RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW OCTOBER 1, 2008 – SEPTEMBER 30, 2009

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INTRODUCTION

The Indiana Rules of Evidence ("Rules") went into effect January 1, 1994. Since that time, judicial decisions and statutory amendments have refined these Rules. This Article explains the developments in Indiana evidence law during the period of October 1, 2008 through September 30, 2009.[1] The discussion topics track the order of the Rules.

I. GENERAL PROVISIONS (RULES 101 – 106)

A. General Overview

Pursuant to Rule 101(a), the Rules apply to all court proceedings in Indiana except when "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[2] Common law and statutory law continue to apply to specific issues not covered by the Rules.[3]

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

- Is this issue covered by an Evidence Rule? If not (but only if not), is the issue covered by a statute or by pre-Rule case law?
- Is this a preliminary issue of fact to be decided by the judge rather than by the fact-finder, and so not governed by the Evidence Rules except those

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1. The authors did not to include *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 552 (Ind. 2009) or *Beldon v. State*, 906 N.E.2d 895 (Ind. Ct. App. 2009), *trans. granted*, 919 N.E.2d 556 (Ind. 2009), *vacated by* No. 43505-0910-CR-496, 2010 WL 1790456 (Ind. May 5, 2010) in this Article because the Indiana Supreme Court vacated these opinions by granting transfer. *See* IND. APP. R. 58(A). The authors likewise did not include *Sibbing v. Cave*, 901 N.E.2d 1155 (Ind. Ct. App.) (discussing Rules 413, 701, 801, 802 and 803), *trans. granted*, 915 N.E.2d 993 (Ind. 2009), *opinion vacated*, 922 N.E.2d 594 (Ind. 2010) or *Lafayette v. State*, 899 N.E.2d 736 (Ind. Ct. App.) (discussing Rule 404(b) and Sixth Amendment issues), *trans. granted*, 917 N.E.2d 660 (Ind.), *opinion vacated*, 917 N.E.2d 666 (Ind. 2009) in this Article. The Indiana Supreme Court decisions fall into the subsequent survey period.

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

3. *Id.*

concerning privilege?

- If this is a sentencing hearing and so not governed by the Evidence Rules, is the evidence against the accused reliable, and so consistent with principles of due process?[4]

B. Situations in Which Use of Evidentiary Rules Is Limited

In probation and community corrections placement revocation hearings, "judges may consider any relevant evidence bearing some substantial indicia of reliability."[5] In *Monroe v. State*,[6] Monroe challenged the admissibility of certain hearsay evidence and the sufficiency of the evidence as a whole to support the revocation of his placement on home detention. At the revocation hearing, a Delaware County Community Corrections Supervisor testified about officers finding a forty-caliber handgun in the bottom of the refrigerator at the home where Monroe lived while on home detention after his Class D felony conviction.[7] While community corrections placement revocation hearings must meet certain due process requirements, the proceeding, the court noted, did not need to be equated with an adversarial criminal proceedings.[8] Accordingly, pursuant to Rule 101(c), the Rules in general, and the rules against the admission of hearsay evidence in particular, did not apply.[9] Thus, the trial court properly considered the hearsay testimony presented at the revocation hearing. Because the trial court did not wrongfully consider hearsay testimony and sufficient evidence existed demonstrating Monroe's constructive handgun possession, the court affirmed the trial court's revocation of Monroe's home detention.[10]

Similarly, in *Peterson v. State*,[11] the Indiana Court of Appeals found that the trial court had not erred when it admitted a report produced from a polygraph examination of the defendant, indicating that he had violated his probation terms by viewing pornography.[12] Testimony by the defendant's mental health counselor, who viewed a videotape of the polygraph and testified that the transcript matched what she saw, was sufficient to establish the reliability of the challenged evidence.[13]

In certain circumstances a party can, by its wrongdoing, forfeit his ability to

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4. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE 5 (2009).

5. Monroe v. State, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009) (citing Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999)).

6. *Id.* at 691-92.

7. *Id.*

8. *Id.* at 691.

9. *Id.*

10. *Id.*

11. 909 N.E.2d 494 (Ind. Ct. App. 2009).

12. *Id.* at 497-98.

13. *Id.* at 499.

object to the admission of certain evidence. In *Roberts v. State*,[14] the trial court allowed testimony from co-workers and friends of the deceased, Faith Vanarsdale, that she had told them of her boyfriend's threats to kill her. Dana Roberts, sentenced to sixty-two years for murdering Vanarsdale, contended that the trial court erred in admitting the evidence because it violated his Sixth Amendment right to confrontation and because it constituted inadmissible hearsay under Indiana's Evidence Rules.[15] The trial court ruled that the statements did not implicate the Sixth Amendment because they were not testimonial.[16] The Indiana Court of Appeals, for argument's sake, assumed that the statements were inadmissible hearsay but went on to conclude that any objection to the admissibility of the statements was forfeited by Roberts via his wrongdoing—the murder of the declarant.[17] The *Roberts* case affirmed the principle articulated in *Boyd v. State*,[18] that the common law doctrine of forfeiture by wrongdoing applied to objections made pursuant to the Rules.[19]

The Indiana Court of Appeals, in *Kimbrough v. State*, reiterated a number of general evidence concepts including: (1) under Rule 103, error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of a party is affected;[20] (2) trial courts have broad discretion to admit or exclude evidence;[21] (3) appellate courts review decisions to admit or exclude evidence on an abuse of discretion standard;[22] and (4) a decision constitutes an abuse of discretion when it "is clearly against the logic, facts, and circumstances presented."[23] The court also dealt with waiver of issues in the context of the admission of a taped 911 call.[24]

The defendant argued on appeal that the trial court erred in admitting the 911 call, made immediately after the incident underlying the defendant's conviction. Although the defendant had filed a motion in limine asserting a number of grounds for exclusion of the evidence,[25] at trial he objected only on the basis that

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14. 894 N.E.2d 1018 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

15. *Id.* at 1022-27.

16. *Id.* at 1024.

17. *Id.*

18. 866 N.E.2d 855, 857 (Ind. Ct. App. 2007).

19. *Roberts*, 894 N.E.2d at 1025 (citing *Boyd*, 866 N.E.2d at 857 (citing Rule 101(a) ("If these rules do not cover a specific evidence issue, common or statutory law shall apply."); Rule 802 (excluding the admission of hearsay except as provided by law or by the Indiana Rules of Evidence))).

20. 911 N.E.2d 621, 631 (Ind. Ct. App. 2009).

21. *Id.*

22. *Id.*

23. *Id.* (citing Platt v. State, 589 N.E.2d 222, 229 (Ind. 1992)).

24. *Id.* at 631-32.

25. Defendant filed a motion in limine objecting to the evidence on four bases: (1) that the evidence was overly cumulative; (2) that the admission of the evidence violated the defendant's right to confrontation under article I, section 13 of the Indiana Constitution; (3) that the evidence constituted inadmissible hearsay; and (4) that the evidence was prejudicial. *Id.*

the call was cumulative. Finding the defendant waived all other objections to the tape, and finding that the tape was neither cumulative nor "inflammatory or unduly prejudicial in any way,"[26] the court concluded that there was no error in the admission of the evidence.[27]

C. Formal Offer of Proof

In *Griffith v. State*,[28] Griffith appealed his convictions for criminal recklessness, intimidation, and battery, in part asserting that the trial court abused its discretion[29] by excluding his alleged hearsay statements, which statements he claimed illustrated "the real reason why" the victim was at his duplex.[30] According to Rule 103(a)(2),

> [e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (2) [in the] case [where] the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.[31]

An offer of proof preserves an error in the exclusion of a witness's testimony and allows the trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded.[32] However, Rule 103(a)(2) does not require an offer of proof if the substance of the evidence "was apparent from the context within which questions were asked."[33] Based on the record, the court determined that Griffith failed to make an offer of proof in accordance with Rule 103.[34]

D. Relevancy Conditioned on Fact

In *Lewis v. State*,[35] Lewis appealed his conviction for marijuana possession, alleging that the court should not have admitted evidence of marijuana seized from the defendant because the State had failed to properly admit the warrant for arrest which precipitated and led to the discovery of the marijuana.[36] In a bench trial, Officer Eldridge testified that he was dispatched to a gas station on a report

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26. *Id.*

27. *Id.* at 635.

28. 898 N.E.2d 412 (Ind. Ct. App. 2008).

29. Indiana's trial courts hold broad discretion in ruling on the admission or exclusion of evidence at trial and will only be overturned with a finding of abuse of discretion. Platt v. State, 589 N.E.2d 222, 229 (Ind. 1992); Sallee v. State, 785 N.E.2d 645, 650 (Ind. Ct. App. 2003).

30. *Id.* at 413, 416.

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

32. *See* Dowdell v. State, 720 N.E.2d 1146, 1150 (Ind. 1999).

33. IND. R. EVID. 103(a)(2).

34. *Griffith*, 898 N.E.2d at 416.

35. 904 N.E.2d 290 (Ind. Ct. App. 2009).

36. *Id.* at 291.

of "trouble with a person."[37] Upon arriving at the scene, Lewis was arrested—not because of any action observed by the officer but due to a pre-existing arrest warrant. A search revealed a baggie of marijuana in Lewis's pocket.[38] Although not challenging the validity of the warrant, Lewis argued that the trial judge erred in allowing testimony about the marijuana because the State did not introduce the warrant and therefore failed to establish the basis for the search.[39] In this case of first impression, the Indiana Court of Appeals held that the State did not hold an affirmative obligation to provide a criminal defendant with a warrant that leads to a search incident to an arrest and that Lewis had not been deprived of his right to challenge the validity of the warrant.[40] Lewis alternatively claimed the testimony of Officer Eldridge's testimony was inadmissible hearsay. Citing to its previous decision in *Williams v. State*,[41] the court of appeals held that Officer Eldridge's testimony was not hearsay but was, instead, a preliminary matter governed by Rule 104(a):

> In the context of a criminal investigation, we have held that "[a]n out-of-court statement introduced to explain why a particular course of action was taken during a criminal investigation is not hearsay because it is not offered to prove the truth of the matter asserted." Here, [the arresting officer] was not an out-of-court declarant, and he did not testify as to the truth of any out-of-court statement; rather, he testified in court as to his observation of an active warrant for [defendant's] arrest and the course of action that he took as a result.[42]

Lewis argued that if the trial court did not admit Officer Eldridge's testimony to prove the truth of the matter asserted, then no evidence existed of the warrant and, therefore, no basis for admitting of the marijuana evidence. The Indiana Court of Appeals held that to the extent Officer Eldridge's testimony was offered to establish the existence of a warrant, that evidence concerned the admissibility of marijuana. The warrant "was not an element of the State's case."[43] Rather, in accordance with Rule 104, it pertained "only to the admissibility of evidence obtained under the warrant."[44] "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the Court. . . . In making its determination, it is not bound by the Rules of Evidence, except those with respect

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37. *Id.*

38. *Id.*

39. *Id.* at 292.

40. *Id.* at 292-93. Although the warrant was referenced by cause number in the probable cause affidavit, Lewis had not made a discovery request for the warrant. Moreover there was no evidence of any effort by Lewis to obtain the warrant and no evidence of any discovery violation by the State. *Id.* at 293.

41. 898 N.E.2d 400, 403 n.1 (Ind. Ct. App. 2008). This case is discussed below with regards to the Rule 801 discussion in the same.

42. *Lewis*, 904 N.E.2d at 293 (quoting *Williams*, 898 N.E.2d at 403 n.1 (citation omitted)).

43. *Id.*

44. *Id.* (quoting Guajardo v. State, 496 N.E.2d 1300, 1303 (Ind. 1986)).

to privileges."[45] Rule 104(a) therefore permitted the trial court to consider Officer Eldridge's potentially hearsay evidence when ruling on the admissibility of marijuana evidence.

E. The Rule of Completeness

In *Farmer v. State*, the defendant stood accused of Class A attempted rape, Class A felony burglary, Class C felony robbery, Class D felony criminal confinement, and Class D felony criminal recklessness.[46] The charges arose from a single incident in which Charles Farmer followed a Noblesville, Indiana woman home from a Wal-Mart. He then proceeded to rob her, attempt to rape her, and hold her captive for several hours.[47] After the incident, Farmer fled to Utah, where local police ultimately arrested and interrogated him.[48] At trial, the officer who interrogated Farmer in Utah testified regarding admissions that Farmer made to her.[49] The court granted the State's motion to bar Farmer's self-serving statements made during his interrogation.[50]

On appeal, Farmer, citing Rule 106, argued that the trial court erred in barring his self-serving statements.[51] The Indiana Court of Appeals determined that because Rule 106 applied only to writings and recordings and not oral conversations, it did not require admission of the self-serving statements,[52] but the common law doctrine of completeness applied to oral conversations.[53] Therefore, the trial court should have admitted Farmer's statements.[54]

Nevertheless, the court of appeals did not reverse the trial court's ruling because Farmer failed to make an offer of proof with regard to the improperly excluded evidence. Under Rule 103(a)(2), advocates may not predicate error upon a ruling excluding evidence unless the substance of the evidence was made known to the court by an "offer of proof, or was apparent from the context within which questions were asked."[55] Thus, by neglecting to make an offer of proof, Farmer failed to preserve the error.[56] Moreover, even if he had preserved the error, the error would not require reversal because the statements at issue were

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45. *Id.*; *see* MILLER, *supra* note 4, § 104.102, at 112 ("Rule 104(a) expressly provides that the trial court is not bound [by] any evidence rules other than those with respect to privileges. Thus, for example, a trial judge may consider inadmissible hearsay . . . in deciding a motion to suppress evidence in a criminal case . . . .").

46. 908 N.E.2d 1192, 1194 (Ind. Ct. App. 2009).

47. *Id.* at 1194-95.

48. *Id.* at 1196.

49. *Id.* at 1197.

50. *Id.* at 1200.

51. *Id.*

52. *Id.*

53. *Id.* (citing Lewis v. State, 754 N.E.2d 603, 607 (Ind. Ct. App. 2001)).

54. *Id.*

55. *Id.* at 1201.

56. *Id.*

self-serving statements, and the defendant had the opportunity to tell his version of events and to explain the statements he made to the officer during his interrogation.[57]

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

In *Bonilla v. Commercial Services of Perry, Inc.*,[58] Bonilla challenged the trial court's presumptions regarding evidence.[59] The defendants utilized Indiana Code section 33-42-2-6 to establish the presumption that Bonilla signed certain notarized mortgages at issue in the case. The trial court allowed Bonilla to introduce evidence to rebut the presumption, but it found Bonilla's evidence to be unpersuasive and insufficient.[60]

As previously established by the Indiana Supreme Court, in *Schultz v. Ford Motor Co.*,[61] Rule 301 mandates that "the finder of fact would be required to find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the presumed fact."[62] Under this approach, a presumption "met by rebutting evidence effectively becomes an inference under Rule 301."[63] "An inference remains in the case despite the presentation of contrary proof and may be weighed with all the other evidence."[64] Applying Rule 301 and *Shultz*, the Indiana Court of Appeals held that the trial court in *Bonilla*, after weighing all of the evidence, did not err when it held that Bonilla failed to rebut the presumption.[65]

In *Daisy v. Sharp*,[66] Kelly Daisy asserted that the trial court abused its discretion when it denied her petition to change the name of her minor daughter, M.S., to include her surname.[67] Finding that the father had failed to establish that he had met statutory requirements which would have allowed the trial court's application of the presumption set forth in Indiana Code section 34-28-2-4(d),[68] the court remanded the case to the trial court reweigh the evidence without application of the presumption.[69]

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57. *Id.* at 1201 (citing McElroy v. State, 553 N.E.2d 835, 840 (Ind. Ct. App. 2009)).

58. 900 N.E.2d 22 (Ind. Ct. App. 2009).

59. *Id.* at 23, 27.

60. *Id.* at 27.

61. 857 N.E.2d 977, 982-83 (Ind. 2006).

62. *Id.* at 982 (citations omitted).

63. *Bonilla*, 900 N.E.2d at 27 (quoting MILLER, *supra* note 4, § 301.101, at 229 (3d ed. 2007)).

64. *Id.* (quoting MILLER, *supra* note 4, § 301.101, at 22 (3d ed. 2007)).

65. *Id.* at 28.

66. 901 N.E.2d 627 (Ind. Ct. App. 2009).

67. *Id.* at 630.

68. *Id.* at 632.

69. *Id.* at 631-32.

III. RELEVANCY AND ITS LIMITS OF THE CONCEPT (RULES 401 – 413)

A. Irrelevant Evidence

In *Ward v. State*, the Indiana Supreme Court affirmed the death sentence of defendant Roy Lee Ward, who was convicted of the rape and murder of a fifteen-year-old girl.[70] Among the issues presented on appeal was whether the trial court erred in allowing the admission of graphic photographs of the victim's body, including photographs taken after she had received medical treatment and post her autopsy.[71] Generally, photos of a victim's injuries are inadmissible.[72] Specifically, autopsy photos are generally inadmissible in order to avoid risking a mistaken inference that the defendant caused the autopsy incisions. However, such photos may be admitted when accompanied by testimony explaining what has been done to the body.[73] The trial court did not err in admitting the photos because sufficient explanatory testimony accompanied the admission of the photographs.[74]

In *Roberts v. State*,[75] Roberts argued that the trial court abused its discretion when it admitted into evidence the testimony of the murder victim's daughter, T.R.[76] On appeal, Roberts alleged that the testimony was not relevant and was introduced for the purpose of creating "sympathy with the jury regarding the death of [her mother]."[77] However, Roberts failed to object to this evidence at trial and as a result waived this issue for appeal.[78] Even if the defendant had not waived the issue, the court determined that the evidence would have been relevant because it confirmed that Roberts was at the scene of the murder and thus was admissible pursuant to Rule 401.

In *Pitts v. State*,[79] Pitts appealed his conviction and sentence for murder alleging that the trial court failed to permit him to present a defense.[80] Pitts made several offers of proof related to his defense theory that someone else committed the murder in question.[81] "[A] defendant has a right to present evidence tending to show that someone other than the accused committed the charged crime."[82] However, the evidence that a defendant wishes to present must be relevant.

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70. 903 N.E.2d 946, 950 (Ind.), *aff'd on reh'g*, 908 N.E.2d 595 (Ind. 2009), *cert. denied*, Ward v. Indiana, 130 S. Ct. 2060 (2010).

71. *Id.* at 957-58.

72. *Id.* at 958 (citing Corbett v. State, 764 N.E.2d 622, 627 (Ind. 2002)).

73. *Id.* (citations omitted).

74. *Id.* at 958-59.

75. 894 N.E.2d 1018 (Ind. Ct. App. 2008).

76. *Id.* at 1027.

77. *Id.*

78. *Id.*

79. 904 N.E.2d 313 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 922 (Ind. 2009).

80. *Id.* at 318.

81. *Id.* at 318-19.

82. *Id.* at 318 (quoting Allen v. State, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004)).

"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.'"[83] The court cited an Indiana Supreme Court holding that "evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of Rule 401."[84] The court held that the evidence proffered by Pitts failed to show, or even imply, that someone else committed the murder. Thus, the trial court did not commit reversible error in excluding the evidence.[85]

In *Hinds v. State*,[86] Hinds appealed his conviction for operating a vehicle while intoxicated arguing, in part, that the trial court improperly admitted certain field sobriety tests administered by the Indiana State Police.[87] Hinds contended that finger-to-nose and backward count tests were irrelevant. Citing Rules 401 and 402, the court found the evidence relevant, even though it only had a slight tendency to make a fact more or less probable.[88] The fact that the tests were not standardized did not "render them irrelevant."[89]

In *Kimbrough v. State*, the defendant objected to testimony by his victim, James Peoples, concerning the pain that Peoples suffered after Kimbrough attacked him with a wooden table-leg.[90] Kimbrough argued that the evidence did not meet the relevancy threshold demanded by Rule 401.[91] The charge against Kimbrough was battery with a deadly weapon.[92] This charge, Kimbrough pointed out, failed to involve the infliction of a serious bodily injury.[93] The Indiana Court of Appeals quoted the rule, stating that "evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"[94] With respect to the charge against the defendant, the court explained that the definition of a "deadly weapon" is "an object that, in the way it is used, is readily capable of causing serious bodily injury."[95] The court went on to explain that "serious bodily injury includes 'extreme pain.'"[96] Thus, "the amount of time that Peoples was in pain from the injury that Kimbrough inflicted with the table leg was relevant to whether the object constituted a

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83. *Id.* (quoting Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001) (quoting Rule 401)).
84. *Id.* (quoting *Smith*, 754 N.E.2d at 504).
85. *Id.* at 319.
86. 906 N.E.2d 877 (Ind. Ct. App. 2009).
87. *Id.* at 879.
88. *Id.* at 880-81.
89. *Id.* at 881.
90. 911 N.E.2d 621, 622 (Ind. Ct. App. 2009).
91. *Id.*
92. *Id.* at 626.
93. *Id.* at 633.
94. *Id.* (quoting IND. R. EVID. 401).
95. *Id.* (citing IND. CODE § 35-41-1-8(a)(2) (2008)).
96. *Id.* (citing IND. CODE. § 35-41-25 (2008)).

deadly weapon."[97]

Spar v. Cha presented the question of whether, in a medical malpractice action, evidence of a patient's prior informed consent is admissible under Rules 401, 402, and 403.[98] Plaintiff alleged that the defendant doctor had performed laparoscopic surgery without obtaining the plaintiff's informed consent.[99] During the surgery, the plaintiff suffered a perforated bowel.[100] The trial court allowed the defendant doctor to introduce evidence of plaintiff's informed consent to similar prior surgeries.[101] The Indiana Supreme Court affirmed. The court explained that the evidence was relevant to two issues presented at trial: (1) to what extent the defendant was required to disclose risks of the surgery, and (2) whether the plaintiff would have chosen to forego the surgery had the defendant fully apprised her of all risks.[102]

B. Probative Value Versus Unfair Prejudice

In *Pelley v. State*,[103] the defendant, Pelley, argued that the trial court erred by excluding evidence of a third party motive for the murders of Pelley's father, stepmother, and stepsisters.[104] In upholding the exclusion of this evidence, the Indiana Supreme Court first noted that evidence of third party intent is relevant and thus generally admissible under Rule 401.[105] Where its probative value is outweighed by its prejudicial effect, however, such evidence stands subject to exclusion under Rule 403. For evidence of third-party motive to be admissible, the defendant must show a "connection between the third party and the crime."[106] Because Pelley failed to establish such a connection, the trial court properly deemed the evidence inadmissible.[107]

In *Bassett v. State*, Basset objected to the testimony of two men who were incarcerated with him in the Bartholomew County Jail as he awaited resolution of the charges against him.[108] The witnesses, Clarence Johnson and Jimmy Wiles, each testified that Bassett had asked them to kill Chief Deputy Prosecutor Kathleen Burns, who had principal responsibility for Bassett's prosecution.[109]

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97. *Id.* at 633-34.

98. 907 N.E.2d 974, 976 (Ind. 2009).

99. *Id.* at 977-78.

100. *Id.* at 978.

101. *Id.* at 984.

102. *Id.*

103. 901 N.E.2d 494 (Ind. 2009), *reh'g denied*, No. 71S05-0808-CR-446, 2009 LEXIS 619 (Ind. May 13, 2009).

104. *Id.* at 496, 504.

105. *Id.* at 505.

106. *Id.* (citing Holmes v. South Carolina, 547 U.S. 319, 327 & n.* (2006)).

107. *Id.*

108. 895 N.E.2d 1201, 1205 (Ind. 2008), *cert. denied*, Bassett v. Indiana, 129 S. Ct. 1920 (2009).

109. *Id.* at 1210.

Rejecting Bassett's argument that the admission of this testimony violated Rule 403 in that its probative value was substantially outweighed by the danger of unfair prejudice, the court noted a long line of Indiana cases holding that "'threats against potential witnesses as attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt.'"[110]

In *McClain v. State*,[111] McClain appealed his conviction for Failure to Register as a Sex Offender claiming that the trial court abused its discretion when, despite his offer to stipulate to his status as a sexual offender, the trial court permitted the introduction of evidence regarding McClain's prior sexual battery conviction.[112] Finding the prejudicial impact of the details of McClain's sexual battery conviction indisputable in light of the fact the it had no probative value to the offense to which he had been tried, the court reversed McClain's conviction and remanded the case for a new trial.[113]

C. Use of Related Extrinsic Evidence

Under Rule 404(b), evidence of a person's other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it is admissible for other limited purposes, including demonstrating motive.[114] In *Camm v. State*,[115] a jury convicted David Camm of murdering his wife and children.[116] Part of the prosecution's theory of the case was that Camm had murdered his family to hide his molestation of his young daughter, Jill.[117] Although testimony established that Jill Camm had injuries to her groin that might have resulted from molestation, there was no direct evidence demonstrating that David Camm had molested her.[118]

In addressing whether the trial court's admission of the molestation evidence constituted reversible error, the Indiana Supreme Court noted that the State had failed to sufficiently connect Jill Camm's injuries to the defendant.[119] Under Rule 104(b), "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[120] Thus, the court explained, the relevance of the alleged molestation as motive

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110. *Id.* at 1211 (quoting West v. State, 755 N.E.2d 173, 182 (Ind. 2001)).

111. 898 N.E.2d 409 (Ind. Ct. App. 2008), *reh'g denied*, No. 02A03-0808-CR-428, 2009 Ind. App. LEXIS 866 (Ind. Ct. App. Apr. 24, 2009).

112. *Id.* at 410.

113. *Id.* at 411-12.

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

115. 908 N.E.2d 215 (Ind. 2009), *reh'g denied*, No. 87500-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

116. *Id.* at 219-20.

117. *Id.* at 221.

118. *Id.* at 224.

119. *Id.* at 223.

120. *Id.* at 223-24. (quoting IND. R. EVID. 104(b)).

depended on evidence of two premises: (1) that Jill's groin injuries had resulted from molestation, and (2) that the defendant molested her.[121] Because there was no evidence supporting the second premise, the court found that the trial court's decision to allow "speculative evidence and argument that the defendant molested his daughter, combined with the State's use of this evidence as the foundation of its case" constituted reversible error.[122] The court added that even if the evidence had been admissible under Rules 404(b) and 104(b), Rule 403 would prevent its admission, as the "prejudicial impact" of the molestation allegation was "vividly evident."[123]

On another Rule 404 issue, the Indiana Supreme Court in *Camm* affirmed the trial court's exclusion of tendered evidence regarding alleged coconspirator Charles Boney's foot fetish and Boney's prior felony convictions for robberies targeting women's shoes.[124] Camm argued that such evidence established Boney's motive and identified Boney as the murderer. Finding Boney's previous crimes were not sufficiently similar to the murders of Camm's family and that there was no evidence connecting the murders to a foot or shoe fetish, the Indiana Supreme Court held that Rule 404(b) barred admission of the tendered evidence.[125] The court explained that the inference suggested by the defense—that the court should infer Boney's guilt because of his fetish for shoes and feet—is precisely the type of inference forbidden by Rule 404.[126] The court also rejected Camm's argument that the admission of the evidence was compelled by the Supreme Court's decision in *Holmes v. South Carolina*,[127] even if it was not admissible under the Indiana Rules of Evidence.[128]

In *Atteberry v. State*, the defendant claimed that the trial court erred when it permitted a witness for the prosecution to testify that the defendant's DNA was found in a DNA database.[129] Specifically, the defendant argued that, because the particular DNA database contained the DNA of convicted felons, any reference to it violated Rule 404(b) in that it informed the jury of his prior criminal acts.[130] The trial court did not allow the witness to testify as to the particular database but only that the defendant's DNA was in a national database.[131] The Indiana Court of Appeals, in declining to find that the trial court had erred, rejected the defendant's argument that the jury could have inferred that he had been convicted in the past by virtue of his DNA appearing in a national database.[132]

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121. *Id.* at 224.
122. *Id.* at 225.
123. *Id.*
124. *Id.* at 230-31.
125. *Id.* at 231.
126. *Id.*
127. 547 U.S. 319 (2006).
128. *Id.* at 231-32 (citing *Holmes*, 547 U.S. at 323).
129. 911 N.E.2d 601, 608 (Ind. Ct. App. 2009).
130. *Id.*
131. *Id.* at 609.
132. *Id.*

McClendon v. State[133] presented the issue of whether Rules 403 and 404(b) prevented the admission of testimony concerning a confrontation between the defendant, Emanuel McClendon, and witness, "Christopher H."[134] The confrontation occurred approximately eleven months before McClendon fired shots at the home where Christopher H.'s wife and children lived, killing Christopher H.'s eight-year-old daughter, K.H.[135] McClendon claimed that he fired the shots in self-defense.[136] The State sought to introduce evidence of the earlier confrontation as proof of contrary intent.[137] In Christopher H.'s testimony about the earlier confrontation, he claimed that McClendon had accused him of watching McClendon bring "weed" into McClendon's residence. Initially the trial court denied the State's request, but eventually it reconsidered and allowed the evidence.[138]

On appeal, McClendon argued that the trial court should have excluded the evidence because "(1) the confrontation occurred eleven months before the shooting; and (2) Christopher H. mentioned 'weed' in his testimony, which could [have led] the jury to believe McClendon was involved in drug dealing."[139] The record showed that the trial court admitted the evidence because of its relation to the defendant's anticipated self-defense argument and because the probative value of the evidence outweighed its prejudicial effect.[140] The earlier confrontation related to an ongoing conflict between the men and the reference to "weed" provided context for the confrontation. On this record, the Indiana Court of Appeals found that the trial court had not abused its discretion by admitting the evidence.[141]

In *Bean v. State*, Joshua Bean was convicted of the murder and dismemberment of his former girlfriend, Heather Norris.[142] On appeal, Bean contended that the trial court, pursuant to Rule 404(b), should have excluded certain evidence, most of which concerned previous incidents of violence between Bean and Norris.[143] The evidence included an oral statement by Norris to a friend concerning a choking incident;[144] testimony that Bean had thrown Norris out of his car; and testimony regarding a confession to Norris's murder Bean made to a friend.[145] In each situation, however, the Indiana Court of

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133. 910 N.E.2d 826 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0811-CR-999, 2009 Ind. LEXIS 1340 (Ind. Oct. 1, 2009).

134. *Id.* at 833.

135. *Id.* at 829-30.

136. *Id.* at 830.

137. *Id.* at 832.

138. *Id.* at 831, 833.

139. *Id.*

140. *Id.* at 834.

141. *Id.*

142. 913 N.E.2d 243, 247-48 (Ind. Ct. App), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

143. *Id.* at 251.

144. *Id.* at 252.

145. *Id.* at 254.

Appeals held that Bean waived the alleged error by failing to make a contemporaneous objection,[146] by failing to make an appropriate record of the objection,[147] or by failing to include citations to supporting authority.[148]

In *Roberts v. State*,[149] Roberts argued that the trial court abused its discretion when it allowed the State to introduce rebuttal evidence that he had choked three other women.[150] Noting that Roberts failed to object at trial, however, the Indiana Court of Appeals found the issue to be waived.[151] Moreover, waiver notwithstanding, the Indiana Court of Appeals held that the trial court properly admitted this evidence in accordance with Rule 404(b) because Roberts "opened the door" to such evidence via his own testimony on direct examination.[152]

Otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence.[153] During direct examination, Roberts testified that he had learned how to perform a chokehold during his martial arts training and that he had performed chokeholds approximately 100 times in the past.[154] He claimed, however, that he had only used the choke holds on men in a martial arts setting. The trial court did not abuse it discretion when it ruled that this direct testimony "opened the door" to the rebuttal evidence because the testimony left the jury with the false and misleading impression that Roberts had only performed chokeholds on other men in a martial arts setting.[155]

In *Whatley v. State*,[156] Whatley appealed his conviction for murder based, in part, on the State's introduction of testimony that Whatley had been using drugs and had visited the Relax Inn to deliver drugs.[157] Whitley claimed the admission of this evidence constituted fundamental error[158] because it constituted evidence

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146. *Id.* at 252.

147. *Id.* at 253.

148. *Id.* at 254 (citing IND. APP. R. 46(A)(8)(a)). Under IND. APP. R. 46(A)(8)(a), the argument section of an appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." IND. APP. R. 46(A)(8)(a).

149. 894 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*, No. 03A01-0804-CR-169, 2008 Ind. LEXIS 1381 (Ind. Dec. 18, 2008).

150. *Id.* at 1026.

151. *Id.* at 1027.

152. *Id.*

153. *Id.* at 1026-27 (citing Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000); Schmidt v. State, 816 N.E.2d 925, 946 (Ind. Ct. App. 2004) ("A party may 'open the door' to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related.")).

154. *Id.* at 1027.

155. *Id.*

156. 908 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 549 (Ind. 2009).

157. *Id.* at 278.

158. Whatley's counsel failed to object to the admission of this evidence at trial and as a result

of uncharged misconduct that should have been excluded under Rules 404(b) (evidence of other crimes, wrongs or acts) and 403.[159] The court noted that evidence of other bad acts should be excluded where the State offers it merely to produce the "forbidden inference" that the defendant engaged in the other bad acts and that "the charged conduct was in conformity with the uncharged misconduct."[160] Here, however, the court found the State did not offer the evidence to show Whatley's propensity to engage in crime or that he acted in conformity with a bad character trait.[161] Rather, the State offer the disputed evidence to assist the jury in understanding the relationship between Whatley and other witnesses and the context of the arguments and events that culminated in Whatley's murder of Patel.[162] The evidence did not violate Rule 404(b) because it explained the relationship between the parties and the probative value of the relationship substantially outweighed the danger of prejudice.[163]

In *Hudson v. State*,[164] Hudson claimed that the trial court committed reversible error when it admitted evidence of his other acts of child molesting for which he was not charged.[165] The State charged Hudson with multiple offenses related to his sexual activities with his step-daughter and, asserting the evidence to be probative with regards to Hudson's motive to commit the offenses charged, introduced the other uncharged acts.[166] Under Rule 404, "[e]vidence of uncharged misconduct which is probative of the defendant's motive and which is 'inextricably bound up' with the charged crime is properly admitted under Rule 404."[167] The victim's testimony disputed the State's claim that the uncharged conduct was inextricably bound up with the charged conduct. As a result the trial court abused its discretion when it admitted evidence of Hudson's other uncharged acts.[168] The court found the error to be harmless but went on to affirm in part, and reverse in part, Hudson's convictions, on grounds unrelated to the trial court's Rule 404 error.[169]

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he had no choice but to claim "fundamental error" as the basis of his appeal on this evidence. Normally, an appellate court only "review[s] the trial court's ruling on the admission of evidence for an abuse of discretion." *Id.* at 280 (citing Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000)). Failure to object at trial "normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." *Id.* at 280. (citing Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000)).

159. *Id.* at 280-81.

160. *Id.* at 281.

161. *Id.*

162. *Id.* at 282.

163. *Id.*

164. No. 82A04-0806-CR-355, 2009 Ind. App. LEXIS 363 (Ind. Ct. App. Mar. 6, 2009).

165. *Id.* at *1.

166. *Id.* at *13.

167. *Id.* (citing Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003)).

168. *Id.* at *14.

169. *Id.* at *16.

In *Rogers v. State*,[170] Rogers appealed his conviction of murder, in part, claiming that the trial court committed a Rule 404(b) error in the admission of evidence regarding his prior possession of a steak knife.[171] Rogers murdered his victim using a knife.[172] The State argued that simple possession of a knife is not evidence of a crime or wrong to which 404(b) applies. Relying upon the Indiana Supreme Court's decision in *Williams v. State*,[173] the court held the possession of a steak knife, like the possession of firearms, is not a "bad act" for Rule 404(b) purposes.[174]

In *Shepherd v. State*,[175] Shepherd, claiming that the trial court committed reversible error by admitting evidence that he made advances toward the victim and had taken a vehicle without permission the week before the murder, appealed his convictions for felony murder, rape, and burglary.[176] During his direct examination, Shepherd admitted to raping the victim and committing the burglary.[177] In light of these statements, the court declined to decide whether the evidence violated Rule 404(b), finding the admission of the evidence to be "clearly harmless beyond a reasonable doubt."[178]

In *Davis v. State*,[179] Davis contended that the trial court erred in admitting evidence that tended to indicate Davis had previously been involved in dog fighting—an offense similar to his convictions—thus violating Rule 404(b).[180] The State entered into evidence: (1) a handwritten paper titled, "April Show 2004," (2) a receipt for trophies dated October 24, 2003, (3) printouts dated 2002 from the Internet of information on dog fighting, (4) a blog printout dated 2003 discussing how other dog fighting rings had been "busted" by police, and (5) testimony regarding observations by neighbors of a gathering at Davis's home in February 2006.[181] Although the court found the Internet printouts and neighbors' testimony to be outside of Rule 404(b)'s scope of protection, the court found the handwritten paper and trophy receipt within the scope of Rule 404(b) because "they indicate past actions taken from which inferences could be drawn of Davis

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170. 897 N.E.2d 955 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

171. *Id.* at 959-60.

172. *Id.* at 958-59.

173. 690 N.E.2d 162 (Ind. 1997).

174. *Rogers*, 897 N.E.2d at 960. The court went on to state that even assuming that Roger's possession of steak knife was Rule 404(b) evidence, he would not prevail because the error would have been considered harmless error and the evidence would be admissible for another purpose. "Evidence that the defendant had access to a weapon of the type used in the crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Id.* at 960-61 (citing Pickens v. State, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002)).

175. 902 N.E.2d 360 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

176. *Id.* at 361-62.

177. *Id.* at 363.

178. *Id.* at 364.

179. 907 N.E.2d 1043 (Ind. Ct. App. 2009).

180. *Id.* at 1055.

181. *Id.* at 1055-56.

organizing dog fights."[182] The court further found the prejudicial effect of the evidence outweighed its probative value and that the evidence was excludable pursuant to Rule 403. Regardless, the court found the admission of this evidence to be harmless error due to the "substantial independent evidence" of Davis's guilt.[183]

In *Gallagher v. State*,[184] Gallagher challenged his conviction for dealing in a schedule II substance, in part on Rule 404(b) grounds, arguing that the trial court improperly admitted a digital recording of the drug buy both because the State violated a discovery order and the recording contained evidence of other bad acts on his part.[185] Although troubled by some of the State's actions, the court found exclusion of the evidence improper as a discovery sanction because it saw no evidence that the State's actions were deliberate.[186] As to his 404(b) argument, Gallagher claimed that the recording "painted him as a regular drug dealer who got high on cocaine and mistreated his own baby to get high."[187] The court held that although the recording did contain evidence of other wrongdoing by Gallagher, it was properly introduced "to show Gallagher's motive, intent, preparation, plan, knowledge, and absence of mistake," especially in light of the limiting instruction give to ameliorate any Rule 403 concerns.[188]

In *Hape v. State*,[189] Hape challenged his conviction for felony possession of methamphetamine with the intent to deliver and felony resisting arrest on Rule 404(b) grounds.[190] He argued that a mistrial should have been granted "after the State elicited testimony indicating that he may have stolen the truck in which he fled from the arresting officers," and that the police initially found Hape because of outstanding warrants.[191] The Indiana Court of Appeals found that Hape opened the door to testimony concerning the stolen truck when he testified about the ownership and possession of the truck.[192] Hape failed to raise the issue of warrants at trial and therefore waived that argument.[193] Moreover, the court held that even if Hape had raised a proper objection at trial, it would have lacked merit because defendant's counsel advised the jury during opening statements that Hape was wanted by police because he "missed a court date."[194]

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182. *Id.* at 1056.

183. *Id.* at 1056.

184. 906 N.E.2d 272 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 552 (Ind. 2009), *superseded by* 922 N.E.2d 588 (Ind. 2010) (summarily affirming on 404(b) issue); *see* IND. APP. R. 58(A)(2).

185. *Gallagher*, 906 N.E.2d at 274-75.

186. *Id.* at 279.

187. *Id.*

188. *Id.*

189. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 903 N.E.2d 944 (Ind. 2009).

190. *Id.* at 984-86.

191. *Id.* at 995.

192. *Id.* at 996.

193. *Id.* at 996-97.

194. *Id.* at 997.

D. Knowledge Exception to Rule 404(b)

In *Dean v. State*,[195] Dean appealed his conviction for two counts of dealing cocaine by asserting the trial court erred in admitting evidence of uncharged misconduct—that he confined and beat the State's informant.[196] The court held that this admission of this evidence did not violate Rule 404(b) because it proved, or tended to prove, defendant's "guilty knowledge or consciousness of guilt with respect to the charged crime."[197] The court found that the evidence rested squarely within the "knowledge exception" listed in Rule 404(b)—evidence of other bad acts "may . . . be admissible for other purposes, such as proof of . . . knowledge."[198]

E. Reverse 404(b) Evidence

In *Wells v. State*,[199] Wells appealed his conviction for felony involuntary manslaughter as a lesser-included offense of the charged crime of murder.[200] He claimed that the trial court erred when it excluded evidence regarding the prior sexual conduct of the victim. According to Wells, he and the victim were lovers and had a "wild lifestyle."[201] In the offer of proof, Wells presented testimony of Christopher Sadler.[202] Sadler testified that he had worked for the victim, that the victim physically abused him, and that the victim forced him into sexual acts. Sadler further proffered that this abuse only stopped when he threatened the victim with a dagger.[203] The trial court applied Rule 404(b) to exclude this evidence of the prior conduct of the victim, not the defendant, citing the Indiana Supreme Court's decision in *Garland v. State*.[204] In order to be admissible, evidence about the bad acts of a non-defendant must fall into one of the Rule 404(b) exceptions.[205] Wells asserted that the evidence fell into two of the exceptions to Rule 404(b). First, Wells asserted that the proffered evidence fell into the exception to prove the victim's motive and intent to instigate the fight that led to his death—Wells wanted to show that the victim's conduct toward Sadler was the same or similar as the victim's conduct toward Wells.[206] The court held that "[t]his is exactly what . . . Rule 404(b) was designed to prevent, i.e. using proof of someone's crimes, wrongs, or acts to prove the character of a

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195. 901 N.E.2d 648 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).
196. *Id.* at 651.
197. *Id.* at 652 (quoting Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999)).
198. *Id.* (quoting IND. R. EVID. 404(b)).
199. 904 N.E.2d 265 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).
200. *Id.* at 268.
201. *Id.*
202. *Id.* at 269.
203. *Id.*
204. 788 N.E.2d 425 (Ind. 2003).
205. *Wells*, 904 N.E.2d at 270.
206. *Id.*

person in order to show action in conformity therewith."[207]

Next, Wells also claimed that Sadler's testimony should have been admitted to show the victim's modus operandi.[208] "The identity exception to [Rule 404(b)] is crafted primarily for 'signature' crimes with a common *modus operandi*. The exception's rationale is that the crimes, or means used to commit them, were so . . . unique that it is highly probable that the same person committed all of them."[209] Finding that the victim's prior conduct and the conduct in question were not "strikingly similar," the court held the trial court did not err when it held this exception to Rule 404(b) likewise did not apply.[210]

F. Rape Shield Issues

In *Oatts v. State*,[211] Oatts appealed his conviction for child molesting asserting that the trial court erred when it excluded evidence that the victim had previously viewed an allegedly pornographic video and had previously been molested.[212] Rule 412(a) governs the admissibility of past sexual conduct and provides in relevant parts: "In a prosecution of a sex crime, evidence of the past sexual conduct of a victim . . . may not be admitted, except" under certain circumstances.[213] Oatts failed to file a formal offer of proof with regards to this evidence at least ten (10) days before trial pursuant to Rule 412(b).[214] The court, acknowledging the existing split of opinions of prior Indiana Court of Appeals panels on this issue,[215] declined to address the apparent conflict, holding that, even assuming that Oatts did not waive the issue, the trial court did not abuse its discretion in excluding the past sexual conduct evidence.[216]

Indiana's Rape Shield Rule—Rule 412—"incorporates the basic principles"

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207. *Id.*

208. *Id.*

209. *Id.* (quoting Thompson v. State, 690 N.E.2d 224, 234 (Ind. 1997)).

210. *Id.*

211. 899 N.E.2d 714 (Ind. Ct. App. 2009).

212. *Id.* at 716.

213. IND. R. EVID. 412(a).

214. *Oatts*, 899 N.E.2d at 716.

215. *Id.* at 719 n.6 (*comparing* Sallee v. State, 785 N.E.2d 645, 651 (Ind. Ct. App.) ("holding that the defendant's failure to comply with [Rule 412(b)] precluded her from presenting evidence of the victim's past sexual history and resulted in waiver of the issue on appeal"), *trans. denied*, 792 N.E.2d 46 (Ind.), *cert. denied*, Sallee v. Indiana, 540 U.S. 990 (2003), *and* Graham v. State, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000) ("holding that defendant's failure to comply with the procedural mandate of [Rule 412(b)] was fatal to his attempt to introduce evidence of prior false rape allegations"), *with* Sallee v. State, 777 N.E.2d 1204, 1210 n.6 (Ind. Ct. App. 2002) ("rejecting the State's argument that the defendant had waived any claim of error by failing to comply with the procedural requirements of [Rule 412] and holding that 'the requirement that the proponent of the evidence file a written motion ten days prior to trial applies only if the evidence sought to be introduced fits within one of the exceptions to the general rule'")).

216. *Id.* at 721.

of Indiana's Rape Shield Act.[217] In additional the exceptions enumerated in Rule 412(a), "a common-law exception has survived the 1994 adoption of the [Rules]."[218] The common-law exception provides that "evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that his or her prior accusation of rape is false; or (2) the victim's prior accusation is demonstrably false."[219] The evidence that the victim viewed an allegedly pornographic video and had been previously molested did not fall into any of the Rule 412(a) or the common-law exceptions to Indiana's Rape Shield Rule. Citing a long line of Supreme Court decisions holding that a trial court did not err in excluding evidence of a similar nature, the court of appeals held that the trial court did not abuse its discretion by excluding the evidence.[220]

In *Maldonado v. State*[221] the defendant, who was convicted of felony child molesting, argued that he had received ineffective assistance of counsel because his attorney did not attempt to introduce evidence of the victim's alleged statements about a sexual encounter with an imaginary brother.[222] Maldonado asserted that Indiana's Rape Shield Rule would not have barred the evidence.[223]

In rejecting Maldonado's argument, the Indiana Court of Appeals explained that Indiana has both a Rape Shield Rule and a Rape Shield Statute;[224] where the statute and rule differ, the statute yields to the rule.[225] The court also noted the existence of an additional common law exception to the rape Shield Rule that allows a defendant to introduce evidence of a victim or witness's prior false

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217. State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (confirming Rule 412's incorporation of the principles of Indiana's Rape Shield Act in IND. CODE § 35-37-4-4 (2008)).

218. *Oatts*, 899 N.E.2d at 720 (citing *Walton*, 715 N.E.2d at 826-28).

219. *Id.* at 721 (citing *Walton*, 715 N.E.2d at 826-28).

220. *Id.* The court cited the following cases and included the quoted parentheticals: *Tague v. State,* 539 N.E.2d 480, 482 (Ind. 1989) ("holding that the trial court did not err in excluding the evidence of possible molestation of the victim by a person other than the defendant and '[v]irginity or the lack thereof has absolutely nothing to do with the crime of child molestation'"); *Beckham v. State*, 531 N.E.2d 475, 477 (Ind. 1988) ("addressing a situation in which the defendant offered to prove the fact that the seven-year-old victim reportedly told his mother that he had previously been molested by another person and the similarity between the physical acts in the two instances and holding that the trial court properly excluded evidence of a prior molestation committed by a different person"); *Baughman v. State*, 528 N.E.2d 78, 79 (Ind. 1988) ("holding that evidence of prior molestation by a different person was the type of evidence which the legislature deemed should be excluded"); *Parrish v. State*, 515 N.E.2d 516, 519-20 (Ind. 1987) ("holding that the trial court properly refused to permit the defendant to question the nine-year-old victim as to whether he had been sexually abused in the past because Indiana's Rape Shield Statute shields the victim of a sex crime from a general inquiry into the history of past sexual conduct").

221. 908 N.E.2d 632, 633 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

222. *Id.* at 633-34.

223. *Id.*

224. IND. CODE § 35-37-4-4 (2008).

225. *Maldonado*, 908 N.E.2d at 637 (citing Fugett v. State, 812 N.E.2d 846, 848-49 (Ind. Ct. App. 2004)).

accusation of rape or sexual misconduct.[226] Because the evidence did not concern any actual sexual conduct—any statement by the victim concerning a sexual relationship with an imaginary brother was demonstrably false—the evidence was admissible either under the Rape Shield Rule's exceptions or under the common law exception.[227] The court explained that the evidence "would have been used to question the veracity of [the victim's] allegations against Maldonado and impeach her parents' testimony that she had never made up stories of a sexual nature in the past."[228]

G. Statement Written as Part of the Plea Negotiation Process

In *Gonzalez v. State*, the State charged Gonzalez with several crimes after he ran a stop sign and hit a school bus.[229] As part of his attempt to negotiate a plea, Gonzalez wrote a letter to the school corporation apologizing for the incident and admitting that he had been drinking beforehand.[230] The trial court allowed the State to admit the letter as substantive evidence of Gonzalez's guilt.[231] On appeal, the court held that the letter constituted a privileged communication made in connection with the plea negotiation process that the trial court should not have admitted under Rule 410.[232] Moreover, because the letter amounted to a confession, the decision to admit it was not harmless error, and Gonzalez's conviction warranted reversal.[233]

IV. WITNESSES (RULES 601 – 613)

A. Requirement of Oath of Affirmation

In *Griffith v. State*,[234] Valentino Griffith asserted that the trial court erred when it permitted a witness (Griffith's neighbor and the victim of criminal acts) to testify without having first been sworn to tell the truth.[235] Griffith appeared to argue that the victim's testimony lacked probative value because she failed to "swear or affirm that she would tell the truth."[236] Prior to testifying, the victim responded "[s]o" when the trial court asked the question: "do you solemnly swear, or affirm, under penalty of perjury, that the testimony that you are about

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226. *Id.* (citing *Fugett*, 812 N.E.2d at 848-49).

227. *Id.*

228. *Id.* at 638.

229. 908 N.E.2d 313, 315 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 552 (Ind. 2009).

230. *Id.*

231. *Id.*

232. *Id.* at 315-16.

233. *Id.* at 319.

234. 898 N.E.2d 412 (Ind. Ct. App. 2008).

235. *Id.* at 413.

236. *Id.*

to give is the truth, the whole truth, and nothing but the truth?"[237] Griffith failed to object to the victim's response, and the prosecutor proceeded with the examination.[238] Rule 603 governs the oath or affirmation requirement to be satisfied before a witness testifies.

Rule 603 provides:

> Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered.[239]

This rule "embodies a pre-existing Indiana statute," Indiana Code section 34-45-1-2.[240] Indiana Code section 34-45-1-2 provides: "Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered."[241] Indiana's trial courts have consistently held that failure to object at trial to a witness's failure to adhere to the statutory requirement that testimony be given under oath or affirmation may be waived by failing to objection.[242] Griffith failed to object to his victim's testimony at trial; therefore, the court ruled that Griffith waived this issue and the trial court properly considered the testimony.[243]

B. Inquiry as to Validity of Verdict

Under Rule 606(b), a juror may testify to the validity of a verdict to determine whether any outside influence improperly influenced a member of the jury.[244]

The case of *Hape v. State*,[245] raised an interesting issue in the modern

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237. *Id.*

238. *Id.*

239. IND. R. EVID. 603.

240. *Griffith*, 898 N.E.2d at 412 (quoting MILLER, *supra* note 4, § 603.101, at 70 (2007)).

241. IND. CODE § 34-45-1-2 (2008).

242. *Griffith*, 898 N.E.2d at 412 (citing Sweet v. State, 498 N.E.2d 924, 926 (Ind. 1986) ("holding that the statutory requirement under [Indiana section] 34-1-14-2 that every witness be sworn to testify the truth, the whole truth, and nothing but the truth can be waived by the parties if no objection is made and holding that appellate review was foreclosed because there was no objection"), *superseded on other grounds by* IND. EVID. R. 404; Pooley v. State, 62 N.E.2d 484, 485 (Ind. Ct. App. 1945) (holding that the statutory requirement that every witness shall be sworn can be waived by the parties and if no objection is made to a witness testifying without being so sworn such waiver will be presumed)).

243. *Id.* at 415-16.

244. IND. R. EVID. 606(b).

245. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

electronic age. The State introduced Hape's cellular telephones into evidence at trial as part of an exhibit showing the items confiscated from Hape at the time of his arrest.[246] Unbeknownst to Hape or the State, the telephones contained text messages that the jury read during its deliberations.[247] On appeal, Hape raised multiple issues, a number of which pertained to the accidental exposure of the text messages to the jury.[248] The Indiana Court of Appeals ultimately found text messages to be intrinsic to the cellular telephones in which they were stored.[249] Therefore, pursuant to Rule 606(b) Hape could not use the text messages to impeach the jury's verdict.[250]

C. Mode and Order of Testimony

In *Franciose v. Jones*,[251] Mark Franciose and Ray Ramirez raised a number of issues on appeal, one of which asserted that the trial court abused its discretion by refusing to strike the testimony from Aaron Jones's expert—Dr. Yarkony—which preemptively rebutted the anticipated testimony of an expert witness for Franciose—Dr. Owens.[252] Dr. Yarkony testified about Jones's future need for medical treatment and the attendant costs stemming from said treatment.[253] The trial court permitted Dr. Yarkony to testify before Dr. Owens, in accordance with Rule 611(a), and merely conditionally admitted Dr. Yarkony's testimony, subject to the content of Dr. Owen's subsequent testimony, in accordance with Rule 104(b).[254] Dr. Owen testified during Franciose's

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246. *Id.* at 984.

247. *Id.*

248. *Id.* at 986.

249. *Id.* at 987-88.

250. *Id.* The court quickly dispensed with Hape's authentication objections to the text messages under Rules 901(a) and 1002. *Id.* at 989-90. The State established a clear chain of custody with regards to the phones, and by extension, the text messages. *Id.* at 990. The court found the text messages themselves requiring authentication under Rule 901(a); however, it found the States failure to present such authentication evidence harmless error. *Id.* at 990-91 (citing Bone v. State, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002) (discussing the authentication of files containing child pornography on a computer)).

251. 907 N.E.2d 139 (Ind. Ct. App. 2009), *aff'd on reh'g*, 2009 Ind. App. Unpub. LEXIS 1444 (Ind. Ct. App. July 29, 2009), *aff'd* 910 N.E.2d 862 (Ind. Ct. App. 2009), *trans. denied,* 919 N.E.2d 558 (Ind. 2009).

252. *Id.* at 143-44.

253. *Id.* at 144.

254. *Id.* at 144-45. Franciose made an oral motion to strike Dr. Yarkony's testimony after the close of his testimony, "arguing that Dr. Yarkony, as a rebuttal witness, should have testified after Dr. Owens." *Id.* at 144. The trial court denied the motion. Franciose reiterated his argument on this point before Dr. Owens testified, to which the trial court responded that its ultimate ruling on the admissibility of Dr. Yarkony's testimony "would depend on what [Dr. Owens] testifies to and whether it's what Dr. Yarkony actually said as rebuttal" testimony during Jones's case-in-chief. *Id.* at 145.

presentation of evidence about the chance of Jones's future need for surgery. The court found that the trial court did not abuse its discretion when it held that Franciose "opened the door" to rebuttal evidence on this topic from Dr. Yarkony.[255] The court furthered reaffirmed a trial court's discretion to control the order of witnesses and flow of testimony at trial pursuant to Rule 611(a).[256]

D. Jury Questions of Witnesses

In *Amos v. State*,[257] Amos argued that the trial court abused its discretion when it permitted two jury questions to be asked of a witness to clarify his testimony.[258] Rule 614(d) governs juror questions and provides:

> A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.[259]

A proper juror question "allows the jury to understand the facts and discover the truth."[260] Determining whether a litigant offers a question "for a proper purpose necessarily requires an examination of the substance of the question."[261] Amos contended that "the questions were not proper because they allowed the jury to inquire about issues, which had come out on direct examination, but which Amos had chosen not to pursue on cross-examination."[262] Thus, he claimed "that the questions allowed inquiry beyond the scope of his cross-examination and went beyond clarification."[263] The Indiana Court of Appeals held that Rule 614 does not confine jury questions to the scope of cross-examination and may be proper if helpful in clarifying testimony on direct examination.[264]

E. Scope of Cross Examination

In *Stokes v. State*, defendant Jay Stokes appealed his conviction for, among

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255. *Id.*

256. *Id.*

257. 896 N.E.2d 1163 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 979 (Ind. 2009).

258. *Id.* at 1170.

259. IND. R. EVID. 614(d).

260. *Amos*, 896 N.E.2d at 1170 (citing Trotter v. State, 733 N.E.2d 527, 530 (Ind. Ct. App. 2000)).

261. *Id.* (quoting *Trotter*, 733 N.E.2d at 530).

262. *Id.*

263. *Id.*

264. *Id.* at 1170.

other things, attempted armed robbery and being a habitual offender.[265] Stokes claimed that the trial court erred when it allowed a number of "comments" relating to his criminal history, including various testimony and a question by the State.[266] Stokes himself testified that "he had been in trouble with the law on two prior occasions, one of which involved a robbery."[267] Consequently, the Indiana Court of Appeals noted that Stokes "opened the door" to the State's cross-examination regarding his criminal history.[268] The court further explained that Rule 611(b) limits the scope of cross-examination "to the subject matter of the direct exam and matters affecting the credibility of the witness."[269] Likewise, the court explained, "when a defendant injects an issue into the trial, he opens the door to otherwise admissible evidence."[270] Because Stokes opened the door to the otherwise inadmissible testimony, the trial court had not erred in admitting it.[271]

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

A. Reliable of Scientific Principles Underlying Opinion

In *Camm v. State*, the defendant, who stood accused of murdering his wife and children, challenged expert testimony offered by the State to show that bloodstains on the defendant's clothing resulted from high-velocity impact spatter, as opposed to mere contact with the victims' bodies.[272] Under Rule 702(b), expert scientific testimony is admissible where the court is satisfied that the scientific principles underlying the testimony are reliable.

Here, the defendant did not challenge the general admissibility of expert opinion on bloodstain analysis.[273] Instead, he argued that bloodstain analysis was not proper under the circumstances because the stains on his clothing were few and small. The Indiana Supreme Court rejected this argument, noting that in addition to the State's five experts, the defendant called four of his own expert witnesses to testify on the issue, and that each of the defendant's experts believed themselves capable of rendering an opinion on the source of the bloodstains.[274] Moreover, the defendant failed to provide any authority demonstrating that bloodstain analysis was unreliable under the circumstances.[275] The court

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265. 908 N.E.2d 295, 299 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

266. *Id.* at 301.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 302 (citing Tadwul v. State, 720 N.E.2d 1211, 1217 (Ind. Ct. App. 1999)).

271. *Id.*

272. 908 N.E.2d 215, 234 (Ind. 2009), No. 87S00-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

273. *Id.*

274. *Id.* at 234-35.

275. *Id.*

similarly rejected Camm's arguments concerning a courtroom demonstration involving the bloodstain evidence.[276]

B. Opinion Testimony by Lay Witness

In *Ashworth v. State*,[277] Ashworth appealed his conviction and sentence for murder, challenging the trial court's admission of opinion evidence from a lay witness—the investigating detective—about the elimination of two persons as suspects.[278] The trial court permitted Detective Rogers's opinion testimony (based upon his investigation and the investigation of others) regarding the elimination of the two persons as suspects. Ashworth, invoking Rule 701, argued that the trial court abused its discretion in allowing this lay opinion fraught with hearsay.[279] Rule 701 limits lay opinion testimony such as Rogers's to opinions that are: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[280] Relying on federal precedent due the lack of Indiana case law on point, the court held the opinion testimony inadmissible under Rule 701.[281]

C. Rule 702(b) Challenge in the Midst of Trial—A Cautionary Tale

In *Cox v. Matthews*,[282] the defendants appealed the trial court's judgment holding them liable to Matthews for $4,126,529 in damages. The defendants claimed that the trial court committed reversible error when it allowed the expert testimony of Anthony M. Gamboa, Ph.D., a vocational economic analyst.[283] The defendants specifically attacked Dr. Gamboa's testimony regarding Matthews's decreased work life, asserting that because said testimony "did not relate to the specific case and lacked a foundation," making it unreliable under Rule 702(b).[284] The defendants failed to specifically object to Dr. Gamboa's testimony under Rule 702(b) and, as a result, the court found the issue to be waived on appeal.[285] Waiver notwithstanding, the court went on to say that even if the issue had not been waived, the trial court nonetheless properly admitted the evidence under Rule 702(b), which provides, "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert

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276. *Id.* at 235-36.

277. 901 N.E.2d 567 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

278. *Id.* at 569.

279. *Id.* at 571-72.

280. *Id.* at 572.

281. *Id.* (citing United States v. Garcia, 413 F.3d 201, 209-10 (2d Cir. 2005) (holding that the trial court improperly permitted a DEA agent to provide a lay opinion laden with "information gathered by various persons in the course of an investigation").

282. 901 N.E.2d 14 (Ind. Ct. App. 2009), *reh'g denied*, No. 45A05-0803-CV-183, 2009 Ind. App. LEXIS 752 (Ind. Ct. App. Apr. 7, 2009), *trans. denied.*, 915 N.E.2d 995 (Ind. 2009).

283. *Id.* at 16.

284. *Id.* at 21.

285. *Id.* at 22.

testimony rests are reliable."[286] Finding the scientific principles upon which Dr. Gamboa's testimony rested reliable, the court found Dr. Gamboa's testimony admissible.[287]

In *Franciose v. Jones*,[288] the court again visited the issue of Dr. Gamboa being permitted to testify at a trial regarding a plaintiff's diminishing future earning capacity.[289] Franciose argued that "the trial court committed reversible error by permitting Dr. Gamboa to testify because his testimony lacked sufficient reliability to be admissible."[290]

The parties agreed that Dr. Gamboa was an expert witness but ultimately disagreed on whether his testimony constituted scientific testimony.[291] During trial, before testifying to his opinions regarding Jones's diminished future earning capacity, Dr. Gamboa explained his area of expertise as follows: "What I do is define what effect a disability has on a person's capacity to work and earn money. I function like an appraiser, except I'm appraising human beings who have become disabled in defining what loss of earning capacity is probably as a result of a disability."[292] Indiana's courts had previously held that Dr. Gamboa's testimony about his analysis and conclusions constituted scientific testimony and the court saw no reason to readdress this issue.[293] The basis upon which a party may object to scientific testimony by an expert witness is Rule 702(b), which provides: "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."[294] The Indiana Supreme Court's seminal case, *Steward v. State*,[295] discussed the application of Rule 702(b) to expert testimony in Indiana's trial courts:

> The concerns driving *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), interpreting Federal Rule of Evidence 702] coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved. Thus, although not

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286. *Id.* (quoting IND. R. EVID. 702(b)).

287. *Id.*

288. 907 N.E.2d 139 (Ind. Ct. App. 2009), *aff'd on reh'g*, 2009 Ind. App. Unpub. LEXIS 1444 (Ind. Ct. App. July 29, 2009), *aff'd* 910 N.E.2d 862 (Ind. Ct. App. 2009), *trans. denied,* 919 N.E.2d 558 (Ind. 2009).

289. *Id.* at 145.

290. *Id.*

291. *Id.* at 145-46.

292. *Id.*

293. *Id.* at 146 (citing Cox v. Matthews*,* 901 N.E.2d 14, 22 (Ind. Ct. App. 2009) ("examining Dr. Gamboa's testimony under Indiana Evidence Rule 702(b)"); Kempf Contracting & Design, Inc. v. Holland-Tucker*,* 892 N.E.2d 672, 677-78 (Ind. Ct. App. 2008) ("discussing admissibility of testimony from a vocational economist pursuant to Indiana Evidence Rule 702(b)")).

294. *Id.*

295. 652 N.E.2d 490, 498 (Ind. 1995).

> binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).[296]

Under Rule 702(b), there exists no "specific 'test' or set of 'prongs' which must be considered" by a trial court.[297] Instead, a *Steward* analysis involves inquiring into factors identified in the *Daubert* decision "and any other considerations that assist the trial court in determining whether 'the scientific principles upon which the expert testimony rests are reliable.'"[298]

Franciose "failed to sufficiently alert the trial court that he objected to Dr. Gamboa's testimony."[299] In the objection that he did voice, Franciose additionally failed to discuss the list of *Daubert* factors or any other factors in an attempt to challenge the reliability of the scientific principles upon which Dr. Gamboa rested his testimony.[300] The court noted:

> Franciose's objection could have appeared to the court and the other parties to be an objection to the data used by Dr. Gamboa rather than his scientific methodology. If Franciose desired a ruling on the reliability of Dr. Gamboa's scientific methodology, it was his responsibility to make that clear to the court.[301]

The court ultimately found that Franciose failed to "sufficiently alert the trial court" that he sought a ruling under Rule 702(b) and as a result the trial court did not abuse its desertion in allowing Dr. Gamboa's testimony.[302] As its parting point, the court issued a practice tip on the Rule 702(b) issue in this case: "[It would be] wise for a party to inform the trial court before trial that it wishes to raise an objection to the reliability of the expert witness's scientific methodology."[303]

D. "Skilled Witness" Testimony

A witness may be qualified as a "skilled witness" under Rule 701,[304] which states that "[a] skilled witness is a person with 'a degree of knowledge short of that sufficient to be declared an expert under [Rule 702], but somewhat beyond

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296. *Id.* at 498.

297. *Franciose*, 907 N.E.2d at 146 (quoting McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997)).

298. *Id.* at 146-47 (quoting from Rule 702(b)).

299. *Id.* at 147.

300. *Id.*

301. *Id.*

302. *Id.* at 147-48.

303. *Id.* at 148 ("Where a party waits until trial to raise a challenge requiring a *Steward* analysis, that party places a significant burden upon the trial court by asking the court to halt its proceedings and engage in what will possibly be a very lengthy hearing separate from the trial, often while an impaneled jury sits idle").

304. Kubsch v. State, 784 N.E.2d 905, 922 (Ind. 2003).

that possessed by the ordinary jurors.'"[305] Pursuant to Rule 701, a skilled witness may provide an opinion or inference that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[306] In *Hape v. State*,[307] the court addressed whether the trial court properly found that the State established Trooper Gadberry's heightened degree of knowledge about methamphetamine, and by extension that he could testify about the amount of meth held by a typical user versus a typical dealer and other information related to the processing, packaging, pricing and sale of meth pursuant to Rule 701.[308] Under the facts in this case, the court found it to be error, albeit harmless error, for Gadberry to testify regarding "how much methamphetamine it takes for a person to get high," because such testimony required scientific knowledge as required under Rule 702.[309] The court went on to hold that the trial court properly admitted as a "skill witness" Gadberry's testimony regarding "dose and dealing amounts" and "the relationship between quantity [of meth] and personal use" under Rule 701.[310]

E. Post-Conviction Relief Expert Testimony

In *Whedon v. State*,[311] Whedon contended that the post-conviction court erred when it excluded the expert testimony of her proffered witness—Rob Warden, Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law—pursuant to Rules 702 and 704.[312] Whedon sought to introduce Warden's testimony about incentivized witnesses and wrongful convictions at her post-conviction hearing.[313] Warden conducted studies on wrongful convictions involving incentivized witnesses, i.e., "snitches."[314] Whedon asserted that Warden's testimony was "relevant to her allegation of newly discovered evidence" (which the court of appeals held that the post-conviction court had properly excluded) that the inmate witnesses against her concocted testimony, asserting that Whedon made incriminating statements, "in hopes of receiving favorable treatment from the State on their own sentences."[315] The issue of the admissibility of Warden's testimony was not available for collateral review because the claim that the testimony of the two jailhouse witnesses had not been truthful did not constitute "newly discovered evidence." Warden's testimony was therefore properly excluded on those grounds and it was

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305. *Id.* (quoting MILLER, *supra* note 4, § 701.105, at 31 (2008)).
306. *Id.*
307. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 903 N.E.2d 977 (Ind. 2009).
308. *Id.* at 992.
309. *Id.* at 993.
310. *Id.*
311. 900 N.E.2d 498 (Ind. Ct. App.), *aff'd*, 905 N.E.2d 408 (Ind. 2009).
312. *Id.* at 505.
313. *Id.* at 500, 505.
314. *Id.* at 505.
315. *Id.*

not necessary to address the issue of its general admissibility.[316]

F. Opinions as to Legal Conclusions

In *Pelley v. State*, the state waited thirteen years after the crime occurred to charge the defendant Jeff Pelley with murder.[317] Pelley sought to question Jack Krisor, a deputy prosecuting attorney who was present at one of Pelley's police interviews not long after the crime was committed, about his opinion at the time of the interview that there was not enough evidence to charge Pelley.[318] The Supreme Court found that the trial court had properly excluded the evidence of Krisor's opinion as inadmissible under Rule 704(b). The Indiana Supreme Court explained that Rule 704(b) prohibits a witness in a criminal case from testifying to opinions concerning intent, guilt, innocence, or legal conclusions. Krisor's opinion regarding the sufficiency of the evidence against Pelley qualified as inadmissible because it constituted an opinion of a legal conclusion and was also protected by the work-product privilege.[319]

G. Use of Hearsay by Qualified Experts in Forming Opinion

In *Pendergrass v. State*,[320] the Indiana Supreme Court explored the intersection of Rule 703 and Rule 803.[321] The State accused defendant Pendergrass of molesting his daughter, C.D.[322] At age thirteen, C.D. became pregnant and had an abortion. Police collected DNA evidence from the fetus and the defendant. Dr. Michael Conneally performed a paternity analysis and determined that Pendergrass was the father of C.D.'s aborted fetus. During Conneally's testimony at trial, the State presented documents prepared by Conneally and the Indiana State Police Laboratory. Pendergrass objected to the admission of the evidence on hearsay and Confrontation Clause grounds, arguing that the State was required to call the laboratory analyst who performed the tests on which Conneally and the documents relied.[323]

The Supreme Court explained that under Rule 703 qualified experts may properly rely on information supplied by third parties, where the qualified expert determines such information to be material, even if the party that supplied the information is not available to testify in court.[324] Thus, although the trial court could have chosen to subject the sources on which Conneally relied to a limiting

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316. *Id.* at 506.

317. 901 N.E.2d 494, 506 (Ind. 2009), *reh'g denied*, No. 71S05-0808-CR-446, 2009 Ind. LEXIS 619 (Ind. May 13, 2009).

318. *Id.*

319. *Id.*

320. 913 N.E.2d 703, 704 (Ind. 2009).

321. *Id.* at 708-09.

322. *Id.* at 704.

323. *Id.*

324. *Id.* at 708-09.

instruction, it did not err in admitting them.[325]

H. Testimony Regarding Analysis Performed by Another Analyst

In *Farmer v. State*, an expert witness for the State, Scott Owens, testified to a laboratory analysis performed by another analyst, Kathy Boone.[326] On appeal, the defendant argued that the trial court erred in allowing this testimony. The record, however, demonstrated that Owens testified about Boone's analysis "at length" before the defense conducted a voir dire of Owens to determine whether he had personally performed the analysis.[327] Even after the voir dire, the defense did not object to Owens' testimony until the State asked him whether Boone provided accurate analysis.[328] Consequently, most of Owens' testimony came in without objection. Moreover, even if the defense had timely objected, the admission of Owens' constituted harmless error, because there was so much other, more compelling evidence of Farmer's guilt.[329]

VI. HEARSAY (RULES 801 – 806)

A. Out-of-Court Statement Related to Criminal Investigation

In *Williams v. State*,[330] Williams appealed his conviction for misdemeanor marijuana possession, asserting that the trial court abused is discretion when it admitted evidence of the marijuana seized from him incident to his arrest on an outstanding arrest discovery during the course of his being stopped for a routine traffic violation.[331] Williams claimed that the trial court violated his constitutional rights when it admitted the evidence of the marijuana seized from his person incident to his arrest because the State failed to prove that the arrest was lawful. Williams failed to challenge the validity of the warrant that led to his arrest.[332]

In this case of first impression, the Indiana Court of Appeals ruled that the State was not under an affirmative obligation to produce an active arrest warrant, or to introduce the warrant at trial, where the defendant does not challenge the warrant's validity.[333] According to Rule 801(c), in the context of a criminal investigation, "[a]n out-of-court statement introduced to explain why a particular course of action was taken during a criminal investigation is not hearsay because it is not offered to prove the truth of the matter asserted."[334] The arresting officer

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325. *Id.* at 709.
326. 908 N.E.2d 1192, 1197-99 (Ind. Ct. App. 2009).
327. *Id.*
328. *Id.* at 1200.
329. *Id.* at 1199-1200.
330. 898 N.E.2d 400 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).
331. *Id.* at 401.
332. *Id.* at 402.
333. *Id.* at 402-03.
334. *Id.* at 403 n.1 (quoting Ballard v. State, 877 N.E.2d 860, 864 (Ind. Ct. App. 2007)).

did not testify as an out-of-court declarant—he did not testify as to the truth of any out of court statement—rather, "he testified in court as to his observation of an active warrant for Williams's arrest and the course of action that he took as a result."[335]

B. Indiana's Protected Person Statute and Indiana Evidence Rule 802

In *Tyler v. State*,[336] the Indiana Supreme Court examined the admissibility of videotaped testimony made via Indiana's Protected Person Statute (PPS)[337] where the same witness giving testimony via the PPS also testifies in open court regarding the same matters.[338] The court explained that videotaped testimony made pursuant to the PPS generally does not conflict with Rule 802's prohibition on hearsay testimony, as Rule 802 provides for an exception for hearsay testimony otherwise permitted by law.[339] The court then invoked its supervisory powers to "elaborate on the permissible use of statements under the PPS."[340] Though the statute specifically provided for the admissibility of prior videotaped testimony where the protected person testifies at trial, the Supreme Court held that the "testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence."[341]

C. Then Existing State of Mind

In *Pelley v. State*,[342] murder defendant Jeff Pelly argued that the trial court erred when it allowed the State to introduce statements made by his father and alleged murder victim, Bob Pelley, concerning restrictions he had placed on Jeff Pelly's attendance of high-school prom activities.[343] The state argued that the statements were admissible to demonstrate Bob Pelley's intent to keep his son from attending prom activities.[344] Jeff Pelley contended that the state of mind exception to the hearsay rule only applies to a victim's statements when the defendant places the victim's statements at issue.[345]

The Indiana Supreme Court explained that Rule 803(3) allows an exception to Rule 801(c)'s general prohibition on hearsay statement for statements of a declarant's then existing state of mind, including intent, plan, mental feeling,

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335. *Id.*

336. 903 N.E.2d 463 (Ind. 2009)

337. IND. CODE § 35-37-4-6 (2008).

338. *Tyler*, 903 N.E.2d at 465.

339. *Id.* at 467 (citing Pierce v. State, 677 N.E.2d 39, 43 n.6 (Ind. 1997)).

340. *Id.*

341. *Id.*

342. 901 N.E.2d 494 (Ind. 2009), *reh'g denied*, No. 71S05, 0808-CR-446, 2009 Ind. LEXIS 619 (Ind. May 13, 2009).

343. *Id.* at 504.

344. *Id.*

345. *Id.*

pain, and bodily health.[346] The fact that Bob Pelley was the victim was not critical, the court explained, as the exception is not limited to victims.[347] Moreover, the Supreme Court noted, it is not necessary that the defendant place the victim's state of mind at issue in order for the exception to apply to a victim's statements.[348]

In contrast, in *Camm v. State*, the Indiana Supreme Court found the trial court had committed a reversible error in admitting a statement purportedly made by the defendant's murdered wife, Kim Camm.[349] Cindy Mattingly, a friend of Kim Camm's, testified that Kim Camm told her, on the day Kim Camm and her children were murdered, that she was expecting her husband home between 7:00 and 7:30 p.m.[350] The statement clearly qualified as hearsay, so the question as to as admissibility was whether the statement fell within an exception to the hearsay rule.[351] The State argued that the statement was admissible under Rule 803(3) as a statement of the declarant's then-existing state of mind.[352] The Supreme Court rejected this argument, holding that although Rule 803(3) allows the admission of state-of-mind declarations to prove acts of conduct of the *declarant*, they are not admissible to as evidence of a third party's conduct.[353] The statement reflected the declarant's—Kim Camm's—expectation of her husband's future conduct, and thus it stood as inadmissible.[354] Because the statement placed the defendant at the scene of the crime at the time the crime was committed, the admission of this testimony constituted reversible error.[355]

The *Camm* court also addressed the question of whether Rule 801(d)(2)(E) bars evidence that is admissible under Rule 803(3).[356] Charles Boney was tried for the murders of the Camm family separately from David Camm.[357] David Camm claimed that Boney had acted alone, but the State claimed that the two men had worked in concert.[358] The defendant argued that the trial court erred by allowing Boney's girlfriend, Mala Singh Mattingly, to testify that he had told her on the day of the murders, that "'he was going to help a buddy.'"[359]

Under Rule 801(d)(2)(E), "a statement by a coconspirator of a party during

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346. *Id.*

347. *Id.* at 504 n.5.

348. *See id*.

349. 908 N.E.2d 215, 225-26 (Ind.), *reh'g denied*, No. 87S00-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

350. *Id.* at 225.

351. *Id.* at 226.

352. *Id.*

353. *Id.* at 228.

354. *Id.*

355. *Id.*

356. *Id.* at 230.

357. *Id.* at 220. n.1.

358. *Id.* at 220-21.

359. *Id.* at 230.

the course and in furtherance of the conspiracy" does not qualify as hearsay.[360] As the defense pointed out, Rule 801(d)(2)(E) requires "independent evidence of a conspiracy prior to admission."[361] David Camm argued that because the State treated him and Boney as coconspirators, the State's use of Singh Mattingly's testimony was subject to the requirements of Rule 801(d)(2)(E), which Camm asserted the State had failed to meet.[362] The Indiana Supreme Court rejected this argument, noting that Rule 802 prevents the admission of hearsay except as allowed by law or the Rules.[363] Because the evidence was admissible under the exception created by Rule 803(3), it was unnecessary to analyze it under Rule 801(d)(2)(E).[364] The court also rejected Camm's argument that the evidence was inadmissible under Rule 403.[365]

D. Admission of Out of Court Statements

In *Bassett v. State*,[366] the State charged Bassett with the murder of his girlfriend, Jamie Engleking, and her two minor children.[367] At the time of the murders, Bassett was on parole. The terms of his parole prohibited him from engaging in "intimate or sexual relationship[s]" and from making contact with minor children.[368] The State contended that Bassett had murdered Engleking and her children to conceal his parole violations. Among other witnesses, the State called Karen Carroll, a friend of Engleking's, to testify that Bassett and Engleking had carried on an intimate relationship.[369] After the defense subjected Carroll to "vigorous cross and re-cross-examination," the trial court allowed the State to attempt to rehabilitate Carroll by asking her whether she had testified to the same fact in 2001, during Bassett's first trial.[370] Bassett objected that such testimony was inadmissible under Rule 801 as hearsay. The Supreme Court disagreed with Bassett, concluding that Carroll's prior consistent statement was admissible for the purposes of rehabilitating her testimony following cross and re-cross.[371]

E. Prior Consistent Statements

The *Bassett* court also addressed the admissibility of testimony by Lisa

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360. *Id.* (quoting IND. R. EVID. 801(d)(2)(E)).
361. *Id.* (quoting Brief of Appellant at 34, *Camn*, 908 N.E.2d 215 (Ind. 2009)).
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. 895 N.E.2d 1201 (Ind.), *cert. denied*, 129 S. Ct. 1920 (2009).
367. *Id.* at 1204.
368. *Id.* at 1212.
369. *Id.* at 1213.
370. *Id.*
371. *Id.* at 1214-13.

Johnson, the wife of jailhouse informant Clarence Johnson.[372] Clarence Johnson testified that while he was in jail, Bassett had asked him to kill Chief Deputy Prosecutor Kathleen Burns.[373] Over the defendant's objection, the court admitted Lisa Johnson's testimony that her husband had told her of Bassett's request.[374] The Indiana Supreme Court explained that ordinarily, as an out-of-court statement offered for the truth of the matter asserted, Lisa Johnson's testimony concerning what her husband told her that Bassett had said would qualify as inadmissible hearsay under Rule 801(c).

Rule 801(d)(1)(B), however, provides an exception from this general rule where

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose.[375]

Bassett conceded that all the requirements of the exception were met—with one exception: Charles Johnson's statement to Lisa Johnson was not made before the motive to fabricate arose. The court disagreed. It noted that where there was no evidence implicating the declarant in the crime, the question of when the motive to fabricate arose was a "fact-sensitive inquiry" left to the discretion of the trial court.[376]

In *Bullock v. State*,[377] Bullock appealed his conviction of three counts of felony theft for stealing televisions from Wal-Mart on three occasions.[378] The court found that the trial court erred when it allowed the State to admit into evidence the recorded statement of Thomas Hornberger, who drove Bullock and his accomplice to Wal-Mart to steal the televisions. The State asserted that the recorded statement was admissible as a prior consistent statement under Rule 801(d)(1)(B).[379] The court disagreed with the State because Hornberger's motive to fabricate his recorded statement arose before he gave the recording, thereby rendering Rule 801(d)(1)(B) inapplicable.[380] Ultimately, the court found the error harmless because it presented cumulative evidence and counterbalanced with evidence of the lesser sentence afforded to Hornberger for providing the recorded statement.[381]

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372. *Id.* at 1211.
373. *Id.* at 1210-11.
374. *Id.* at 1211.
375. *Id.* (citing IND. R. EVID. 801(d)(1)(B)).
376. *Id.*
377. 903 N.E.2d 156 (Ind. Ct. App. 2009).
378. *Id.* at 158.
379. *Id.* at 161.
380. *Id.* at 162.
381. *Id.*

F. Statements of a Party-Opponent

Rule 801(d)(2) allows, among other things, for the admission of hearsay statements that are

> offered against a party and [are] (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth . . . or (D) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment, during the existence of the employment.[382]

In *Irmscher Suppliers, Inc. v. Schuler*,[383] the court addressed the admissibility of two letters written by an employee of one the defendants, Irmscher, in which the employee acknowledged that window units sold to the plaintiffs by Irmscher (and which were manufactured by the other defendant, Pella) were defective.[384]

Specifically, the letters noted the opinion of Pella engineers that the window units were defective.[385] The court noted that the opinions of the Pella engineers were hearsay within hearsay.[386] Each layer of hearsay required an exception from the hearsay rule in order to qualify as admissible.[387] The court found that the statements were admissible against Pella under 801(d)(2)(A) and (D), as they were made by a Pella employee, offered at trial against Pella, and reported by an Irmscher employee acting as Pella's agent or intermediary.[388] Likewise, the statements were admissible against Irmscher under 801(d)(B) as an adoptive admission.[389]

G. Excited Utterance

In *Kimbrough v. State*,[390] the defendant was convicted of beating a co-worker, James Peoples, with a wooden table leg.[391] Officer Hebert, who arrived on the scene immediately after the beating, testified to what Peoples told him at that time.[392] The trial court determined that the testimony was admissible under the excited utterance to the hearsay rule.[393] The elements that must be shown for a statement to be admitted under the excited utterance exception are: "(1) a startling event occurs; (2) a statement is made by a declarant while under the

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382. IND. R. EVID. 801(d)(2).
383. 909 N.E.2d 1040 (Ind. Ct. App. 2009).
384. *Id.* at 1045-46.
385. *Id.*
386. *Id.*
387. *Id.* at 1046 (citing Barger v. Barger, 887 N.E.2d 990, 993 (Ind. Ct. App. 2008)).
388. *Id.*
389. *Id.*
390. 911 N.E.2d 621 (Ind. Ct. App. 2009).
391. *Id.* at 632-33.
392. *Id.* at 628.
393. *Id.*

stress of excitement caused by the event; and (3) the statement relates to the event."[394] Because Officer Herbert's testimony showed that Peoples was still under the stress of his altercation with Kimbrough when Office Herbert arrived, the trial court did not err when it admitted the testimony under the excited utterance exception.[395]

In *Morgan v. State*,[396] Morgan appealed his convictions for murder and robbery, claiming that the trial court erred and violated his Sixth Amendment Confrontation Clause rights by admitting the discovery depositions of Shana Belcher and Ocie Brasher.[397] The court noted that "[g]enerally, deposition testimony of an absent witness offered in court to prove the truth of the matter assert [see Rule 801(c)] constitutes classic hearsay."[398] Morgan, citing Rule 804(b) argued Belcher's deposition to be inadmissible under Rule 804 because he did not have a "similar motive to develop the testimony by direct, cross, or redirect examination" in the discovery deposition as he would have had in live trial testimony or a trial deposition.[399] The court found Morgan's argument unpersuasive because, although Belcher's deposition testimony was testimonial, Belcher "was clearly unavailable" and he did not lack a prior opportunity for cross-examination, thereby satisfying Morgan's Sixth Amendment confrontation rights.[400]

The trial court found Brasher's deposition testimony admissible under the Rule 804(a)(5) exception to the hearsay rule.[401] Rule 804(a)(5) provides that a witness is unavailable if a witness "is absent from the hearing and the proponent has been unable to procure the declarant's attendance by process or other reasonable means."[402] Morgan questioned the trial court's finding that Brasher was "unavailable" to testify, asserting that the court should consider him unavailable due to the State's "negligence" in failing to monitor him properly so as to secure his live testimony at trial. The court of appeals opined that Morgan's equating of "negligence" with "wrongdoing" to be unpersuasive and as a result the trial court did not abuse its discretion by finding Brasher to be unavailable for purposes of Rule 804.[403]

In *Tiller v. State*,[404] the court again addressed the question of what it means

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394. *Id.* (citing Gordon v. State, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001)).

395. *Id.* at 633.

396. 903 N.E.2d 1010 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).

397. *Id.* at 1012.

398. *Id.* at 1015 (quoting Garner v. State, 777 N.E.2d 721, 724 (Ind. 2002)).

399. *Id.* at 1016 (quoting Brief of Appellant at 21, *Morgan*, 903 N.E.2d 1010 (Ind. Ct. App. 2009)).

400. *Id.*

401. *Id.* at 1017.

402. IND. R. EVID. 804(a)(5).

403. *Morgan*, 903 N.E.2d at 1017.

404. 896 N.E.2d 537 (Ind. Ct. App. 2008), *reh'g denied*, No. 45A03-0802-CR-78, 2009 Ind. App. LEXIS 8 (Ind. Ct. App. Jan. 6, 2009).

for a declarant to be unavailable with the meaning of Rule 804(a)(5).[405] In this case, Tiller claimed that the State did not make reasonable efforts to secure the live testimony of Richard Cannon and as a result the reading into evidence his deposition testimony violated his right of confrontation under both the Sixth Amendment to the U.S. Constitution and article 1, section 13, of the Indiana Constitution.[406] The court viewed the steps taken by the State to secure Cannon's live testimony to be reasonable and as a result decline to hold the trial court's allowance of the testimony via the reading of deposition testimony into the record to be reversible error.[407]

H. Multiple Layers of Hearsay Testimony

In *Amos v. State*,[408] the court addressed a familiar issue of the admissibility of multiple layers of hearsay testimony.[409] In the present case, the State sought to admit what one witness's testimony regarding what a second witness told her (hearsay layer one) that Amos said (hearsay layer two) during their cell phone conversation.[410] This testimony contains hearsay (Amos's statement) within hearsay (the second witness's statement). Pursuant to Rule 805, each layer of hearsay must qualify under an exception to the hearsay rule before a court may admit the statement at issue into evidence.[411] Amos's statements to the second witness, the second layer of hearsay, were not hearsay because they were statements by a party-opponent (Rule 801(d)(2)(A)) in that they were statements made by Amos and offered against him at trial.[412] The court allowed the first layer of hearsay, under Rule 803(1), the present sense impression exception to the hearsay rule. In order for this testimony to fall under the present sense impression, three requirements must be met: "(1) it must describe or explain an event; (2) during or immediately after its occurrence; and (3) it must be based on the declarant's perception of the event."[413] The record revealed that these requirements had been met and that the trial court did not err in admitting the evidence.[414]

I. Business Records

In *King v. State*, the State convicted Andrew King of felony child solicitation

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405. *Id.* at 544.

406. *Id.* at 543.

407. *Id.* at 544.

408. 896 N.E.2d 1163 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 979 (Ind. 2009).

409. *Id.* at 1167-68.

410. *Id.* at 1168.

411. *Id.*

412. *Id.* There were no Sixth Amendment issues because the statements were not testimonial. *Id.* at 1169 n.5.

413. *Id.* at 1168.

414. *Id.* at 1169.

and felony attempted dissemination of matter harmful to minors.[415] King's arrest and conviction resulted from an online child solicitation sting operation, in which the defendant made contact with a police officer posing as a fifteen-year-old girl under the screen name "vollygirl1234."[416] King sent vollygirl1234 pictures of himself, pictures of exposed penises, and arranged to meet "volleygirl1234" for sex.[417] The State issued a subpoena to Yahoo! requesting information relating to the account of the person who had contacted "vollygirl1234," which the State ultimately determined was King.[418] Based on information received from Yahoo!, the State issued an additional subpoena to an Internet service provider. Using information provided by the Internet service provider, the State tracked the internet protocol ("IP") address of the computer used to send instant online messages to vollygirl1234 to Crossroads Bible School, where King was a student.[419] With records from the Bureau of Motor Vehicles, police identified King as the perpetrator and found him at the Crossroads Bible School.[420]

At trial, King objected to the admission of records subpoenaed from Yahoo! and the Internet service provider.[421] Over King's objection, the court admitted the records under Rule 803(6), which provides an exception from the hearsay rule for records kept in the course of regularly conducted business activity. Such records remain inadmissible where "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[422] Because Yahoo! could not, and did not, provide any verification that the account information it provided was connected to King, the Indiana Court of Appeals concluded that the circumstances indicated a lack of trustworthiness, and thus the trial court erred in admitting the account information under Rule 803(6).[423]

On the other hand, the Indiana Court of Appeals found that the records from the Internet service provider were properly admitted.[424] The fact that the actual documents produced, which contained a summary of electronically-stored data concerning the IP address from which King contacted vollygirl1234, were not themselves kept in the regular course of business, did not render the documents inadmissible.[425] The underlying data, not the summary thereof, must be kept in

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415. King v. State, 908 N.E.2d 673, 676 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 556 (Ind. 2009), *aff'd*, 921 N.E.2d 1288 (Ind. 2010). The Indiana Supreme Court only granted transfer in this case "to resolve a decisional conflict regarding the effect of an adult recipient posting as a minor in prosecutions for [the] attempted crime [in this case]." *King*, 921 N.E.2d at 1289. The court summarily affirmed the Indiana Court of Appeals' decision as to all other issues. *Id.*

416. *King*, 908 N.E.2d at 675.

417. *Id.*

418. *Id.* at 677.

419. *Id.* at 676.

420. *Id.*

421. *Id.* at 676-83.

422. *Id.* at 678 (quoting IND. R. EVID. 803(6)).

423. *Id.* at 681.

424. *Id.* at 682-83.

425. *Id.* at 683.

the regular course of business.[426]

Records of regularly conducted business activities may be authenticated through the use of an affidavit from an appropriate person, rather than by a witness's in-court testimony, through the combination of Rules 803(6) and Rule 902(9) or 902(10). In *Ziobron v. Squire*,[427] Mary Ziobron attempted to "bolster" Drs. Ferrara and Judd testimony "with medical records pertaining to the mass inside of [her] pelvis that was a suspected retained left ovary" in this medical malpractice action.[428] But Ziobron failed to properly certify these records in accordance with Rules 803(6) and 902(9) and the trial court properly excluded said records from consideration.[429]

J. Public Records and Reports

In *IDEM v. Steel Dynamics, Inc.*,[430] the court considered the issue of whether an IDEM inspection report is considered an investigative report under Rule 803(8)—the public records exception to the hearsay rule.[431] Steel Dynamics, Inc. (SDI) claimed "that the inspection report contained inadmissible hearsay which did not fall within the public records exception to the hearsay rule because the report amounted to an investigative report."[432] IDEM claimed that the inspection report would not be classified as an investigative report and a result fell with the Rule 803(8) public records exception to the hearsay rule.[433] The inspection report was important because it indicated that an EAF dust spill occurred at SDI's facility.[434] The court of appeals never reached the question of whether the report fell under the Rule 803(8) exception to the hearsay rule, because it found that SDI waived such an objection due to its submission of the report to the ELJ as an exhibit to its own motion for summary judgment.[435]

K. Statements Against Interest

In *Camm v. State*, David Camm, convicted of murdering his wife and children, argued that the trial court erred when it excluded certain self-inculpatory statements of Charles Boney, who was tried and convicted separately for the murders of Camm's family.[436] Boney told an investigator that if the State

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426. *Id.*

427. No. 29A04-0804-cv-235, 2008 Ind. App. LEXIS 2637 (Ind. Ct. App. Oct. 7, 2008).

428. *Id.* at *15-16.

429. *Id.* at *15.

430. 894 N.E.2d 271 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

431. *Id.* at 276.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 276-77. "A party may not submit evidence and then claim error based upon the consideration of such evidence." *Id.* at 277 (citing Beeching v. Levee, 764 N.E.2d 669, 674 (Ind. Ct. App. 2002)).

436. 908 N.E.2d 215, 229-30 (Ind. 2009), *reh'g denied*, No. 87S00-0612-CR-499, 2009 Ind.

found physical evidence of Boney's presence at the crime scene, it was "pretty obvious" that Boney was involved.[437] Boney also told a friend, after the killings, that "'he had three bodies on his conscience, and that one more wouldn't matter.'"[438] The State asserted that there was no issue that Boney was present at the scene of the crime and that he participated in the murders. The only issue was whether Boney acted alone or in concert with Camm, and the evidence in question was irrelevant to the resolution of that issue.[439] Thus, the State contended that the evidence was irrelevant and inadmissible under Rule 402. The court acknowledged the strength of the State's argument, but noted that there was an alternate basis for exclusion.[440]

Because Boney's statements qualified as hearsay, the question was whether an exception applied.[441] Camm argued that the statements were admissible under Rule 804(b)(3), which provides for the admission of statements by an unavailable witness, where such statements, at the time they are made, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true.[442] In this case, the court found that the statements did not tend to subject Boney to criminal liability or constitute an admission of a crime. Thus, the trial court properly excluded them.[443]

VII. AUTHENTICATION AND IDENTIFICATION (RULES 901 – 903)

In *Hape v. State*,[444] the court addressed the issue of authentication of text messages on cellular telephones. The court held the authentication of text messages on a cellular telephone a condition precedent to the admission of the texts.[445] The court further held that such authentication may be accomplished using Rule 901(a) in the same manner that parties use this rule to authenticate files from computers.[446]

LEXIS 1513 (Ind. Nov. 30, 2009).

437. *Id.* at 232.

438. *Id.*

439. *Id.*

440. *Id.* at 232-33.

441. *Id.* at 233.

442. *Id.*

443. *Id.*

444. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

445. *Id.* at 990.

446. *Id.*; *see also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 546 (D. Md. 2007) ("observing that federal courts have recognized [FED. R. EVID.] 901(b)(4) as a means to authenticate electronic data, including text messages").

VIII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS (RULES 1001 – 1008)

In *Rogers v. State*,[447] Rogers appealed his conviction for theft in part asserting that the trial court abused its discretion when it admitted evidence elicited from CVS's surveillance footage.[448] CVS provided a copy of the footage to the Vanderburgh County Prosecutor's office on a disc. The Prosecutor's office created four photographs from the footage on the disc. The State introduced the disc and four photographs created from the surveillance footage disc at Rogers's trial.[449] Rogers argued that the State failed to lay a proper foundation for the admission of the disc because CVS's supervisor "admitted he left out portions of the hard drive for the relevant time period and that he never checked the CD against the hard drive."[450]

The Rules permit the introduction of substantive photographic evidence under the "silent witness" theory, which requires "a strong showing of authenticity and competency."[451] The court held that the State met its burden under the "silent witness" theory. It likewise established that the CD and photographs had not been altered in any way.[452] The court found the introduction of duplicate copies permissible under Rules 1001(4) and 1003.[453]

CONCLUSION

The Indiana appellate courts addressed a number of important evidentiary issues in 2009 and continued to shape the rules of evidence in the State of Indiana.

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447. 902 N.E.2d 871 (Ind. Ct. App. 2009).

448. *Id.* at 874.

449. *Id.*

450. *Id.* at 876. "Before photographic evidence may be admitted, an adequate foundation must be laid." *Id.* (citing Bergner v. State, 397 N.E.2d 1012, 1014 (Ind. Ct. App. 1979)). "Our courts have consistently held this requires the testimony of a witness who can state the photograph is 'a true and accurate representation of the things it is intended to depict.'" *Id.* (quoting *Bergner*, 397 N.E.2d at 1014).

451. *Id.* (quoting Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002) (discussing admission of a videotape)).

452. *Id.* at 877.

453. *Id.*