "core" of Rule 701 to allow opinion evidence outside the realm of common knowledge or understanding. *See id*. at 1199 (discussing how Rule 701 has been expanded to deal with matters outside ordinary lay opinion). *Kent* certainly takes an expansive view of Rule 701; this expansive view may need reexamination.

130. *Compare Kent*, 675 N.E.2d at 339 *with* United States v. Myers, 972 F.2d 1566, 1576-78 (11th Cir. 1992) (stun gun injuries) *and* Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (opinion that knife wounds were self-inflicted).

131. 682 N.E.2d 1289 (Ind. 1997).

132. *Id.* at 1292.

We are talking about simply a person's observations under a microscope."[133] Consequently, the opinion is not entirely clear about why Rule 702(b) applies to hair comparison analysis, nor does it clearly delineate whether hair comparison analysis is scientific knowledge or technical or other specialized knowledge.

Rule 702 treats scientific evidence differently from technical or specialized knowledge. Rule 702(a) allows the admission of "scientific, technical, or other specialized knowledge"[134] through expert testimony if such evidence will assist the trier of fact. Rule 702(b) states 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."[135] The plain language of Rule 702(b) suggests that only scientific knowledge is subject to the foundational requirements of Rule 702(b).[136] The *McGrew* decision simply does not reveal what standard governs the admissibility of technical or other specialized knowledge.

Another somewhat puzzling part of the *McGrew* opinion is the fact that the court seems to analyze the case under Rule 702(b), which requires the court to find that the scientific principles upon which hair comparison analysis is based are reliable. However, the court did not seem to undertake any analysis concerning the scientific principles upon which hair comparison analysis is based. In fact, the court quoted the colloquy between the analyst and the defendant's attorney: "When asked by the defendant what 'scientific principle is used to base the reliability of hair sample technique[,]' the analyst testified, 'Scientific principle? It's just simply a physical comparison of one hair directly to another one.'"[137] From the opinion it appears that the analyst never stated any scientific principles to support the reliability of hair comparison analysis.[138]

Perhaps the answer may be in the court's statement: "Inherent in any reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will

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133. *Id*. (emphasis added).

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

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

136. The *McGrew* court stated, "This subsection [i.e., Rule 702(b)] differs from the Federal Rules of Evidence in its express requirement that expert testimony be based upon reliable scientific principles." *McGrew*, 682 N.E.2d at 1290 (citing Jervis v. State, 679 N.E.2d 875, 881 n.9 (Ind. 1997); Steward v. State, 652 N.E.2d 490, 498 (Ind. 1995)). This cryptic statement can be read to condition the admissibility of *all* expert testimony on the satisfaction of Rule 702(b)'s foundational requirement. This would be contrary to the plain language of Rule 702 which makes a distinction between scientific knowledge and technical or other specialized knowledge. At first glance, such a requirement would not seem that onerous—until one considered that many experts are not scientists, e.g., carpenters, policemen, bricklayers, etc.

137. *Id*. at 1290.

138. The court noted that the analyst compared a number of different parts and characteristics of the hair. *Id*. However, this does not establish the scientific principles upon which hair comparison analysis evidence is based. Rather, it shows how the comparison was done; it does not show *why* the comparison is reliable.

necessarily become more advanced and complex as well."[139] However, in *McGrew*, there was no showing of *any* scientific principle guaranteeing the reliability of hair comparison analysis.

McGrew also leaves an important question unanswered, i.e., the boundary between scientific knowledge—the admissibility of which is governed by Rule 702(b)—and technical or other specialized knowledge, the admissibility of which is not expressly governed by Rule 702 or any other evidence rule. Despite the uncertainty in the *McGrew* opinion, one thing is clear: hair comparison analysis will be admissible in Indiana.[140] The new battleground over this evidence will be the qualification of the analyst making the comparison.

VII. HEARSAY

A. Out of Court Statements as Non-Hearsay

In *Angleton v. State*,[141] the court stated, "If a statement, the substantive content of which does not *directly* assert the declarant's state of mind, is admitted to show only the declarant's state of mind, it is not hearsay."[142] This proposition raises the issue of the implied assertion and its effect on the hearsay character of an out of court statement. In *Angleton*, the court dealt with a variety of out of court statements made by a murder victim before she died. One example is the victim's statement that she wanted a dog, wanted a gun, and wanted to make sure she got up in the morning. The court held that these statements were not admitted to show what the victim wanted (i.e., the truth of the matter asserted) but rather that she was "fearful and unhappy."[143] As such, the evidence served as circumstantial proof of the declarant's state of mind.

This decision raises some interesting issues, especially since the Indiana Supreme Court appeared to reach a contrary view several months earlier in *Ross v. State*.[144] In general, it seems that the weight of federal authority holds that implied assertions are not hearsay.[145] However, a large number of decisions rest on the fact that the statement at issue was not intended to be an assertion.[146] Out

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139. *Id*. at 1292.

140. For a lengthy discussion of *McGrew*, see William F. Harvey, *Inadvertent Disclosure, Work-product Privilege, Other Holdings*, RES GESTAE, Jan. 1998, at 36.

141. 686 N.E.2d 803 (Ind. 1997).

142. *Id*. at 808 (citing Dunaway v. State, 440 N.E.2d 682, 686 (Ind. 1982)); Byrd v. State, 579 N.E.2d 457, 463 (Ind. Ct. App. 1991), *aff'd in part, vacated in part on other grounds*, 593 N.E.2d 1183 (Ind. 1992) (emphasis added)).

143. *Id*. at 809.

144. 676 N.E.2d 339, 345 (Ind. 1997) (rejecting as hearsay out of court statement that implied a fact).

145. *See* State v. Collins, 886 P.2d 243, 245 (Wash. Ct. App. 1995) (collecting cases); *see also* Carlton v. State, 681 A.2d 1181, 1184 (Md. Ct. App.) (describing differing approaches by federal courts), *cert. denied*, 686 A.2d 634 (Md. 1996).

146. *See* United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990); United States v.

of court statements that are not assertions are, by definition, not hearsay.[147]

In *Angleton*, it seems that the declarant intended to assert something but just not exactly what the statement was offered to prove. The statement was then not offered to prove the truth of the matter asserted and consequently was properly admitted—at least as far as a mechanical application of the rule is concerned. However, problems could arise, depending on the closeness of the facts asserted in the out of court statement and the fact the out of court statement is offered to prove.[148]

B. Statements Defined as Non-Hearsay by Rule 801(d)

Rule 801(d) excludes certain out-of-court statements from the definition of hearsay. Because these statements are defined as nonhearsay, they may be considered by the fact-finder as substantive evidence on the merits. Two cases examining this rule merit discussion. In *Cooley v. State*,[149] the issue was the admissibility of a witness' out-of-court statement. In that out-of-court statement, the witness had told police that the defendant "was dealing drugs." The court made short work of the State's argument that the out-of-court statement constituted the statement of a party-opponent.[150] "The reason [the witness'] statement here is hearsay is because she is testifying about *her* prior unsworn statements[;] . . . [w]hat makes this testimony hearsay is that she was testifying as to what she said on a prior occasion, not as to what [the] defendant said."[151]

In *Humphrey v. State*, [152] a witness gave an unsworn statement to the police that the defendant had gone out to a truck with "white guys"[153] in it, that the witness heard a noise, and that the defendant returned stating that he had shot one of them. On the stand, the witness testified that he did not know the defendant and that he was not with the defendant on the night of the murder. The State then

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Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990); United States v. Groce, 682 F.2d 1359, 1364-65 (11th Cir. 1982); United States v. Zenni, 494 F. Supp. 464 (E.D. Ky. 1980) (*Zenni* has had a tremendous influence in this area of the law.); Jim v. Budd, 760 P.2d 782, 784-85 (N.M. Ct. App. 1987); *Collins*, 886 P.2d at 245; Guerra v. State, 897 P.2d 447, 461 (Wyo. 1995).

147. *See* IND. R. EVID. 803(a)(1), (c).

148. *See* United States v. McGlory, 968 F.2d 309, 332 (3d Cir. 1992) ("We encounter the problem when: the matter which the declarant intends to assert is different from the matter to be proved, but the matter asserted, if true, is circumstantial evidence of the matter to be proved.") (citing United States v. Reynolds, 715 F.2d 99, 103 (3d Cir. 1983)); *see also* United States v. Palma-Ruedas, 121 F.3d 841, 857 (3d Cir. 1997); Brown v. Commonwealth, 487 S.E.2d 248, 251 (Va. Ct. App. 1997) (en banc).

149. 682 N.E.2d 1277 (Ind. 1997).

150. *See* IND. R. EVID. 801(d)(2). The State argued that the witness' out-of-court statement was gleaned from the defendant's statements to her and therefore constituted the defendant's statement.

151. *Cooley*, 682 N.E.2d at 1282.

152. 680 N.E.2d 836 (Ind. 1997).

153. The shooting victim in this case was white.

offered the evidence of the prior statement.[154]

The court began its analysis by concluding that the statement was "'classic hearsay' not ordinarily admissible as substantive evidence."[155] The fact that the witness was available to testify on the stand did not deprive the statement of its hearsay character if offered to prove the truth of the matter asserted in the statement.[156] Although the statement was inadmissible as substantive evidence, it was admissible to impeach the witness as a prior inconsistent statement.[157]

Because the statement was admissible for one purpose (impeachment) and inadmissible for another purpose (as substantive evidence), the defendant could have requested a limiting instruction. However, he did not. In a well-reasoned discussion of the policy reasons for placing the onus of requesting a limiting admonition on the parties, the court held that the defendant's failure to do so constituted waiver of the issue.[158]

The *Humphrey* court also discussed an instruction given to the jury to the effect that the jury was free to consider any witness' prior inconsistent statement as substantive evidence bearing on the defendant's guilt.[159] Because the defendant did not object to this instruction at trial or on appeal, the court found that the defendant had waived the issue.[160] The court did however state that the instruction, which mirrored an Indiana Pattern Jury Instruction,[161] should "not be used in trials in this state."[162]

Lastly, the court discussed the defendant's claim that there was insufficient evidence to support the jury's finding of guilt. In evaluating the defendant's sufficiency claim, the court considered the witness' prior inconsistent statement as substantive evidence supporting the verdict because a limiting admonition was not sought.[163] This seems a harsh result, but it is correct. Hearsay in and of

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154. This was so even though the witness was called by the State. Rule 607 allows the impeachment of a witness by any party, including the party calling the witness. *See* United States v. Ienco, 92 F.3d 564, 568 (7th Cir. 1996) (discussing Rule 607's abolition of the common law voucher rule). For an interesting discussion of this rule and the possibility of the prosecution using it as a subterfuge to get prior inconsistent statements of a hostile witness in front of the jury, see *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984).

155. *Humphrey*, 680 N.E.2d at 838.

156. *Id*.

157. *Id*. at 838-39; *see also* IND. R. EVID. 613(b).

158. *Humphrey*, 680 N.E.2d at 839-40.

159. *Cooley* and *Humphrey* also contain an excellent discussion of the *Patterson* rule (where the instruction in *Humphrey* originated) and its demise. Patterson v. State, 324 N.E.2d 482 (Ind. 1975), *overruled by* Modesitt v. State, 578 N.E.2d 649 (Ind. 1991); *see also* Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15, 18 (1997). Previously, in Indiana, "prior statements made by witnesses who were available to testify under oath were [excluded from the hearsay rule]." *Cooley*, 682 N.E.2d at 1281.

160. *Humphrey*, 680 N.E.2d at 840.

161. 2 IND. PATTERN JURY INSTRUCTIONS (CRIM.) No. 12.19 (2d ed. 1991).

162. *Humphrey*, 680 N.E.2d at 840.

163. *Id*. at 840-41 (citing Banks v. State, 567 N.E.2d 1126, 1129 (Ind. 1991); Keller v. State,

itself is not necessarily unreliable,[164] and where it is admitted without objection or without a proper limiting admonition it may not only support the verdict but also may be the only evidence sustaining the verdict.[165]

Cooley and *Humphrey* clear up some confusion that may have resulted from a previous decision in this area. In a previous case, the court cited Rule 801(d) for the proposition that statements offered for the purpose of impeachment were not hearsay.[166] Commentators have aptly criticized *Hilton*;[167] it is therefore unnecessary to repeat those criticisms here. Suffice it to say that *Cooley* and *Humphrey* are accurate statements of the law and to the extent that *Hilton* is inconsistent with them, it should not be followed.

C. Hearsay Exceptions

1. Excited Utterances.—A number of decisions during the survey period evaluated the excited utterance exception to the hearsay rule.[168] In the first of these cases, *Yamobi v. State*,[169] the court evaluated the admission of a murder victim's statement to a police officer as the victim was dying.[170] The defendant claimed that the statement did not fall within the excited utterance exception for two reasons: 1) the statement was elicited by the police officer's questions and 2) too much time had elapsed between the statement and the startling event.

The court determined that Rule 803(2) codified the common law excited utterance exception.[171] The court then stated that the statement had to meet a three part test in order to be admissible: "1) a startling event occurs; 2) a statement is made by a declarant while under stress of the excitement caused by the event; and 3) the statement relates to the event."[172] The court also

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560 N.E.2d 533, 534-35 (Ind. 1990)).

164. *Id.* at 840.

165. *See* United States v. Hugh-Chalmers Toyota-Chevrolet, Inc., 800 F.2d 737, 738 (8th Cir. 1986); United States v. Taylor, 900 F. Supp. 618, 621 n.2 (E.D.N.Y. 1995); State v. Kulmec, 644 A.2d 887, 901-02 (Conn. 1994). *But see* State v. Corvers, 646 So. 2d 1125 (La. Ct. App. 1994).

166. Hilton v. State, 648 N.E.2d 361, 362 (Ind. 1995). Of course, statements offered for impeachment are not hearsay because they are not offered to prove the truth of the matter asserted. *See* Birdsong v. State, 685 N.E.2d 42, 46 (Ind. 1997). The problem (other than the fact that Rule 801(d) does not speak to this issue) with citing Rule 801(d) for that proposition is that statements offered under Rule 801(d) are admissible as substantive evidence. Run-of-the-mill prior inconsistent statements are not admissible as substantive evidence.

167. Harney & Markavitch, *supra* note 15, at 906 n.157; William F. Harvey, *Evidence: Impeachment by Prior Inconsistent Statements and Hearsay*, RES GESTAE, Jan. 1996, at 15 (characterizing *Hilton* as a bit confused).

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

169. 672 N.E.2d 1344 (Ind. 1996).

170. The statement was not admitted as a dying declaration. *See* IND. R. EVID. 804.

171. *Yamobi*, 672 N.E.2d at 1346.

172. *Id*.

emphasized that a mechanical inquiry is unjustified.[173] The touchstone of admissibility is "whether the statement is inherently reliable because the declarant is incapable of thoughtful reflection."[174]

Under the facts presented, the court concluded that the trial court correctly admitted the statement. The fact that the statement was in response to questioning was only a factor in determining the admissibility of the statement.[175] The court noted that the declarant had just been shot and had not talked to anyone else and that the statement was in response to the police officers first and only question.[176]

As for the time elapsing between the event and the statement, the court held that it was a factor to be considered in evaluating the admissibility of the evidence. The key to the admissibility was not the amount of time that had elapsed,[177] but whether the declarant was still under the stress of the startling event.[178] "A statement made while in a condition of excitement theoretically stills the capacity for reflection and prevents fabrication."[179]

In *Carter v. State*,[180] the court determined that a shooting victim's statements made to a police officer in an emergency room immediately after the shooting were admissible. The court found that the case was "almost identical" to *Yamobi*.[181] The court also concluded that the fact that the declarant could not remember making the statements did not make the statements inadmissible.[182]

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173. *Id*.

174. *Id.*; *see also* United States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994) (justification for excited utterance exception is that statements are made under circumstances that "eliminate the possibility of fabrication, coaching, or confabulation") (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)).

175. *Yamobi*, 672 N.E.2d at 1346; *see also* Brown v. State, 683 N.E.2d 600, 603 (Ind. Ct. App. 1997) (statement does not lose spontaneity simply because it was elicited by police questioning). However, the type and manner of the police questioning has some impact on the inherent reliability of the extra-judicial statements. *See Yamobi*, 672 N.E.2d at 1346; *see also* State v. Barnies, 680 A.2d 449, 452-53 (Me. 1996) (collecting cases); State v. Smith, 909 P.2d 236, 241 (Utah 1995) (significant that questions were "open-ended").

176. *Yamobi*, 672 N.E.2d at 1346.

177. However, if the court cannot determine the time between the startling event and the statement, the evidence should be excluded. *See* Browne v. State, 933 P.2d 187, 191 (Nev. 1997).

178. *Yamobi*, 672 N.E.2d at 1346; *see also* United States v. Sherlock, 962 F.2d 1349, 1352 (9th Cir. 1989) (rape victims had spoken to others and had time to concoct story before allegedly excited utterance made).

179. City of Dallas v. Donovan, 768 S.W.2d 905, 906-08 (Tex. App. 1989, no writ). *Donovan* also contains an excellent analysis of the degree of relatedness of the extrajudicial statement to the startling event. *See also* Woodworth v. Estate of Yunkin, 673 N.E.2d 825, 828 (Ind. Ct. App. 1996) (statement unrelated to startling event not admissible).

180. 686 N.E.2d 834 (Ind. 1997).

181. *Id.* at 837.

182. *Id.* (citing State Street Duffy's, Inc. v. Loyd, 623 N.E.2d 1099, 1103 (Ind. Ct. App. 1993)).

This holding is consistent with federal case law[183] and is entirely correct. The fact that the declarant made the statements is not solely provable by the declarant remembering having made them. The police officer heard them and could testify under oath that they were made. Then the only issue becomes the inherent reliability of the statement. Because it was made under the stress of a startling event, the statement was inherently reliable and therefore admissible.[184]

In *Carter v. State*,[185] the court examined the admissibility of an excited utterance where the issue was the personal knowledge of the declarant. In order for an excited utterance to be admissible, the declarant must have personally observed (or perceived) the startling event.[186] However, that requirement may be satisfied by circumstantial evidence.[187] In *Carter*, the court held that the statement, "Daddy said pow," satisfied the requirement.[188] This leads to the conclusion that the hearsay statement itself may provide the necessary circumstantial evidence to demonstrate the personal knowledge of the declarant. *Carter* also provides a reminder that the admissibility of the declarant's out-of-court statement is not predicated on the declarant being competent to testify.[189]

2. Then Existing State of Mind.—In *Bacher v. State*,[190] the Indiana Supreme Court evaluated the defendant's contention that the trial court impermissibly allowed testimony that the murder victim was fearful of the defendant. The *Bacher* court treated the testimony as hearsay even though the testimony contained no reference to the fact that the source of the information was the victim's statements to the testifying witness.[191] The court held that even if the

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183. *See, e.g.*, United States v. Scarpa, 913 F.2d 993, 1016-17 (2d Cir. 1990); United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980) ("lack of recall may indicate declarant was under stress at time of statement").

184. *Carter*, 686 N.E.2d at 837. A rule that required declarants to always remember their excited utterances would be difficult to justify in light of the fact that people often cannot remember what they said in stressful situations.

185. 683 N.E.2d 631 (Ind. Ct. App. 1997).

186. *Id*. at 632. *But see* State v. Lenarchick, 247 N.W.2d 80, 93 (Wis. 1976) ("personal observation of startling event not required if declarant under influence of startling event"). Another issue that may occur in this area is the identity of the declarant. *See* Miller v. Keating, 754 F.2d 507, 510 (3d Cir. 1985) (statement by unidentified declarants not per se inadmissible).

187. *Carter*, 683 N.E.2d at 632.

188. The declarant was also in the house where the shooting occurred. The court found that this did not prove that the declarant was in the room where the victim was shot. *Id*.

189. *Id*.; *see also* Morgan v. Foretich, 846 F.2d 941, 946-47 (4th Cir. 1988); State v. Bauer, 704 P.2d 264, 267 (Ariz. Ct. App. 1985).

190. 686 N.E.2d 791 (Ind. 1997).

191. *See id*. at 797. Justice Sullivan brought up an interesting question: "This raises the nice evidentiary question of whether a witness's testimony offered to prove the truth of the matter asserted that is based solely on information provided by another is stripped of its hearsay character by removing all reference to the source of the information." *Id*. On this point, see 2 MCCORMICK ON EVIDENCE § 249, at 104 (John William Strong, ed. in chief, 4th ed. 1992) ("[T]he hearsay objection cannot be obviated by eliciting the purport of the statement in indirect form.). *But cf*.

testimony was hearsay, it was admissible as a statement of the victim's then existing state of mind.[192]

This conclusion drew a sharp dissent from Justice Boehm (with Justice Dickson concurring). As the dissent points out, the court's analysis is somewhat troubling. A victim's state of mind is usually not relevant to prove the defendant's conduct; rather, the admissibility of that evidence "must be tied to some subsidiary issue in the case."[193] In this case, there was no dispute about the inharmoniousness of the relationship between the between the victim and the defendant.[194] Therefore, according to the dissent, the evidence was not relevant and therefore inadmissible.[195]

In this author's opinion, the dissenting view is sounder. The dissent correctly points out that the majority's reliance on *Lock v. State*[196] is problematic. In *Lock*, the defendant had made her relationship with the murder victim an issue.[197] In *Bacher*, there was no such evidentiary dispute.[198] Furthermore, in this case, the majority did not focus on why the facts of this case made the victim's then existing state of mind probative. The dissent did so and concluded that the victim's fearfulness of the defendant simply was not relevant.

Other jurisdictions have examined evidence admitted under the then existing

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Strickland Transp. Co. v. Ingram, 403 S.W.2d 192, 195 (Tex. App. 1966, no writ) ("The hearsay character of the testimony must affirmatively appear before it may be disregarded on appeal."). Justice Sullivan's observation also raises the issue of the distinction between the hearsay rule and the requirement of personal knowledge. *See* 2 MCCORMICK ON EVIDENCE, *supra*, § 247, at 99.

192. *See* IND. R. EVID. 803(3).

193. *Bacher*, 686 N.E.2d at 803 (Boehm, J., dissenting).

194. *Compare id. with* Angleton v. State, 686 N.E.2d 803, 809 (Ind. 1997) ("A victim's state of mind is relevant where it has been placed in issue by the defendant."). In *Angleton*, the defendant had "portrayed [the victim] as [his] happily married wife who peacefully spent her time writing love notes and poems [to the defendant]." *Id.* In *Angleton*, the court took pains to emphasize the fact that the evidence of the victim's state of mind was particularly probative. This is to be contrasted with the court in *Bacher*.

195. *Cf.* Headlee v. State, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997). "If the fact sought to be proved under the suggested non-hearsay purpose is not relevant, or it is relevant, but its danger of unfair prejudice substantially outweighs its probative value, the hearsay objection should be sustained." *Id.* (citing Craig v. State, 630 N.E.2d 207, 211 (Ind. 1994)).

196. 567 N.E.2d 1155, 1159-60 (Ind. 1991).

197. Often, a defendant will offer evidence that his or her relationship with the victim was good. The suggestion to the jury, of course, is that the defendant did not kill the victim because the two of them were on good terms. It is readily apparent that the prosecution should be allowed to rebut this evidence by demonstrating the victim's state of mind, either through the hearsay exception provided by Rule 803(3) or through any other permissible means. *Angleton* is a good example of this situation.

198. *Bacher*, 686 N.E.2d at 802 (Boehm, J., dissenting). There are, of course, other situations where the victim's state of mind is admissible. *See* State v. Baca, 902 P.2d 65, 71 (N.M. 1995) (giving common examples, such as where the defendant claims self-defense or that the victim committed suicide); *see also* State v. Nance, 533 N.W.2d 557, 559 (Iowa 1995) (giving examples).

state of mind exception showing that the victim feared the defendant (as was the case in *Bacher*) and have concluded that it should not be used to prove the conduct of the defendant or identify the defendant as the perpetrator.[199] One such case is *Commonwealth v. Qualls*.[200] In *Qualls*, the court cogently explained the dangers of allowing evidence of the victim's fear of the defendant:

> In this context, it seems clear that the Commonwealth's case against the defendant may have been significantly enhanced by the introduction of statements made by one of the victims in the hours, days, and weeks prior to the murders expressing fear that the defendant was going to kill him. [The victim's] statements that he was afraid that the defendant would kill him could have been seen by the jury as "a prophecy of what might happen to him." His statements of fear were certainly "a voice from the grave casting an incriminating shadow on the defendant."[201]

The victim's fearfulness of a defendant, as opposed to other states of mind, presents special dangers. The *Bacher* court does not recognize this reality.

The *Bacher* dissent does not reveal whether the hearsay evidence passes the bare logical relevance test of Rule 401. That is certainly an open question, but the real issue, as illustrated by the case law, is the likelihood of unfair prejudice when hearsay evidence of the victim's fear of the defendant is introduced. In the author's view, the rule should be that evidence of the victim's fear of the defendant should be inadmissible, unless particularized circumstances of the case make that evidence particularly probative.

3. Business Records Exception.—Stahl v. State,[202] involved a challenge to the admissibility of an affidavit asserted to fall under the business record exception to the hearsay rule.[203] In *Stahl*, the defendant was charged with defrauding a bank and theft. According to the State, the defendant withdrew cash from an ATM without authorization. To prove the lack of authorization, the State introduced an affidavit of forgery that the bank had required the account holder to sign so that the account could be recredited.

The court correctly held that the affidavit was not admissible under the business records exception.[204] In doing so, the court embarked on a detailed

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199. One exception to this rule would be where the victim's fear was an essential element of the crime (e.g., extortion). *See, e.g.*, United States v. Collins, 78 F.3d 1021, 1036 (6th Cir. 1996); United States v. Adcock, 558 F.2d 397, 404 (8th Cir. 1977).

200. 680 N.E.2d 61 (Mass. 1997).

201. *Id*. at 67 (quoting United States v. Day, 591 F.2d 861, 883 (D.C. Cir. 1978)); United States v. Brown, 490 F.2d 758, 781 (D.C. Cir. 1974); *see also* State v. Charo, 754 P.2d 288, 291-92 (Ariz. 1988); State v. Canady, 911 P.2d 104, 111 (Haw. Ct. App. 1996); *Baca*, 902 P.2d at 71-72 ("The principal danger is that the jury will consider the victim's fear as somehow reflecting on the defendant's state of mind rather than the victim's—i.e., as a true indication of the defendant's intentions, actions or culpability.").

202. 686 N.E.2d 89 (Ind. 1997).

203. IND. R. EVID. 803(6).

204. *Stahl*, 686 N.E.2d at 92.

analysis of pre-Rules Indiana case law, federal case law and the plain language of Rule 803(6) itself. The opinion contains an excellent discussion of why information gained from outsiders is not inherently reliable and therefore does not fall under the business records exception.[205] Such was the case here. The court also could have simply looked directly to the express trustworthy requirement in the rule itself to reach the same result.[206] Obviously, the source of this information was not trustworthy. The statement served the source's monetary interests, and he was under no business duty to report the facts.[207]

4. Public Records.—In *Ealy v. State*,[208] the court considered the admissibility of an autopsy report under Rule 803(8) in a criminal case. Rule 803(8) allows the admission of public documents and records as an exception to the hearsay rule. However, the rule itself excludes from its scope certain types of public documents and records.[209] At the outset, the court determined that the autopsy report fell under Rule 803(8)(c), which excludes "factual findings offered by the government in criminal cases from this hearsay exception."[210]

Rather than embracing a literal reading of the rule, the *Ealy* court embraced a more flexible rule. Courts evaluating the admissibility of government reports and documents in criminal cases must first determine if the findings address a "materially contested issue" in the case.[211] If not, then the express requirement of trustworthiness in the rule is enough to protect the criminal defendant.[212]

If the findings address a materially contested issue, then the court must evaluate the "nature of what is objected to."[213] If what is objected to is not clearly a factual finding, then the evidence is not inadmissible.[214] "Such evidence may be simple listings, or a simple recordation of numbers."[215] If the evidence contains "factual findings," then the court must determine whether it was "prepared for advocacy purposes or in anticipation of litigation. If it was not,

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205. *Id.* at 92; *cf.* Pierce v. Atchison Topeka & Santa Fe Ry., 110 F.3d 431, 444 (7th Cir. 1997) (business record prepared to memorialize unusual incident and possibly prepared with an eye toward litigation properly excluded by trial court).

206. Most courts evaluate the source of the information in the business record, i.e., the person with actual knowledge. Where that person is outside the organization, "Rule 803(6) does not, by itself, permit the admission of the business record." United States v. Baker, 693 F.2d 183 (D.C. Cir. 1982). *But cf.* United States v. Sokolow, 91 F.3d 396, 403 (3d Cir. 1996) (information may be supplied by sources outside the organization if organization verifies accuracy of information).

207. *Stahl* also contains an analysis of the admissibility of the affidavit as a statement affecting an interest in property. IND. R. EVID. 803(15); *see* Part VII.C.5 *infra*.

208. 685 N.E.2d 1047 (Ind. 1997).

209. IND. R. EVID. 803(8)(a)-(d).

210. *Ealy*, 685 N.E.2d at 1050-51 & n.3.

211. *Id*. at 1054.

212. *Id*.

213. *Id*.

214. *See id*.

215. *Id*.

then the evidence is admissible."[216]

Curiously, the *Ealy* court bases a part of its new test on whether the proffered evidence contains factual findings (as opposed to simple listings or recordations). However, earlier in the opinion the court states, "However, as the vagueness of the definition suggests, any determination as to whether something is a factual finding would be difficult to make, highly subjective, and difficult to review."[217]

Another problem with this opinion is its failure to mention section 34-1-17-7 of the Indiana Code.[218] Section 34-1-17-7, in conjunction with Rule 802, expressly makes autopsy reports admissible. This is so because "[h]earsay is not admissible except as provided by law *or* these rules."[219] Because section 34-1-17-7 is undoubtedly a law, the plain language of Rule 802 operates to make the evidence admissible.

5. Documents Affecting an Interest in Property.—In *Stahl v. State*,[220] the court considered the admissibility of the affidavit of forgery described above[221] under Rule 803(15)—documents affecting an interest in property. The court first reviewed the "sparse" case law on the subject and determined that the exception would apply to documents that were both "ancient" and "dispositive."[222]

The court then examined the policy reasons behind this hearsay exception. First, these documents are usually carefully drawn and are usually not created with an eye toward the controversy in which they are admitted.[223] Second, they usually have an added assurance that at least one of the parties involved in the creation of the document is motivated to ensure accuracy.[224] Lastly, these documents often have a great deal of minutiae and often are expected to last for a long period of time.[225] Consequently, it is impossible to expect that witnesses will be able to testify about the facts recited in the document. Therefore, out of necessity, the statements in the documents are admissible.[226]

The court then explained that the exception has been applied to non-dispositive documents (i.e., documents that do not create, in and of themselves, an interest in property).[227] Presumably, this results from the fact that "the

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216. *Id*.

217. *Id.* at 1051-52. The *Ealy* court's requirement that the trial court *clearly* find that a given piece of evidence is not a factual finding may address its concerns about the difficulty of determining what constitutes a factual finding. However, a requirement that the trial court be sure of its decision does little to facilitate appellate review, particularly if there is an abuse of discretion standard of review.

218. IND. CODE § 34-1-17-7 (1993).

219. IND. R. EVID 802 (emphasis added).

220. 686 N.E.2d 89 (Ind. 1997).

221. *See* Part VII.C.3, *supra*.

222. *Stahl*, 686 N.E.2d at 93.

223. *See id*.

224. *See id*.

225. *See id*.

226. *See id*.

227. *See id*. (citing United States v. Weinstock, 863 F. Supp. 1529, 1535 (D. Utah 1994)).

parameters of the phrase 'establish or affect an interest in property' are not entirely clear."[228] The *Stahl* court did not explicitly define these parameters, apparently leaving that for future cases.[229] However, the court did require that, to be admitted, the document must be executed in circumstances that "generate confidence in its reliability."[230] Additionally, the court stated that recent and non-dispositive documents (like the affidavit of forgery) must be scrutinized more closely to ensure reliability.[231] Because the affidavit in this case was generated in conjunction with the present litigation and there was a motive for untruthfulness in its creation, it did not have a sufficient guarantee of reliability. Hence, it was inadmissible.

VIII. BEST EVIDENCE RULE[232]

Only one case dealt with the best evidence rule during the survey period. In *Thomas v. Department of State Revenue*,[233] the court allowed the admission of a reconstructed tax return where there was no dispute about the accuracy of the evidence and no evidence that the original return was intentionally destroyed.[234] This is a straightforward and correct application of the rule. The case also provides a reminder that an effective objection to secondary evidence will show the court an actual dispute about the accuracy of that evidence.

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228. *Id.* (quoting IND. R. EVID. 803(15)).

229. The *Stahl* court stated that "[i]t is debatable whether the affidavit should be described as one affecting an interest in property." *Id.* at 93-94. The court is correct in its skepticism. The affidavit did not effect a change in title to the funds, nor did it in a strict sense grant an interest in those funds.

230. *Id*. at 94.

231. *Id*.

232. The Indiana Supreme Court has referred to the best evidence rule as an "original documents rule." *See* Moore v. State, 498 N.E.2d 1, 3 (Ind. 1986).

233. 675 N.E.2d 362 (Ind. T.C. 1997). *Thomas* was decided before the author joined the Indiana Tax Court.

234. *See* IND. R. EVID. 1004.