RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW OCTOBER 1, 2011 – SEPTEMBER 30, 2012

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INTRODUCTION

The Indiana Rules of Evidence ("Rules") went into effect in 1994. Since that time, court decisions and statutory changes have continued to refine these rules. This Article explains the developments in Indiana evidence law during the Survey Period of October 1, 2011 through September 30, 2012. The discussion topics track the order of the Rules

I. GENERAL PROVISIONS (RULES 101 – 106)

A. General—Rule 101

Pursuant to Rule 101(a), the Rules apply to all court proceedings in Indiana "except [when] otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[1] Common law and statutory law continue to apply to specific issues not covered by the Rules.[2]

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

- Is it covered by an Evidence Rule? If not (but only if not), is the issue covered by a statute or by pre-Rule case laws?
- Is it 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 concerning privilege?
- If in a sentencing hearing and so not generally governed by the Evidence Rules, is the evidence against the accused reliable, and therefore consistent with principles of due process?[3]

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

2. *Id.*

3. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE 5 (2013).

B. Situations Where Use of Evidentiary Rules Are Limited, but Not Without Common Sense—Rule 101

"[J]udges *may* consider any relevant evidence bearing some substantial indicia of reliability" "in probation and community corrections placement revocation hearings."[4] Rule 101(c)(2) provides that the Rules do not apply in "[p]roceedings relating to extradition, sentencing, probation, or parole."[5]

In *Robinson v. State*,[6] "Robinson appeal[ed] the revocation of his probation."[7] Although the court of appeals did not reverse the probation revocation, it did hold that a trial court is not automatically required to consider unreliable evidence merely because Rule 101 allows hearsay to be considered during probation proceedings.[8] The court of appeals held that, in the context of Robinson's probation revocation proceeding, "the trial court abused its discretion in admitting the probable cause affidavit because it contain[ed] multiple levels of hearsay."[9] The court of appeals, noting that hearsay can be considered and that confrontation rights are more limited during probationary proceedings, held that such loosening of the Rules "'does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing.'"[10] In *Robinson*, the trial court failed to explain why the hearsay in this case was reliable or why any reliability was sufficient to support "good cause for not producing [a] live witness[]."[11] The court of appeals found the trial court's failure to articulate its finding of admissibility was an abuse of discretion[12] Nonetheless, the court of appeals did not reverse the probation revocation because the State presented "additional factors warranting revocation of probation."[13]

II. JUDICIAL NOTICE (RULE 201)

In *Hogan v. State*,[14] during his post-conviction hearing, "Hogan requested that the court take judicial notice of the trial record" during his habitual offender proceedings.[15] The trial court denied Hogan's judicial notice request.[16] The

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4. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999) (emphasis added). *See* IND. R. EVID. 101(c)(2).

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

6. 955 N.E.2d 228 (Ind. Ct. App. 2011).

7. *Id.* at 229.

8. *Id.* at 232-33.

9. *Id.* at 231.

10. *Id.* at 232 (quoting Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007)).

11. *Id.* (quoting *Reyes*, 868 N.E.2d at 440).

12. *Id.* (quoting *Reyes*, 868 N.E.2d at 440).

13. *Id.* at 233.

14. 966 N.E.2d 738 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 1214 (Ind. 2012).

15. *Id.* at 748.

16. *Id.*

Indiana Court of Appeals found the post-conviction court incorrect on this evidentiary matter, stating that, "Effective January 1, 2010, Indiana Evidence Rule 201 was amended to permit courts to take judicial notice of 'records of a court of this state.'"[17] The Hogan case began in June 2010.[18] The court of appeals did not find this error to be a reversible error or prejudicial to Hogan; rather, it corrected the error by reviewing the relevant portion of the record on appeal, as requested by Hogan.[19] The court of appeals ultimately affirmed the post-conviction court's judgment.[20]

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

A. Relevant Evidence—Rule 401

Pursuant to Rule 401, "[r]elevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[21] In *H.G. v. Indiana Department of Child Services*,[22] the court of appeals discussed whether evidence related to "a child's placement may be relevant in [parental rights] termination cases, especially where . . . DCS relies heavily on a child's need for permanency."[23] DCS failed to present any evidence of "potential permanent home[s] for the children" involved in this case.[24] The court of appeals "acknowledge[d] that adoption has been held to be a satisfactory plan even in cases where a potential adoptive family has not been identified."[25] However, the court of appeals ultimately reversed the trial court's decision to terminate parental rights in this case, remanding the case for further proceedings, stating,

> [T]his case highlights how [an adoption plan for a child] is not necessarily in a child's best interests. DCS must prove both that its plan is satisfactory and that termination is in the child's best interests. Although it is true that DCS is not required to *prove* anything concerning the adequacy of children's placement, that is not the same as saying that the children's placement is *never relevant* to the facts that it must prove. [Other] [c]ases . . . illustrate that a child's placement may be relevant in termination cases, especially where, as here, DCS relies heavily on a child's need for permanency.[26]

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17. *Id.*; *see also In re* D.K., 968 N.E.2d 792, 796 (Ind. Ct. App. 2012).
18. Hogan, 966 N.E.2d at 748.
19. *Id.* at 748-49.
20. *Id.* at 750.
21. IND. R. EVID. 401.
22. 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, 970 N.E.2d 155 (Ind. 2012).
23. *Id.* at 294.
24. *Id.* at 275.
25. *Id.* at 294.
26. *Id.* (citations omitted).

The Indiana Court of Appeals held as follows:

> Because the parents appear willing to continue cooperating with DCS and working toward reunification and because there is no indication that allowing the parents more time to do so will harm the children, we conclude that DCS failed to show that termination is in the children's best interest.[27]

In *Wilson v. State*,[28] the defendant, charged with driving under the influence of alcohol and marijuana, sought to introduce testimony regarding audits of testing results from the State Department of Toxicology relating to the years 2007, 2008, and 2009.[29] The trial court deemed this testimony inadmissible under Rule 402 because it was irrelevant to the defendant's testing results, which were produced in 2011.[30] The court of appeals agreed, noting that the Department of Toxicology, which had discontinued such audits by the time it tested the defendant's blood samples, had different personnel and procedures in 2011 than in prior years.[31]

On the other hand, in *Conley v. State*,[32] the supreme court found no abuse of discretion in the trial court's admission of rebuttal testimony offered by the State's expert, Dr. Daum, which sought to explain and contradict evidence offered by the defendant regarding whether he "'fit the psychotic personality.'"[33] The seventeen-year-old defendant was charged with the murder of his ten-year-old brother by putting him in a choke-hold and then asphyxiating him with a plastic shopping bag.[34] In so holding, the court rejected the defendant's contention that Dr. Daum had offered his opinion as the defendant's psychopathy.[35] Instead, Dr. Daum's testimony was relevant to the issue of whether, as the defendant's expert claimed, the defendant "did not 'fit the psychotic personality'" insofar as it explained and contradicted the defendant's evidence.[36]

B. Probative Value Versus Unfair Prejudice—Rule 403

In *Ceaser v. State*,[37] the court of appeals affirmed its previous standard for assessing the admissibility of Rule 404(b) evidence, stating that the "court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a

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27. *Id.* at 275.
28. 973 N.E.2d 1211 (Ind. Ct. App. 2012).
29. *Id.* at 1213.
30. *Id.* at 1213-15.
31. *Id.* at 1215.
32. 972 N.E.2d 864 (Ind. 2012).
33. *Id.* at 871-73.
34. *Id.* at 869, 876.
35. *Id.* at 872.
36. *Id.*
37. 964 N.E.2d 911 (Ind. Ct. App.), *trans. denied*, 969 N.E.2d 86 (Ind. 2012).

matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to . . . Rule 403."[38] "[A]cknowledg[ing] . . . the potential for unfair prejudice . . . because the prior misconduct involved violence toward a child[,]"[39] the court of appeals found

> that the trial court did not err in finding that the probative value was not outweighed by the threat of unfair prejudice given its direct relation to Ceaser's claim of parental privilege, the similarity and proximity of incidents, and in light of the limitations imposed on the use of the evidence.[40]

In *Freed v. State*,[41] the court of appeals evaluated the inherent interplay of Rules 105, 403 and 404(b) when introducing evidence of uncharged misconduct.[42] During the appeal of his Class B felony robbery, Freed contended that the trial court should not have permitted the admission of "evidence of his uncharged misconduct—specifically, an unrelated burglary, forgery, and solicitation for murder."[43] While incarcerated, Freed wrote a "jailhouse letter" in an effort to hire a hit-man to ensure his "case w[ould] be clean at trial." In the jailhouse letter, Freed wrote to "[c]heck for an unsolved V[illage] P[antry] robbery in July of 08 at Concord and brady ln [sic]."[44] The trial court allowed the State to present the jailhouse letter—with this "equivalent of a confession to the Village Pantry robbery"—"as probative evidence of intent, knowledge, and identity . . . convey[ing] the defendant's involvement in the robbery at issue."[45]

The court of appeals ultimately held that the trial court did not abuse its discretion in admitting the evidence under Rule 404(b) because the trial court properly instructed and admonished the jury throughout the trial about the restricted and limited scope to be afforded the evidence. Furthermore, the court of appeals found that the probative value of the evidence outweighed its potential prejudicial effect:

> Freed's other wrongs consisted not only of a burglary and forgery but also of a plot to murder potential witnesses in the burglary/forgery prosecution. Having said that, we believe that the probative value and need for the evidence in this case was appreciable. The State's case against Freed rested largely on his confessions, both within the letter and made orally to [other] inmates . . . Moreover, the State's remaining evidence linking Freed to the robbery—while not insignificant—was

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38. *Id.* at 915 (citing Embry v. State, 923 N.E.2d 1, 8 (Ind. Ct. App. 2010)).
39. *Id.* at 918.
40. *Id.*
41. 954 N.E.2d 526 (Ind. Ct. App. 2011).
42. *Id.* at 527-28.
43. *Id.*
44. *Id.*
45. *Id.* at 528-29.

> alone somewhat tenuous. *The State thus had a genuine need for Freed's written confession and a corresponding need to contextualize it and demonstrate its authenticity for the jury*.[46]

Accordingly, there was "sufficient evidence to sustain Freed's conviction."[47]

In *Collins v. State*,[48] Collins, in response to her charges of murdering her husband, argued that the victim battered her for over twenty years, and that she thus had acted in self-defense.[49] The jury convicted Collins of voluntary manslaughter.[50] On appeal, Collins asserted that the introduction of a 1979 out-of-state arrest and battery charge was highly prejudicial.[51] The trial court permitted the State to admit certified police records showing that Collins had been booked in Nebraska on misdemeanor charges of battery for cutting her co-worker, despite Collins's objection that "there had been no sufficient notice of the State's intent to use the evidence and that the crimes were too old to qualify for admission under Indiana Evidence Rule 609."[52]

The court of appeals agreed with Collins, reversing her voluntary manslaughter conviction on the grounds that such evidence is highly prejudicial, could lead to the forbidden inference, and has minimal probative value due to the age and victim of the charge in question.[53] Accordingly, the court of appeals ordered a new trial for Collins.[54]

In *Parker v. State*,[55] Parker appealed his conviction for robbery, asserting, in part, that the trial court impermissibly restricted his right to present a defense by denying his request, on the eve of trial, to testify that he was trying to buy marijuana rather than an Xbox gaming system.[56] The State objected under Rule 403, arguing that the proffered evidence "created the highly prejudicial impression that [the victims] were drug dealers and [one of the victims] was unavailable to respond to the allegation."[57] The court of appeals affirmed the trial court's ruling excluding the evidence on Rule 403 grounds.[58] It found that the trial court did not abuse its discretion in this case because "it was extremely prejudicial to make this drug dealing accusation at a time [(on the eve of trial)] and in a manner where [the alleged drug dealer] would have no chance to refute

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46. *Id.* at 531-32 (emphasis added).
47. *Id.* at 532-33.
48. 966 N.E.2d 96 (Ind. Ct. App. 2012).
49. *Id.* at 100-02.
50. *Id.* at 102.
51. *Id.* at 104-05.
52. *Id.* at 102, 105.
53. *Id.* at 105.
54. *Id.* at 107.
55. 965 N.E.2d 50 (Ind. Ct. App.), *trans. denied*, 978 N.E.2d 416 (Ind. 2012).
56. *Id.* at 52-53.
57. *Id.* at 53.
58. *Id.* at 53-54.

it."[59]

With respect to Indiana's implied consent statutes, Indiana Code sections 9-30-6 and 9-30-7, the Indiana Rules of Evidence—Rule 403 in particular—along with the Code itself determine admissibility of blood evidence when the Code does not mandate exclusion.[60] In reaching this conclusion, the court of appeals noted that "[t]he spirit of the Indiana Rules of Evidence is to allow *any relevant evidence*[,]" which "is tempered by Rule 403."[61]

In *Jackson v. State*,[62] the defendant faced charges for murdering David Devine and attempting to murder Rosalie Myers, both of whom he allegedly stabbed.[63] "Devine died from a stab wound to [his] heart," although he also received a number of other potentially fatal stab wounds.[64] At trial, the State introduced several autopsy photos, including State's Exhibit 14(K), which depicted a pathologist holding Devine's heart and using "a metal probe" to "indicat[e] the stab wound to the heart."[65] Exhibit 14(E) presented an external view of the stab wound to Devine's chest that penetrated his heart.[66] The defendant objected to Exhibit 14(K) under Rule 403, arguing that the photo was unnecessary to demonstrate the victim's cause of death because the State introduced Exhibit 14(E) showing the same wound.[67] The trial court and the court of appeals found otherwise, pointing to the pathologist's testimony that the purpose of Exhibit 14(K) was to demonstrate that the stab wound to the heart (and not one of the other stab wounds Devine suffered) was the cause of death,[68] and that Exhibit 14(E) was "difficult to differentiate . . . from other photographs showing separate [external] stab wounds to Devine's chest."[69] Thus, the court of appeals concluded that "[t]he trial court was within its discretion in determining that the probative value of [the photo] outweighed its prejudicial effect."[70]

In *Cherry v. State*,[71] a defendant who had been convicted of "aiding, inducing, or causing" heroin dealing[72] objected, on the basis of Rule 403, to evidence of his videotaped admissions to police that he had accompanied another man on trips to purchase heroin.[73] The defendant argued that the admissions were

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59. *Id.*

60. State v. Bisard, 973 N.E.2d 1229, 1235-36 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

61. *Id*. at 1236 (emphasis added).

62. 973 N.E.2d 1123 (Ind. Ct. App.), *trans. denied*, 977 N.E.2d 353 (Ind. 2012).

63. *Id.* at 1125-26.

64. *Id.* at 1126 (alteration in original) (internal quotation marks omitted).

65. *Id.* at 1128.

66. *Id.* at 1129.

67. *Id.* at 1128-29.

68. *Id.*

69. *Id*. at 1129.

70. *Id*.

71. 971 N.E.2d 726 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 1020 (Ind. 2012).

72. *Id.* at 731 (citing IND. CODE §§ 35-41-2-4, -48-4-1(a)(2)(C) (2013)).

73. *Id*. at 730.

highly prejudicial and "only served to inflame the jury"—and for these reasons, the trial court had abused its discretion in allowing them.[74] The court of appeals rejected this argument, finding the trial court acted within its discretion to admit the evidence because, among other things, the defendant's statement that he had worked with the other man previously was relevant to the defendant's intent to aid, induce, or cause heroin dealing.[75]

C. Character Evidence—Rule 404(a)

In *Johnson v. State*,[76] Johnson "appeal[ed] his conviction for neglect of a dependent" asserting, in part, that "the trial court abused its discretion when it admitted into evidence Johnson's statements on a mental health assessment that he was concerned he would harm [the victim]."[77] The court of appeals affirmed the trial court's admission of the statement by Johnson because "the social worker's testimony was not offered as evidence of Johnson's poor character. Rather, the testimony tended to prove that Johnson was the person that harmed [the victim]."[78] Agreeing with the State, the court of appeals reasoned that "Johnson's statement was not a character statement, but a factual admission [by] Johnson warn[ing] that he would commit the underlying offense, then he committed [it]."[79]

D. Exceptions to Rule 404(b)

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[80] Rule 404(b) tracks Federal Rule of Evidence 404(b) almost verbatim.[81] Rule 404(b)'s list of permissible "purposes is illustrative [but] not exhaustive."[82]

> In assessing the admissibility of Rule 404(b) evidence, a trial court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to

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74. *Id.*

75. *Id.*

76. 959 N.E.2d 334 (Ind. Ct. App. 2011), *trans. denied*, 969 N.E.2d 604 (Ind. 2012).

77. *Id.* at 336.

78. *Id.* at 342.

79. *Id.* (first and fourth alterations in original).

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

81. *See* Hicks v. State, 690 N.E.2d 215, 218 n.1 (Ind. 1997) (noting that the federal rule also includes "opportunity" in its short list of permissible purposes). The rule "is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so called 'forbidden inference.'" *Id.* at 218-19.

82. *Id.* at 219.

> commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403.[83]

1. Motive Exception to Rule 404(b).—In *Collins v. State*,[84] the State was allowed to introduce evidence of Collins's 1979 arrest and charge (without a conviction).[85] This case involved a domestic altercation between Collins and her husband, which led to Collins ultimately shooting and killing her husband.[86] Collins asserted that she was a battered spouse and had defended herself in response to the murder charge.[87] Finding that the trial court erred in admitting evidence of the prior arrest, the court of appeals reversed and remanded for a new trial, reasoning:

> "Numerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime." Where a defendant claims self-defense, the State may use evidence of the defendant's prior misconduct to disprove that argument that the victim was the initial aggressor. Before the alleged prior misconduct can be properly admitted for a permissible purpose under [Rule] 404(b), however, there must be sufficient proof from which a jury could find that the defendant committed the acts. "The relevant point, here, is that, where evidence of prior misconduct consists only of an arrest or charge, the fact of the arrest or charge alone will not suffice to sustain admission under Rules 404(b) and 104(b)."[88]

2. Intent Exception to Rule 404(b).—In *Southward v. State*,[89] Southward "appeal[ed] his conviction . . . for possessing material capable of causing bodily injury while incarcerated" in violation of Indiana Code section 35-44-3-9.5.[90] Southward asserted, in part, that the trial court committed fundamental error when it allowed the State to introduce into evidence "photographic and testimonial evidence regarding a broken broomstick fragment found in Southward's cell on October 27, 2010."[91] Southward's conviction stemmed from a December 20,

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83. Ceaser v. State, 964 N.E.2d 911, 915 (Ind. Ct. App.) (citing Embry v. State, 923 N.E.2d 1, 8 (Ind. Ct. App. 2010)), *trans. denied*, 969 N.E.2d 86 (Ind. 2012).

84. 966 N.E.2d 96 (Ind. Ct. App. 2012). For a discussion of this case in the context of prejudicial harm versus probative value, see discussion *supra* accompanying notes 48-54.

85. *Collins*, 966 N.E.2d at 102.

86. *Id.* at 101.

87. *Id.*

88. *Id.* at 105 (quoting Perry v. State, 956 N.E.2d 41, 59 (Ind. Ct. App. 2011); Iqbal v. State, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004)) (citations omitted).

89. 957 N.E.2d 975 (Ind. Ct. App. 2011).

90. *Id.* at 976.

91. *Id.*

2010, transport.[92] After he was placed in a holding cell, he threatened to "stab an inmate or an officer."[93] A search of Southward's cell revealed "a plastic spoon with its rounded handle altered with the edges ground down."[94] On appeal, the court found that the evidence was sufficient to support the conviction beyond a reasonable doubt.[95] "[T]he trial court found evidence of Southward's prior possession of a sharpened broomstick while incarcerated was relevant to show Southward's intent to commit the charged crime of possessing a spoon with an altered handle while incarcerated."[96] However, the court of appeals acknowledged that an evidentiary safeguard requires that the accused must affirmatively place intent at issue in a case "in his opening statements, cross-examination of the State's witnesses, or case-in-chief" prior to the introduction of Rule 404(b) evidence.[97]

Southwood had not made intent an issue in his opening statement or through his presence at trial.[98] Moreover, the court of appeals, after evaluating the proper intent needed for a conviction under Indiana Code section 35-44-3-9.5, held that "evidence that Southward previously had a broken broomstick fragment secreted in his cell would not have been admissible under . . . R[ule] 404(b) to show Southward's intent to possess the altered spoon because Southward did not contest possession, only the quality of the altered spoon."[99] The court of appeals, nonetheless, affirmed the conviction because it found the error to be harmless—that is, not "ris[ing] to the level of fundamental error"—and the evidence was overwhelming as to Southward's guilt of the crime charged.[100]

In *Duvall v. State*,[101] Duvall appealed his conviction for murder, insurance fraud, and obstruction of justice asserting, in part, that the trial court erred when it deemed a prior suspected poisoning admissible under the Rule 404(b) intent exception.[102] The court of appeals held that the trial court committed error when it admitted the evidence of Rule 404(b) prior bad acts, reasoning that the prosecution inappropriately brought up the prior bad acts before the defendant ever asserted a contrary intent: "the defense did not concede that Duvall gave Alan drugs but only for therapeutic reasons. Nor did the defense "introduce substantial evidence" of a contrary factual scenario . . . . Duvall did not, in opening statements, open the door to a broad application of the intent exception.[103] The court affirmed the conviction, regardless, finding that the Rule

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 979.
96. *Id.*
97. *Id.* (citations omitted).
98. *Id.* at 977-78.
99. *Id.* at 978.
100. *Id.* at 978-79.
101. 978 N.E.2d 417 (Ind. Ct. App. 2012), *trans. denied*, 981 N.E.2d 58 (Ind. 2013).
102. *Id.* at 420.
103. *Id.* at 424-25 (emphasis added) (citation omitted).

404(b) error was harmless due to "substantial independent evidence of Duvall's guilt."[104]

3. Plan or Routine Practice—Exceptions to Rule 404(b) & Rule 406.—In *Weinberger v. Boyer*,[105] the Weinberger Entities challenged the trial court's "admission of testimony concerning improper care rendered by Weinberger to patients other than Boyer" as impermissible evidence of prior bad acts under Rule 404.[106] Boyer asserted, and the trial court agreed, that the evidence was admissible as both a routine practice by Weinberger pursuant to Rule 406 (Boyer contended that Weinberger's action of "pok[ing] holes in the healthy sinuses of other patients in a manner similar to Boyer's [wa]s indicative [of] routine practice") and because, pursuant to Rule 404(b), it demonstrated a "plan" by Weinberger.[107]

The court of appeals agreed with the Weinberger Entities that the trial court's ruling amounted to the impermissible admission of prior bad acts, did not establish a plan or routine practice, and ultimately stood as irrelevant in light of the fact that "Weinberger's procedure of poking holes in Boyer's sinuses was explicitly admitted in the issue instruction and read to the jury prior to trial."[108] However, the court of appeals found the error to be harmless because "the Weinberger Entities fail[ed] to make an argument as to how the evidence affected their substantial rights."[109]

In contrast, in *Nicholson v. State*,[110] evidence of the defendant's prior conviction for voyeurism was properly admitted where the previous crime and the crime he was charged with were "so strikingly similar" and involved the same victims.[111] In reversing the court of appeals and finding that the trial court had not abused its discretion in allowing evidence of the previous conviction, the supreme court noted that under Rule 404(b), prior convictions, when offered for a purpose other than to show a defendant's propensity to commit the crime charged—such as to establish a perpetrator's identity—may be admissible.[112] Specifically, the court noted that "[the] identity exception was carved out primarily for crimes 'so nearly identical that the modus operandi is virtually a 'signature.'"[113] Indeed, the defendant had served a two-year prison term for voyeurism after targeting a family with a series of obscene phone calls—and after

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104. *Id.* at 426. The court of appeals also affirmed one of the convictions for insurance fraud and obstruction of justice, but reversed and remanded with instructions for the remaining five convictions for insurance fraud and the remaining two convictions for obstruction of justice because Duvall's acts constituted a "single chargeable offense." *Id.* at 428.

105. 956 N.E.2d 1095 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1122 (Ind. 2012).

106. *Id.* at 1108.

107. *Id.*

108. *Id.* at 1109.

109. *Id.* at 1110.

110. 963 N.E.2d 1096 (Ind. 2012).

111. *Id.* at 1100.

112. *Id.* at 1099.

113. *Id*. at 1100 (quoting Allen v. State, 720 N.E.2d 707, 711 (Ind. 1999)).

being caught lurking outside of their home.[114] Soon after he was released, the family received another obscene phone call (similar to the ones the defendant had made before being imprisoned) from a man they identified as the defendant, which resulted in stalking and harassment charges in the case at bar.[115] In addition to serving as proof of identity, the prior conviction was also admissible to prove an absence of mistake, given that he knew the phone number and home he was targeting.[116]

4. Intent and Absence of Mistake or Accident—Exceptions to Rule 404(b).— In *Ceaser v. State*,[117] Ceaser "appeal[ed] her conviction for Class D felony battery on her daughter" asserting, in part, "that the trial court erred by allowing the State to present evidence regarding her prior conviction for battering [the same daughter]."[118] Before analyzing the exceptions, the court "note[d] that the 'admissibility of evidence of other crimes, wrongs, or acts to establish intent and an absence of mistake or accident *is well established, particularly in child abuse cases*.'"[119] Ceaser asserted the defense of parental privilege; "the State was required to prove either: (1) the force Ceaser used was unreasonable or (2) Ceaser's belief that such force was necessary to control [her daughter] and prevent misconduct was unreasonable."[120]

The court of appeals found the prior conviction was "admissible under the lack of accident or mistake exception to Rule 404(b)" because such "evidence goes directly to the reasonableness of the force used and the reasonableness of that parent's belief regarding the force used."[121] The court also found the evidence admissible under the intent exception to Rule 404(b) because "the intent underlying parental discipline and battery are not the same."[122] The court held that Ceaser put her intent at issue in the case by raising a parental privilege defense, representing that "her intent was to correct [her daughter's] behavior through corporal punishment, rather than to simply batter her daughter."[123] It also stands worthy of note that the court of appeals also held that the parent's prior actions are "often the only way to determine whether the punishment is a non-criminal act of discipline that was unintentionally harsh or whether it constitutes the felony of child abuse."[124] Here, Ceaser's prior conviction was for battering

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114. *Id.* at 1101-02.

115. *Id.*

116. *Id*. at 1100.

117. 964 N.E.2d 911 (Ind. Ct. App.), *trans. denied*, 969 N.E.2d 86 (Ind. 2012). For additional discussion of this case, see discussion *supra* accompanying notes 37-40.

118. *Id.* at 912.

119. *Id.* at 915 (emphasis added) (quoting United States v. Harris, 661 F.2d 138, 142 (10th Cir. 1981)).

120. *Id.* at 917 (citing Willis v. State, 888 N.E.2d 177, 182 (Ind. 2008)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 915 (quoting State v. Wright, 593 N.W.2d 792, 802 (S.D. 1999)).

the same child in a manner similar to the allegations in the case at hand.[125] The court of appeals found this sufficient to render the evidence admissible under Rule 404(b), even after a Rule 403 analysis.[126]

E. Compromise and Offers to Compromise—Rule 408

In *Horner v. Carter*,[127] the court of appeals held that Rule 408 (as well as Alternative Dispute Resolution Rule 2.11) allows a party to introduce evidence of mediation discussions for the purpose of "establish[ing] traditional contract defenses."[128] This holding was recently vacated by the supreme court.[129]

The case at bar involved a mediated settlement agreement reached during a dissolution proceeding.[130] The ex-husband contended that the agreement was drafted erroneously to the extent that it could be construed as requiring him to make housing payments to his ex-wife following her remarriage.[131] He asserted that the housing payments were actually maintenance payments, which terminated when his ex-wife remarried.[132]

The ex-wife objected to her ex-husband's attempts to testify about statements made during the mediation, arguing they were inadmissible under Rule 408 as evidence of conduct or statements made during a compromise negotiation.[133] The trial court sustained her objections.[134] The court of appeals, however, held that the trial court had erred in excluding the ex-husband's evidence because it "was not offered 'to prove liability for or invalidity of the claim or its amount[,]'"[135] but instead to show that "a mistake occurred in the drafting of the agreement."[136] Thus, and because Alternative Dispute Resolution Rule 2.11 does not preclude its admission, the trial court should not have excluded the evidence under Rule 408.[137]

However, after the Survey Period ended, the supreme court vacated this portion of the court of appeals's ruling, stating,

> Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of

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125. *Id.* at 917.

126. *Id.*

127. (*Horner I*) 969 N.E.2d 111 (Ind. Ct. App. 2012), *vacated by* (*Horner II*) 981 N.E.2d 1210 (Ind. 2013).

128. *Id.* at 117.

129. *Horner II*, 981 N.E.2d at 1210.

130. *Horner I*, 969 N.E.2d at 113.

131. *Id.* at 114.

132. *Id.* at 114-15.

133. *Id.* at 115.

134. *Id.*

135. *Id*. at 117 (quoting IND. R. EVID. 408).

136. *Id.*

137. *Id.*

> compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue.[138]

Notwithstanding this definitive statement on the issue, the supreme court noted that the court of appeals decision was based, in part, on an approach taken from the Uniform Mediation Act ("UMA"), which Indiana has not adopted.[139] The supreme court acknowledged that the Alternative Dispute Resolution Section of the Indiana State Bar Association and the Alternative Dispute Resolution Committee of the Judicial Conference of Indiana were reviewing the UMA and that changes to the Indiana Alternative Dispute Resolution Rules may be forthcoming.[140]

In *Loparex, LLC v. MPI Release Technologies, LLC*,[141] on a certified question from the United States District Court for the Southern District of Indiana, the supreme court declined to expand the limited exceptions to Rule 408(a)(2) to include statements made in the course of settlement negotiations that would serve as proof of blacklisting in violation of Indiana Code section 22-5-3-2.[142] The central issue in the case was whether an unsuccessful lawsuit, filed purportedly to protect trade secrets, could itself constitute blacklisting.[143] As to the evidentiary question, the court reasoned that making an exception to admit statements made in the course of settlement negotiations, for the purpose of proving blacklisting in a later lawsuit, would "chill the negotiating process."[144] Specifically, employers bringing trade secret lawsuits that have the potential to result in a later blacklisting lawsuit would be guarded in settlement negotiations, chilling the process for employer and employee alike.[145]

F. Liability Insurance—Rule 411

According to Rule 411,

> [e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.[146]

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138. *Horner II*, 981 N.E.2d 1210, 1212 (Ind. 2013) (footnote omitted).
139. *Id.* at 1212 n.1.
140. *Id*.
141. 964 N.E.2d 806 (Ind. 2012).
142. *Id.* at 809, 820-21.
143. *Id.* at 818-19.
144. *Id.* at 821.
145. *Id*.
146. IND. R. EVID. 411.

In *Tucker* v. *Harrison*,[147] a patient who became infertile after undergoing surgery to remove ovarian cysts filed a claim for medical malpractice.[148] The plaintiff alleged, and intended to show, that all Indiana physicians, including the members of the medical review panel who examined the case, were biased due to their participation in the Indiana Patient's Compensation Fund ("Fund").[149]

The Fund, explained the court, provides physicians with supplemental coverage for medical malpractice judgments or settlements that exceed the amount covered by their malpractice insurance policies.[150] Thus, the plaintiff argued that all physicians have a vested interest in keeping payouts from the fund to a minimum.[151] The plaintiff further contended that the physicians on the review panel were biased in their analysis of whether the physician charged with medical malpractice had satisfied the applicable standard of care.[152] The defendant objected to the admission of such evidence on the basis of Rule 411's prohibition on "[e]vidence that a person was or was not insured against liability" offered for the purpose of showing "whether the person acted negligently or otherwise wrongfully."[153] Noting that Rule 411 does not bar insurance evidence when it is offered for another purpose, such as demonstrating bias, the court moved to the question of relevancy.[154] Ultimately, the court determined that the evidence did not survive Rule 403's balancing test, given that the plaintiff's evidence concerned a system-wide bias among Indiana physicians and did not relate to the specific experts who testified in the case at bar.[155]

G. Interpreters—Rule 604

In *Tesfamariam v. Woldenhaimanot*,[156] Tesfamariam appealed the trial court's decision, asserting that it committed a fundamental error when it failed, pursuant to Rule 604, to administer an oath to Tesfamariam's interpreter and failed to establish that the interpreter was qualified.[157] The court of appeals held that trial court abused its discretion in the divorce/custody hearing in this case.[158] However, it also found that Tesfamariam "waived her objections by failing to raise them at trial" because they were not fundamental errors.[159] The court of appeals based its decision that no fundamental error occurred on the fact that

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147. 973 N.E.2d 46 (Ind. Ct. App. 2012), *trans. denied*, 980 N.E.2d 325 (Ind. 2013).
148. *Id.* at 47-48.
149. *Id.* at 48, 54.
150. *Id*. at 54 (citing IND. CODE § 34-18-14-3 (2013)).
151. *Id.* at 54-55.
152. *Id.*
153. *Id*. at 54.
154. *Id.* at 54-55.
155. *Id*. at 55.
156. 956 N.E.2d 118 (Ind. Ct. App. 2011).
157. *Id.* at 120-21.
158. *Id.* at 122.
159. *Id.* at 123.

Tesfamariam did "not allege the 'substantial harm' necessary to implicate a fundamental error."[160] "This fundamental error exception is 'extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'"[161] Here, Tesfamariam "told the trial court that she was willing to proceed without an interpreter."[162] The trial court ultimately provided her with an interpreter because it was "easy to do."[163] Thus, no fundamental error occurred.[164]

H. Inquiry as to Validity of Verdict—Rule 606

Under Rule 606(b), a juror may testify to the validity of a verdict to determine "whether any outside influence was improperly brought to bear upon any juror."[165] In *Pattison v. State*,[166] Pattison filed a motion for mistrial after he learned that "the jurors [had] returned to the courtroom during their deliberations" to conduct experiments of their own on pieces of evidence.[167] In his motion, Pattison "asked the Court to hold a hearing and require jurors to appear for questioning about their experiments . . . . The trial court denied Pattison's request."[168]

> As a general rule, a jury's verdict may not be impeached by evidence from the jurors who returned it. Parties may question jurors as to the validity of a verdict in limited circumstances, as follows:
>
> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. . . .[169]

Pattison argued that the jurors should be questioned because their actions may

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160. *Id.*
161. *Id.* at 122 (quoting Delarosa v. State, 938 N.E.2d 690, 694 (Ind. 2010)).
162. *Id.* at 123.
163. *Id.*
164. *Id.*
165. IND. R. EVID. 606(b).
166. 958 N.E.2d 11 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1118 (Ind. 2012).
167. *Id.* at 21.
168. *Id.*
169. *Id.* (alteration in original) (citation omitted).

have "constituted extraneous prejudicial information."[170] The court of appeals found the jurors' actions to be "permissible consideration of the evidence presented at trial" and "not extraneous, additional evidence."[171] The jurors merely operated the piece of evidence just as the witnesses had done during their testimony.[172] Finding that the jury's action was not improper, the court of appeals explained that "the jurors in this case acted in keeping with the testimony presented at trial."[173]

In *Palilonis v. State*,[174] the defendant argued that the trial court had committed an abuse of discretion when it denied his motion to correct errors, which was premised on the contention that jurors had received extraneous prejudicial information.[175] The alleged extraneous information consisted of the jury foreman's claim to the other "jurors that the judge knew [facts] that they did not" have in front of it, and that the defendant's alleged victim, B.S., had committed suicide.[176] After the defendant's conviction, his attorney received an anonymous letter from one of the jurors claiming juror misconduct.[177] Palilonis filed a motion to overturn the verdict, the trial judge recused himself, and a special judge was appointed to review the evidence.[178] After two evidentiary hearings, which featured contradictory testimony from the foreman and the juror who had written the anonymous letter, the special judge determined that no prejudicial extraneous information had come into the jury room.[179] On appeal, the court found no abuse of discretion and characterized the defendant's argument as nothing more than a request for the court of appeals to reweigh the evidence.[180]

I. Who May Impeach—Rule 607

In *Lawrence v. State*,[181] Lawrence appealed his conviction for murder. The sole issue on appeal was "whether the State presented sufficient evidence to support the conviction."[182] In this case, the court of appeals revisited the interplay of Rules 607 and 803(2) as it relates to impeachment evidence and substantive evidence.[183] Lawrence "argue[ed] that the evidence placing him at the scene of the murder consisted almost entirely of impeachment evidence rather than

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170. *Id.* at 22.
171. *Id.*
172. *Id.* at 20-21.
173. *Id.* at 21.
174. 970 N.E.2d 713 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).
175. *Id*. at 723.
176. *Id.*
177. *Id*. at 721.
178. *Id.* at 721-22.
179. *Id.* at 722-23.
180. *Id*. at 724-25.
181. 959 N.E.2d 385 (Ind. Ct. App.), *trans. denied*, 963 N.E.2d 1123 (Ind. 2012).
182. *Id.* at 386.
183. *Id.* at 389.

substantive evidence."[184] The only evidence that the State offered as to Lawrence's presence at the scene of the murder came from "the State's impeachment of its own witnesses."[185] "Lawrence assert[ed] that there was insufficient substantive evidence to sustain the jury's verdict."[186] The court of appeals disagreed.[187]

"Pursuant to . . . Rule 607, a party may impeach the credibility of its own witnesses. However, evidence admitted only for impeachment may not be used as substantive evidence."[188] "Here, the State offered [three witnesses'] prior statements to police as both impeachment and substantive evidence."[189] Noting, that prior

> statements made by a witness are admissible as substantive evidence pursuant to . . . Rule 803(2) when the statements (a) pertain to a startling event or condition; (b) are made while the declarant was under the stress or excitement caused by the event or condition; and (c) are related to the event or condition.[190]

The court of appeals found the statements admissible under both Rule 607 and Rule 803(b) because the elements above had been established by the State for the Rule 803(2) exception to apply.[191] The court of appeals also held that Lawrence waived the issue because he did not first raise the objections at trial.[192] In fact, Lawrence actually agreed to the submission of at least two of the three statements as substantive evidence during the trial.[193] Lawrence ultimately lost his appeal because "[t]here was substantial evidence of probative value to support the jury's conclusion that Lawrence murdered [the victim]."[194]

J. Evidence of Character and Conduct of Witness—Rule 608

Rule 608 narrows the scope of the latitude that Rule 607 affords parties in the right to attack the credibility of any witness—even a party's own witness.[195] Under Rule 608(a), a party may use only evidence in the form of opinion or reputation to attack a witness's credibility—except for the limited range of evidence concerning convictions for crimes allowed by Rule 609,[196] or "evidence

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184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* (citing Gaby v. State, 949 N.E.2d 870, 880 (Ind. Ct. App. 2011)).
189. *Id.*
190. *Id.* (citing Impson v. State, 721 N.E.2d 1275, 1282 (Ind. Ct. App. 2000)).
191. *Id.*
192. *Id.* at 389-90.
193. *Id.* at 389.
194. *Id.* at 390.
195. *See* IND. R. EVID. 607-08.
196. As noted in *Snyder v. King*, 958 N.E.2d 764, 779 n.9 (Ind. 2011), Rule 609(a) allows for

concerning the character for truthfulness or untruthfulness of another witness as to which the witness has testified" per Rule 608(b).[197]

In *Manuel v. State*, the court of appeals determined that the trial court did not abuse its discretion when it barred the defendant from cross-examining his former live-in girlfriend about her recantation of prior domestic battery charges.[198] Here, the defendant faced domestic battery charges for allegedly hitting his ex-girlfriend over the head with a laptop and choking her.[199] The court of appeals held that Rule 609 bars the recantation evidence that the defendant sought to admit related to "specific instances" of untruthfulness.[200]

K. Mode and Order of Interrogation—Rule 611

In *Tharpe v. State*,[201] Tharpe appealed his conviction for attempted murder, asserting, in part, that the trial court erred during its rulings on several of the State's objections.[202] The court of appeals quickly disposed of the issue.

> During Tharpe's testimony, the State made multiple objections that were sustained. Tharpe argue[d] the trial court sustained objections that defense counsel was asking leading questions and asking questions already answered, while allowing the State to ask complex questions on cross examination. Tharpe did not object to the State's questions at trial, nor d[id] he indicate how the rulings were incorrect, except to argue, "Neither the State nor the court offered an explanation of how these are leading questions under . . . Rule 611(c)." As we presume the trial court knows and follows the applicable law, and Tharpe has not overcome that presumption, we cannot say the trial court acted inappropriately in its rulings.[203]

Tharpe's Rule 611(c) argument, in effect, objects to the trial court's using the age-old argument of "It's not fair."[204] It goes without surprise that the court of appeals did not find a basis for reversal upon such an argument alone.[205] This case presents a very practical concept for practitioners: clearly articulate your objections and their bases at trial, or run the risk of waiving the same for appeal.

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impeachment of a witness based on his or her prior conviction for one of the nine "infamous" crimes that normally would render a witness incompetent to testify or for a crime involving dishonesty or a false statement.

197. *See* Manuel v. State, 971 N.E.2d 1262, 1266 (Ind. Ct. App. 2012).

198. *Id*. at 1266.

199. *Id.* at 1265.

200. *Id.* at 1266.

201. 955 N.E.2d 836 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 655 (Ind. 2011).

202. *Id.* at 842.

203. *Id.*

204. *See id.* at 840, 845.

205. *Id.* at 845.

In *Weinberger v. Boyer*,[206] "the Weinberger Entities contend[ed] that the trial court abused its discretion when it allowed Boyer to call the Weinberger Entities' expert . . . during Boyer's case-in-chief."[207] Citing Rule 611(a), the court of appeals held that the trial court did not abuse its discretion in allowing this to occur in light of the fact that Boyer identified the Weinberger Entities' witnesses as potential witnesses on all of the witness lists and the final pretrial order filed in the case, and the "Weinberger Entities specifically moved to bar Boyer from presenting the testimony of [their] expert witnesses in Boyer's case-in-chief."[208]

L. Writing or Object Used to Refresh Memory—Rule 612

Rule 612(a) permits the use of "a writing or similar device" to refresh a witness's memory when "the witness indicates [that] she has no memory of the information sought."[209] In *Cole v. State*,[210] Cole stood accused of raping J.S. while J.S. was asleep and intoxicated.[211] Cole attempted to use the notes of the nurse who examined J.S. after the alleged rape to refresh J.S.'s memory as to statements she made to the nurse about the amount of alcohol J.S. had consumed on the night in question.[212] The State objected on the basis that J.S. had "no personal knowledge of th[e] notes."[213] The trial court sustained the State's objection.[214] The court of appeals found no reversible error, as the evidence the defendant sought to introduce through J.S. "was cumulative of the nurse's testimony earlier."[215] However, the court of appeals noted the general principle that, "there is no requirement that the item used to refresh the witness's memory must have been written by the witness."[216]

The case of *Hutcherson v. State*[217] "addresse[d] the unusual circumstance where [a party] attempt[ed] to use a witness's prior statement to refresh his recollection, but the witness [could not] read."[218] Witness Victor Lee told the police that he "saw Hutcherson shortly after the shootings and that Hutcherson told him that he had shot and robbed two men."[219] At trial, Lee recalled giving

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206. 956 N.E.2d 1095 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1122 (Ind. 2012). For additional discussion of this case, see *supra* discussion accompanying notes 105-09.

207. *Id.* at 1110.

208. *Id.*

209. Cole v. State, 970 N.E.2d 779, 781 (Ind. Ct. App. 2012) (citing Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000)); *see also* IND. R. EVID. 612(a).

210. *Cole*, 970 N.E.2d at 779.

211. *Id.* at 781.

212. *Id.* at 781-82.

213. *Id.* at 782.

214. *Id.*

215. *Id.*

216. *Id*. at 782 n.2 (citing Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000)).

217. 966 N.E.2d 766 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 665 (Ind. 2012).

218. *Id.* at 768.

219. *Id.* at 769.

a statement to the police; however, he "claimed that he could not recall any of the information regarding a conversation with Hutcherson."[220] "[B]ecause he could not read, he could only verify that the signatures on each page of the statement were his own. To refresh Lee's recollection, the prosecutor read Lee's statement aloud in front of the jury, and the jury subsequently found Hutcherson guilty as charged."[221] Hutcherson appealed his conviction "claiming that he was denied his constitutional right to confront and cross-examine Lee. The State [countered,] claim[ing] waiver due to [an] insufficient objection [at trial.] Hutcherson [responded,] claim[ing] fundamental error."[222] The court of appeals found no error, let alone fundamental error, in the trial court's admission of the evidence because Hutcherson waived the issue for appeal by failing to object.[223] The court of appeals found that no fundamental error occurred because Hutcherson's right of confrontation argument lacked merit, holding, "Even if the declarant is unable to recall the events in question, the Confrontation Clause is satisfied as long as the declarant 'appears for cross-examination at trial.'"[224]

"The feigned or real absence of memory is itself a factor for the trier of fact to establish, but does not render the witness unavailable." In short, "[t]he Confrontation Clause . . . generates only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[225]

M. Impeachment via Extrinsic Evidence—Rule 613(b)

In *Dixon v. State*,[226] Dixon appealed his conviction for one count of murder and two counts of attempted murder.[227] At the jury trial in this case, Catrenna Walker ("Walker"), a witness to the murder/attempted murders that occurred at/near her duplex, testified about her knowledge of the facts surrounding the murder/attempted murders.[228] During the course of her testimony she "stated that she could not recall whether [the defendant] got out of his car upon arriving at the duplex."[229] Detective Azcona ("Azcona"), "who had taken Walker's statement," testified for the State in order "to provide extrinsic impeachment of Walker's testimony[,]"[230] which testimony established that Walker had previously advised him that Dixon had gotten out of the car.[231]

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220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 770.
224. *Id.* at 771 (quoting Giles v. California, 554 U.S. 353, 464-66 (2008)).
225. *Id.* (alterations in original) (quoting *Giles*, 554 U.S. at 466, 469).
226. 967 N.E.2d 1090 (Ind. Ct. App. 2012).
227. *Id.* at 1091.
228. *Id.* at 1091-92.
229. *Id.* at 1092.
230. *Id.*
231. *Id.*

Pursuant to Rule 613(a), "[w]here a party seeks to examine a witness concerning a prior statement, the party need not show the statement to the party or disclose the statement's contents to the witness, though it must be disclosed to opposing counsel upon request."[232] Rule 613(b) establishes that "'[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon.'"[233] The facts in this case stand juxtaposed to the situation where the witness admits or denies to making the prior statement. In that situation, the extrinsic evidence would not be admissible under Rule 613(b).[234]

Here, no such acknowledgement of the prior statement exists. Gabrielle simply could not recall whether Dixon got out of the car. In fact she could not recall the requested information even after reading the written transcript of her statement.[235] Under these facts, the court of appeals found that the trial court's admission of Azcona's testimony and the written version of Walker's statement was not erroneous under Rule 613(b) because Walker "neither admitted nor denied making the prior statement" about Dixon getting out of the car.[236]

In *Orr v. State*,[237] the court of appeals addressed a question of first impression concerning a witness's right to be afforded an opportunity to explain or deny a prior inconsistent statement when extrinsic evidence of such a statement is admitted, per Rule 613(b).[238] The witness at issue was not confronted with the prior inconsistent statements at or before the trial, at which time a second witness testified to them.[239]

The court of appeals noted that the rule itself "does not specify the timing of that opportunity."[240] In adopting the approach of Federal Rule of Evidence 613(b), the court of appeals concluded that the opportunity "may be satisfied *at any point in the proceedings*."[241] The court did note that "the traditional method of confronting a witness with the statement before extrinsic evidence is introduced into evidence remains the preferred method [but] the trial court has wide discretion in this matter."[242]

The court also addressed language in Rule 613(b) that makes extrinsic evidence of prior statements admissible where "the interests of justice otherwise require"—even if the "opportunity to explain or deny" has not been afforded or

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232. *Id.* (citing IND. R. EVID. 613(a)).
233. *Id.* (quoting IND. R. EVID. 613(b)).
234. *Id.* at 1092-93.
235. *Id.* at 1093.
236. *Id.* at 1093-94.
237. 968 N.E.2d 858 (Ind. Ct. App. 2012).
238. *Id.* at 860, 862.
239. *Id.* at 862.
240. *Id*.
241. *Id*. at 863 (emphasis added).
242. *Id.*

where "the adverse party had no opportunity to question the statement."[243] Conversely, it noted, courts may require that the witness, to be impeached with a prior statement, be allowed an opportunity to explain or to deny before the extrinsic evidence of the prior statement is admitted.[244] In deciding whether to "require a specific sequence" of evidence, a court should consider certain factors: whether the court will be inclined to recall the impeachee to explain the prior statement; whether the impeachee will be available; the possibility of prejudice through repetition of evidence admitted for the limited purpose of impeachment and how important the impeachee's credibility is "to the resolution of the case."[245]

IV. OPINIONS AND EXPERT TESTIMONY (RULES 701 – 705)

A. "Skilled Witness" Testimony—Rule 701

Pursuant to Rule 701, a skilled witness may provide "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[246] "A skilled witness is a person with 'a degree of knowledge short of that sufficient to be declared an expert under . . . Rule 702, but somewhat beyond that possessed by the ordinary jurors.'"[247] In *Ostrowski v. Everest Healthcare Indiana, Inc.*,[248] Ostrowski argued that it was an abuse of discretion for the trial court to permit "a lay witness [Joe Ringelsten] to testify as to his opinions on specific facts of the case without personal knowledge, where he had not been qualified as an expert."[249] The Merrillville Dialysis Center asserted "that the trial court properly permitted Ringelsten to testify as a skilled lay witness" pursuant to Rule 701.[250] The court of appeals noted,

> One important difference between these rules is that . . . Rule 701 requires that the opinion testimony be based on the perception of the witness, while Rule 702 does not. Therefore, a lay witness may not base an opinion on information received from others or on a hypothetical question.[251]

The court of appeals, finding that Ringelsten's testimony was based on his own perceptions, held the evidence was proper under Rule 701 and ultimately affirmed

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243. *Id*. at 864 (citing 13 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 613.202 (3d ed. 2011)).

244. *Id.* at 864-65 (citing IND. R. EVID. 611(a) -(b)).

245. *Id.* at 865.

246. IND. R. EVID. 701.

247. Kubsch v. State, 784 N.E.2d 905, 922 (Ind. 2003) (quoting 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 705.105, at 318 (2d ed. 1995)).

248. 956 N.E.2d 1144 (Ind. Ct. App. 2011).

249. *Id.* at 1149 (alteration in original).

250. *Id.*

251. *Id.* at 1150.

the verdict against Ostrowski.[252]

B. Expert Testimony—Rule 702

In *Alsheik v. Guerrero*,[253] Dr. Alsheik "appeal[ed] the jury's award of damages . . . to . . . Guerrero, [i]ndividually and as Administratrix of the Estate of I.A.," asserting, in part, that "the trial court abused its discretion when it allowed Guerrero's pathologist [(Dr. Bryant)] to testify as an expert witness" regarding the cause of I.A.'s death.[254] "Dr. Bryant performed a second autopsy on I.A.'s body nearly three years after the coroner's autopsy," noting I.A.'s cause of death as "vascular collapse due to sepsis resulting from the infarction of the left spermadic cord, tip of I.A.'s penis, left testicle and scrotum," which Guerrero's counsel attributed to malpractice on the part of Dr. Alsheik.[255]

Dr. Alsheik disputed the admissibility of Dr. Bryant's expert testimony under both prongs of Rule 702:[256] "(1) the subject matter must be distinctly related to some scientific field, business or profession beyond the knowledge of the average person and (2) the witness must have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier of fact."[257]

The court of appeals found "Dr. Bryant's testimony concerning I.A.'s autopsy and resulting cause of death was uncontrovertibly beyond the knowledge of the average juror."[258] Furthermore, it found "Dr. Bryant's extensive experience performing autopsies qualified him to offer an opinion about I.A.'s sudden death."[259] The court of appeals found that the doctor's lack of "knowledge about the precise surgical procedure of an orchiopexy and the basic anatomical structure of blood supply to the penis, testicles, and scrotum . . . more properly goes to the weight of Dr. Bryant's testimony rather than to his qualification as an expert pathologist."[260]

As to the trial court's Rule 702(b) obligations, "the court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and reliable."[261] In the opinion of the court of appeals, the question presented, and to be resolved by expert testimony "[was] not the cause of I.A.'s suffering but rather what caused his death, [that is,] a

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252. *Id.* at 1150-51.

253. 956 N.E.2d 1115 (Ind. Ct. App. 2011), *aff'd in part*, *vacated in part*, 979 N.E.2d 151 (Ind. 2012).

254. *Id.* at 1120.

255. *Id.* at 1121.

256. *Id.* at 1125.

257. *Id.* at 1126 (citing Taylor v. State, 710 N.E.2d 921, 923 (Ind. 1999)).

258. *Id.*

259. *Id.*

260. *Id.* at 1126.

261. *Id.* (citing Norfolk S. Ry. Co. v. Estate of Wagers, 833 N.E.2d 93, 103 (Ind. Ct. App. 2005)).

'differential etiology.'"[262] "In a differential etiology, the doctor rules in all the potential causes of a patient's ailment and then, by systematically ruling out causes that would not apply to the patient, the physician arrives at what is the likely cause of the ailment or death."[263] This was the exact purpose of Dr. Bryant's expert testimony. Finding "nothing controversial about that methodology," the court of appeals "conclude[d] that Dr. Bryant's scientific methodology in reaching his result rested on reliable scientific principles."[264] The court of appeals held that Dr. Alsheik's complaints about Dr. Bryant's autopsy and expert testimony "relate[d] to the credibility and weight of Dr. Bryant's testimony and is more appropriately reserved as fodder during the proverbial battle of the experts to be fought through their direct and cross-examination."[265]

In *Otte v. State*,[266] Otte challenged the testimony of the State's expert (Creekbaum) under Rule 702, asserting that it "was not based upon demonstrably reliable scientific principles."[267] The court of appeals found Otte's argument misplaced because Creekbaum's "status as an expert witness was due to her specialized knowledge about victims of domestic violence[,]" not scientific principles *per se*.[268] As established by the supreme court in *Malinski v. State*,[269] "'specialized knowledge' as referenced by Rule 702(a) is not a matter of scientific principles."[270] The court of appeals, noting that Otte did not challenge the adequacy of Creekbaum's experience, affirmed the trial court's admittance of Creekbaum's expert testimony because her "qualification as an expert witness was instead based upon her twenty-three-year history of experience, training, and education in the area of domestic violence."[271] The court of appeals likewise held that Creekbaum's testimony did not "constitute[] impermissible vouching testimony" pursuant to Rule 704(b) because it was offered to "explain[ ] the behavior of victims of domestic violence" at the hands of Otte and her recanting of allegations against Otte.[272]

In *Jones v. State*,[273] Jones appealed his conviction for dealing in methamphetamine asserting, in part, that the trial court erred in allowing a law enforcement officer "to testify . . . regarding the one-pot reaction method of manufacturing methamphetamine."[274] In response, the State argued on appeal that it offered the officer's "testimony as a skilled witness [pursuant to Rule 701],

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262. *Id.* at 1127 (quoting Myers v. Ill. Cent. R.R. Co., 629 F.3d 639, 644 (7th Cir. 2010)).
263. *Id.* (citing *Myers*, 629 F.3d at 644).
264. *Id.* (quoting *Myers*, 629 F.3d at 644).
265. *Id.* at 1128.
266. 967 N.E.2d 540 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 668 (Ind. 2012).
267. *Id.* at 547.
268. *Id.*
269. 794 N.E.2d 1071 (Ind. 2003).
270. *Otte,* 967 N.E.2d at 547 (quoting *Malinski*, 794 N.E.2d at 1085).
271. *Id.*
272. *Id.* at 546, 548.
273. 957 N.E.2d 1033 (Ind. Ct. App. 2011).
274. *Id.* at 1040.

rather than an expert [pursuant to 702]."[275] The officer "offered an opinion about the one-pot reaction method of manufacturing methamphetamine based upon his own observations at the . . . residence" at issue in this case.[276] He based his opinions on

> visual recognition of materials commonly used in the manufacture of methamphetamine, which he was able to identify due to his training and experience. Training and experience had also familiarized [the officer] with the appearance of these materials when combined in a single vessel, which he knew to be the one-pot method.[277]

The court of appeals, finding this information to be beyond that of what an ordinary juror would possess, concluded that the officer testified as a skilled witness pursuant to Rule 701 and not as an expert pursuant to Rule 702.[278] The court of appeals "therefore conclude[d] that the trial court did not abuse its discretion by allowing [the officer] to testify regarding the one-pot reaction method."[279]

In *Person v. Shipley*,[280] the supreme court upheld the court of appeals' ruling that an expert with a bachelor's degree in Mechanical Engineering and a Ph.D. in Biomedical Engineering was qualified to offer his opinions as to the cause of lower back injuries allegedly sustained by the plaintiff in an automobile accident.[281] The expert, Dr. Turner, who was not a medical doctor, was "a professor of Orthopedic Surgery and Biomedical Engineering" at Purdue University.[282] The plaintiff claimed that he sustained back and neck injuries in an accident and subsequently sued the other driver.[283] Dr. Turner testified that the collision minimally impacted the plaintiff's vehicle and was unlikely to have caused the plaintiff's injury.[284] Noting the general principle that testimony on medical causation must come from a medical doctor or surgeon, the supreme court nevertheless found Dr. Turner qualified to give his opinion, as his opinion focused on issues of engineering and physics rather than medical issues.[285] The court also made it clear that there is no bright-line rule that "an otherwise qualified expert" could not offer an opinion on "medical causation simply because he or she" was not a medical doctor.[286]

However, the supreme court disagreed with the court of appeals' conclusion

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275. *Id.*
276. *Id.* at 1041.
277. *Id.*
278. *Id.*
279. *Id.* at 1042.
280. 962 N.E.2d 1192 (Ind. 2012).
281. *Id.* at 1195.
282. *Id.*
283. *Id.* at 1193.
284. *Id.*
285. *Id.* at 1195.
286. *Id*. at 1196.

that the testimony provided by Dr. Turner was not based on reliable scientific principles.[287] Dr. Turner made certain factual assumptions regarding the speed and weight of the defendant's vehicle in order to calculate the "momentum transfer" from the defendant's car to the plaintiff's vehicle.[288] In reversing the court of appeals, the supreme court noted that Rule 702 "does not require such specific factual support [as the court of appeals demanded] for expert testimony. Rather, it only requires the trial court's satisfaction that the expert's opinion is based on reliable scientific principles that can be properly applied to the facts in issue."[289]

In *Bennett v. Richmond*,[290] the supreme court held that "psychologists are not per se unqualified to opine on issues of medical causation, but rather, under . . . Rule 702, they may be qualified to give such an opinion based on certain knowledge, skill, experience, training, or education."[291] This case involved a brain injury that plaintiff allegedly suffered when the defendant's truck rear-ended his van.[292] The expert, Dr. McCabe, a psychologist, had taken workshops relating to the evaluation of traumatic brain injuries, and neurologists and general practitioners had referred patients to him for evaluation concerning the potential link between their medical issues (including brain injuries) and their psychological state.[293]

Although the court of appeals did not apply a blanket rule as to psychologists testifying on medical causation, in this case

> it held that a psychologist who is not a medical doctor but is otherwise qualified under Rule 702 to offer expert testimony as to the existence and evaluation of a brain injury is not qualified to offer his or her opinion as its cause without demonstrating some medical expertise in determining the etiology of brain injuries.[294]

The supreme court rejected this requirement, characterizing it as "more stringent" than what Rule 702 demands.[295] The court noted that Dr. McCabe needed only demonstrate that he had sufficient "knowledge, skill, experience, training, *or* education in order to be qualified as an expert"—not that he satisfied each of those criteria.[296] Dr. McCabe's knowledge of the results of brain injuries and his experience working with medical doctors on psychological issues rendered him

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287. *Id.* at 1197.

288. *Id.* at 1197-98.

289. *Id*. at 1197 (citing Shafer & Freeman Lakes Envtl. Conservation Corp. v. Stichnoth, 877 N.E.2d 475 484 (Ind. Ct. App. 2007)).

290. 960 N.E.2d 782 (Ind. 2012).

291. *Id*. at 785 (citing Bennett v. Richmond, 932 N.E.2d 704, 710 n.3 (Ind. Ct. App. 2010)).

292. *Id.* at 784.

293. *Id*. at 787.

294. *Id*. at 788 (citing *Bennett*, 932 N.E.2d at 709-10).

295. *Id.* at 789.

296. *Id.* (emphasis added) (citing Kubsch v. State, 784 N.E.2d 905, 921 (Ind. 2003)).

qualified to testify as an expert.[297]

The supreme court also disagreed with the court of appeals that the expert testimony of Dr. McCabe was not reliable and should not have been admitted under Rule 702(b), rejecting the defendant's contention that the trial court erred in admitting Dr. McCabe's testimony without conducting a *Daubert* hearing; the defendant had failed to request such a hearing or raise an objection at that basis.[298] Regardless, the trial court's hearing on defendant's motion to exclude Dr. McCabe's testimony generally served the purposes that a *Daubert* hearing is intended to address.[299]

Tucker v. Harrison[300] concerned the admissibility of expert epidemiological evidence of the probability that surgery performed by the defendant damaged the plaintiff's ovaries and caused her resulting infertility.[301] As a threshold matter, the court quickly concluded that the plaintiff's expert—Dr. Freeman, an epidemiologist—was qualified under Rule 702(a) to testify as to epidemiological evidence.[302] The remaining question regarded the relevancy of Dr. Freeman's testimony.[303]

The court determined that the testimony was not relevant under Rule 401 and was excludable under Rule 403 due to its lack of probative value.[304] Specifically, the court noted that Dr. Freeman's testimony was not focused on the plaintiff's individual condition or the medical care she received from the defendant.[305] Instead, the testimony claimed that a broad statistical analysis indicates that surgery, as opposed to coincidence, is the more likely cause of similar injuries suffered by women in the plaintiff's age group who underwent the same procedure.[306] The court noted that "Dr. Freeman is not a medical doctor," and while "he [was] qualified to offer a *mathematical* opinion, . . . he was not shown to be qualified to offer a *medical* opinion as to causation"[307] and, thus, did not establish a causal connection between the plaintiff's injury and the surgery.[308]

In *TDM Farms, Inc. v. Wilhoite Family Farm, LLC*,[309] the court of appeals noted that testimony by veterinary experts that a "virus on [plaintiff hog farmer]'s farm was more than 99% genetically identical to [defendant]'s virus" on defendant's neighboring farm, was based on reliable scientific principles and was

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297. *Id.*

298. *Id.* at 791-92 & n.15.

299. *Id*. at 791-792.

300. 973 N.E.2d 46 (Ind. Ct. App. 2012), *trans. denied*, 980 N.E.2d 325 (Ind. 2013). For additional analysis of this case, see discussion *supra* accompanying notes 147-55.

301. *Id.* at 47, 50-52.

302. *Id*. at 50.

303. *Id.*

304. *Id.* at 52.

305. *Id.*

306. *Id.* at 51-52.

307. *Id.* at 52.

308. *Id*.

309. 969 N.E.2d 97 (Ind. Ct. App. 2012).

sufficient for the plaintiff to survive summary judgment on the issue of causation, notwithstanding the fact that the defendant had waived any Rule 702 argument by failing to object at trial.[310]

In *Curts v. Miller's Health Systems, Inc*.,[311] the court of appeals held that although its precedent had generally prohibited nurses from offering expert testimony as to medical causation, there could be circumstances under which a nurse would be qualified to testify as to "whether a healthcare provider breached a standard of care or whether an alleged breach caused an injury."[312] In the case at bar, the standard of care at issue related to the care the plaintiff's mother, now deceased, received while in a nursing home.[313] The plaintiff alleged that his elderly mother had died from a fall she suffered while a resident of the defendant nursing home, and that her fall resulted from the defendant's negligence.[314] Given the non-technical nature of the plaintiff's allegations, the court of appeals acknowledged that "it is possible for a nurse to . . . qualify as an expert witness" under such circumstances, but that the plaintiff failed to provide enough evidence to support his proposed nurse expert's qualification.[315]

The court in *Doolin v. State*[316] discussed whether the lack of a proper foundation for an open-court field test conducted by a police deputy, on a substance alleged to be marijuana, should have prevented the admission of the test under Rule 702(b). The court noted that although the deputy conducting the test had given

> a general overview of the several steps he intended to follow . . . and stated that his department routinely utilizes the field test, he did not provide any specific name or otherwise identify the test, indicate its reliability or rate of accuracy or error, note the scientific principles on which it [wa]s based, or recognize any standards regarding its use and operation.[317]

However, the trial court's error in admitting the test proved harmless, as there was sufficient evidence aside from the field test to establish that the substance at issue was, in fact, marijuana.[318]

C. Bases of Opinion Testimony by Experts—Rule 703

In *Miller v. Bernard*,[319] the plaintiff appealed the trial court's granting of

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310. *Id.* at 107 n.5.
311. 972 N.E.2d 966 (Ind. Ct. App. 2012).
312. *Id.* at 971.
313. *Id.* at 968, 971.
314. *Id.* at 971.
315. *Id*. at 972.
316. 970 N.E.2d 785 (Ind. Ct. App.), *trans. denied*, 976 N.E.2d 40 (Ind. 2012).
317. *Id*. at 789.
318. *Id*. at 789-90.
319. 957 N.E.2d 685 (Ind. Ct. App. 2011).

defendants' motion for summary judgment asserting, in part, that "[t]he trial court abused its discretion in excluding Dr. Loeb's affidavit on the grounds that he participated in the Medical Review Panel and Defendants were not parties to those proceedings."[320] The defendants also objected to Dr. Loeb's affidavit because, in their opinion, "the information relied on by the panel is the same flawed data [Plaintiffs] ha[ve] relied on throughout this litigation."[321] The court of appeals held that the trial court abused its discretion when it exclude Dr. Loeb's affidavit. It found defendants' arguments unpersuasive because they "challenge the weight and not admissibility of the evidence."[322] The court of appeals, noting that Dr. Loeb's opinion alone may be enough to demonstrate a genuine issue of material fact, ultimately "reverse[d] the trial court's decision to exclude Dr. Loeb's opinion and remand[ed] for the trial court to determine whether Dr. Loeb satisfies the requirements of . . . Rule 702."[323]

D. Opinions as to Legal Conclusions—Rule 704

In *Bradford v. State*,[324] and *Gutierrez v. State*,[325] both defendants appealed their respective convictions for child molesting, asserting, in part, that their trial courts committed reversible error by allowing certain witnesses to testify as to their opinions concerning the defendants' intent, guilt, or innocence in these criminal cases in contravention of Rule 704(b). Although these cases did not arise from the same facts or incidents, they do present a similar thread of application under Rule 704(b). In *Bradford*, Bradford asserted that the trial "abused its discretion by admitting into evidence testimony from a Department of Child Services ("DCS") worker regarding the conclusion of her investigation into the allegation of sexual abuse."[326] In *Gutierrez*, Gutierrez asserted that the trial court committed reversible error when it "improperly admitted vouching testimony from two of the State's witnesses as to whether the victim was telling the truth."[327] Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."[328] "'Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony.'"[329]

"In the context of child molesting cases, however, the Indiana Supreme Court

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320. *Id.* at 694.

321. *Id.* (alterations in original).

322. *Id.* (citing Dorsett v. R.L. Carter, Inc., 702 N.E.2d 1126, 1128 (Ind. Ct. App. 1998)).

323. *Id.* at 695.

324. 960 N.E.2d 871 (Ind. Ct. App. 2012).

325. 961 N.E.2d 1030 (Ind. Ct. App. 2012).

326. *Bradford*, 960 N.E.2d at 872.

327. *Gutierrez*, 961 N.E.2d at 1031.

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

329. *Bradford*, 960 N.E.2d at 874 (quoting Rose v. State, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006)).

has recognized 'that there is a special problem in assessing the credibility of children who are called upon as witnesses to describe sexual conduct.'"[330] In *Lawrence v. State*, the supreme court held that, regardless of impeachment efforts of the opponent of the witness, a child's ability to accurately tell the truth and describe an encounter with an adult involving "touching, sexual stimulation, displays of affection and the like" will automatically be an issue justifying the testimony of someone with adequate experience with the child to verifying the child's propensity for truthfulness, as opposed to a tendency to aggrandize. [331] However, such opinions "should not take the direct form of 'I believe the child's story', or 'In my opinion the child is telling the truth.'"[332]

The court of appeals agreed with the defendants in both of these cases, holding that the respective trial courts violated Rule 704 and that such errors were not harmless, thereby reversing the convictions and remanding them for further proceedings. In the *Bradford* case, the trial court improperly allowed DCS witness to testify as to "the truth or falsity of the allegations."[333] In *Gutierrez*, the court of appeals held that although Gutierrez's counsel failed to object at the trial level, the admission of the evidence rose to the level of fundamental error.[334]

In *Morse v. Davis*,[335] Morse "appeal[ed] the judgment against him . . . alleging medical malpractice for failure to diagnose Davis' colon cancer," asserting, in part, that "the trial court abused its discretion when it excluded from the evidence at trial certain expert testimony."[336] The trial court held that, pursuant to Rule 704(b), expert witnesses cannot testify that based on their review of the medical records in a case, they believed a patient had not advised his doctor of a family history of colon cancer when the patient's testimony stands to the contrary.[337] The only purpose of the proffered evidence was to impeach the patient's credibility, which issue stands "within the sole province of the jury" on a critical issue of fact.[338] Thus, since Rule 704(b) prohibits testimony concerning whether a witness testified truthfully, the court of appeals held that the trial court correctly excluded the proffered evidence.[339]

In *Green River Motel Management of Dale, LLC v. State*,[340] GRMM appealed the trial court's denial of its motion for summary judgment in this inverse condemnation action.[341] GRMM asserted, in part, that the trial court abused its

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330. *Id.* at 874 (quoting Lawrence v. State, 464 N.E.2d 923, 925 (Ind.1984), *abrogated on other grounds by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992)).

331. *Id.* (quoting *Lawrence,* 464 N.E.2d at 925).

332. *Id.*

333. *Id.* at 876.

334. 961 N.E.2d at 1034-35.

335. 965 N.E.2d 148 (Ind. Ct. App.), *trans. denied*, 978 N.E.2d 416 (Ind. 2012).

336. *Id.* at 150.

337. *Id.* at 156-57.

338. *Id.* at 161.

339. *Id.*

340. 957 N.E.2d 640 (Ind. Ct. App. 2011), *trans. denied*, 968 N.E.2d 232 (Ind. 2012).

341. *Id.* at 642.

discretion when it allowed a State's witness ("Bartlett") "to state a legal conclusion, *i.e.*, that the change in access was not a compensable damage to GRMM. GRMM contend[ed] that this testimony amounted to testimony by an expert regarding a legal conclusion, which is generally not permitted [by Rule 704(b).]"[342] The court of appeals held that the trial court erred when it admitted Bartlett's legal conclusion, but the error was harmless because "GRMM's inverse condemnation action fail[ed] as a matter of law."[343]

In *Heinzman v. State*,[344] the court of appeals found no error in the admission of a Department of Child Services ("DCS") investigator's testimony that she had "substantiated" allegations of child molesting against Heinzman after her initial investigation.[345] In this context, the court explained, "substantiated" meant that the investigator "had a 'reason to believe'" that there was at least some factual support for the allegations, but it was not equivalent to a finding that the allegations were true.[346] Instead, it meant merely that there was enough evidence for the investigation to proceed further.[347] In other words, admission of investigator's testimony on the substantiation issue was not barred by Rule 704(b) because the investigator was not "vouching" for the alleged victim's truthfulness.[348]

In *Kindred v. State*,[349] another decision concerning "vouching" testimony in a child-molestation case, the court of appeals held that testimony that a child witness has or has not been "coached" is the "functional equivalent" of testimony as to the child's truthfulness.[350] Thus, a child protective services caseworker's testimony that he had been trained to determine whether a child had been coached, and that the alleged victim had not been coached, was inadmissible.[351] The supreme court previously held that testimony regarding a child's propensity "to exaggerate or fantasize about sexual matters is an indirect but nonetheless functional equivalent of saying the child is telling the truth," but it had not addressed testimony concerning coaching specifically.[352]

In *Manuel v. State*, [353] the court of appeals determined that the trial court had not abused its discretion by allowing the State to question the alleged victim of

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342. *Id.* at 646.

343. *Id.* at 646-47. GRMM asserted further evidentiary errors by the trial court pursuant to Rule 703. The court of appeals also found any errors on this testimony to be harmless as well. *Id.*

344. 970 N.E.2d 214 (Ind. Ct. App.), *aff'd in part*, 979 N.E.2d 143 (Ind.), *trans. granted, opinion vacated*, 980 N.E.2d 323 (Ind. 2012).

345. *Id.* at 223.

346. *Id*. at 222.

347. *Id.*

348. *Id*. at 222-23.

349. 973 N.E.2d 1245 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 298 (Ind. 2013).

350. *Id*. at 1257.

351. *Id.* at 1251, 1258.

352. *Id*. at 1257 (quoting Hoglund v. State, 962 N.E.2d 1230, 1234 (Ind. 2012)).

353. 971 N.E.2d 1262 (Ind. Ct. App. 2012).

domestic battery, D.S., as to whether she was testifying truthfully.[354] As the State argued, and the court of appeals agreed, the witness's credibility had been attacked, opening "the door" for D.S. to be questioned about the truthfulness of her testimony.[355] Additionally, the evidence supporting her credibility met the standard of "logically refut[ing] the specific focus of the attack [on the witness's credibility.]"[356]

Palilonis v. State, in addition to the more extensive hearsay issues discussed below, addressed vouching—but for an adult witness, not a child.[357] A nurse who treated the victim, B.S., after her alleged sexual assault by defendant Palilonis, testified "that B.S.'s case was noteworthy to her because her statement that she was raped was believable."[358] The court of appeals, with little analysis, concluded that this was impermissible vouching.[359]

V. HEARSAY (RULES 801 – 806)

A. No Out-of-Court Declarant Available Exception to the Hearsay Rule

As defined in Rule 801(c) "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[360] It may not be admitted unless it falls within one of the exceptions enumerated in the Rules. However, as noted by the court of appeals in *Cole v. State*,[361] a party waives its claim of error regarding the admission of hearsay statements if it fails to object at trial, unless the error qualifies as a "fundamental error," which is a "'clearly blatant violation[] of basic and elementary principles, and the harm or potential for harm could not be denied.'"[362]

In *K.F. v. State*,[363] "K.F. appeal[ed] her adjudication as a delinquent child for having committed acts that, if committed by an adult, would constitute burglary; . . . theft; . . . and carrying a handgun without a license."[364] Although the court of appeals found the evidentiary error to be harmless, it nonetheless reversed, in part, the adjudication.[365] The evidentiary error is worth noting because it highlights a common practice error when it comes to the Indiana Rules of Evidence. The trial court allowed a police officer to testify about statements a

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354. *Id.* at 1266, 1269.
355. *Id*. 1267.
356. *Id*. (citing Embry v. State, 923 N.E.2d 1, 7 (Ind. Ct. App. 2010)).
357. 970 N.E.2d 713 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).
358. *Id.* at 729.
359. *Id*.
360. IND. R. EVID. 801(c).
361. 970 N.E.2d 779 (Ind. Ct. App. 2012).
362. *Id.* at 782 (quoting Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982)).
363. 961 N.E.2d 501 (Ind. Ct. App.), *trans. denied*, 967 N.E.2d 1033 (Ind. 2012).
364. *Id.* at 504-05.
365. *Id.* at 516.

witness made to him on the sole basis that the witness was in the courtroom and available for cross examination.[366]

Under Rule 801(d)(1), a prior statement by a witness is "not hearsay" if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) 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; or (C) one of identification of a person made shortly after perceiving the person[.][367]

The State conceded that the witnesses' statements did not qualify as non-hearsay under Rule 801(d)(1).[368] It likewise conceded that the statements did not qualify "for any of the normally recognized exceptions to the hearsay rule" found in Rule 803.[369] The State ultimately conceded its error, stating that it was harmless.[370] The court of appeals agreed that the evidence had been admitted in error and that the error was harmless because the evidence was cumulative as the witness did, in fact, testify.[371] The important point, and practice tip, to remember from this case is that since the supreme court's *Warren v. State* decision in 2000, the fact that an out-of-court declarant is available to be called to testify and be cross examined at trial is not an exception to the hearsay rule.[372]

In *Kirk v. State*,[373] the court of appeals held that minor "D.K.'s" statement to a police officer that D.K. was "with [his] dad" while carrying guns and selling drugs was inadmissible hearsay, even though it was not barred by Indiana Code section 31-32-3-1, which protects juveniles from waiving their constitutional rights in police investigations.[374] Indiana Code section 31-32-3-1 did not bar the statements because they were offered against the defendant's father, who had no standing to raise D.K.'s privilege as to *himself*.[375] However, the statements satisfied neither the requirements of Rule 801(d) ("a statement offered against a party by that party's co-conspirator"), nor 804(b)(3) ("a statement against

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366. *Id.* at 513-14.

367. IND. R. EVID. 801(d)(1).

368. *K.F.*, 961 N.E.2d at 514.

369. *Id.*

370. *Id.* at 514-15.

371. *Id.*

372. *Id.* at 514. "[R]egardless of whether the declarant is available at trial for cross-examination, a hearsay statement is not ordinarily admissible as substantive evidence." *Id.* at 514-15 (alteration in original) (quoting Warren v. State, 725 N.E.2d 828, 835 n.1 (Ind. 2000)).

373. 974 N.E.2d 1059 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

374. *Id.* at 1067-68.

375. *Id.*

interest").[376] Moreover, although the statement could have been admitted as a prior inconsistent statement to impeach D.K., the State failed to follow the requisite procedures to admit it as such.[377] Ultimately, the court of appeals determined that while the error was harmless as to three of the charges the defendant faced, it was not harmless as to a fourth, and reversed the defendant's conviction on that count.[378]

B. Hearsay—Rule 802

In *Weinberger v. Boyer*,[379] the Weinberger Entities challenged the trial court's admission of Boyer's testimony that his cardiologist had told him that the EKG performed by Weinberger prior to his surgery was abnormal.[380] The court of appeals agreed with the Weinberger Entities that the trial court's ruling amounted to the impermissible admission of hearsay evidence contrary to Rule 802.[381] However, the court of appeals found the error to be harmless because it merely stood as cumulative in nature.[382]

C. Then-Existing Mental, Emotional, or Physical Condition—Rule 803(3)

In addition to its ruling on a Rule 704(b) "vouching" issue, the court of appeals, in *Heinzman v. State*,[383] concluded that the letter an alleged victim of child molestation, Z.B., wrote to the defendant, but never delivered, was admissible under the Rule 803(3) exception.[384] The letter, the court opined, "consist[ed] of a statement of his then-existing state of mind and emotions," rejecting the defendant's argument that the State offered the letter to prove the fact that Z.B. remembered the alleged molestation.[385] In any event, even if the letter had been improperly admitted, the error was harmless.[386]

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

In *Mastin v. State*,[387] Mastin appealed his convictions on three counts of child molesting asserting, in part, that the trial court erred when it improperly admitted

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376. *Id.* at 1068.

377. *Id.*

378. *Id*. at 1068-69, 1071-72.

379. 956 N.E.2d 1095 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1122 (Ind. 2012).

380. *Id.* at 1106, 1100-01.

381. *Id.* at 1106.

382. *Id.* at 1106-07.

383. 970 N.E.2d 214 (Ind. Ct. App.), *aff'd in part*, *vacated in part*, 979 N.E.2d 143 (Ind.), *trans. granted*, *opinion vacated*, 980 N.E.2d 323 (Ind. 2012).

384. *Id.* at 223-24.

385. *Id.* at 224.

386. *Id*.

387. 966 N.E.2d 197 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012).

a child victim's hearsay statement under the "statement . . . made for purposes of obtaining a medical diagnosis or treatment" exception to the hearsay rule.[388] The child did not testify at trial.[389] Rather, the State introduced the child's statement through her maternal grandmother's (Diana Winans ("Winans")) testimony.[390] The trial court allowed Winans to testify about the statements made by the child during the ride home from a visit with a nurse practitioner, finding it admissible under Rule 803(4).[391] Rule 803(4) recognizes the following as an exception to the general rule that hearsay is inadmissible evidence:

> Statements made by persons who are seeking medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.[392]

The court of appeals held that even though the statement from sexual abuse victim about secret games was improperly admitted under Rule 803(4) because it was made after a medical examination had concluded and there was no health professional present, Mastin's substantial rights were not affected because of the "substantial independent evidence of guilt."[393] Mastin admitted to engaging in sexual contact with the victim, which resulted in the transmission of genital herpes.[394]

In *Palilonis v. State*,[395] the court of appeals held that statements that B.S., the defendant Palilonis's alleged victim, made to a nurse who performed a "sexual-assault examination" on her were admissible as statements made for the purposes of medical diagnosis or treatment.[396] The statements concerned the events of B.S.'s rape, but did not include B.S. identifying the defendant by name.[397] The defendant argued that B.S.'s statements to the nurse "were not for the purposes of medical diagnosis or treatment" because "she [had] reported no physical injury or pain," and because she was motivated primarily by complying with police directives that she go to the hospital and by attempting to assist the nurse in collecting evidence.[398] The court rejected this argument, citing its recent decision in *Perry v. State*, in which similar statements a rape victim made to a nurse were found admissible under Rule 803(4).[399] Specifically, the court noted, "B.S.'s

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388. *Id.* at 200.
389. *Id.*
390. *Id.*
391. *Id.* at 200-01.
392. *Id.* at 201.
393. *Id.*
394. *Id.* at 201-03.
395. 970 N.E.2d 713 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).
396. *Id.* at 718.
397. *Id.* at 719, 726-27.
398. *Id.* at 726-27.
399. *Id*. at 727 (citing Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011)).

statements describing the events of her rape were highly important for making treatment decisions for sexually transmitted diseases, HIV, and psychological counseling."[400]

E. Business Records—Rule 803(6)

In *Houston v. State*,[401] Gruzinsky appealed her convictions for failure to ensure school attendance, asserting that "the trial court abused its discretion when it admitted the referral and attendance records of [her] child into evidence . . . under the business records exception to the hearsay rule."[402] The trial court allowed the introduction of the records via the testimony of "Michael McFadden ("McFadden"), the attendance officer for Irvington Community School."[403] McFadden testified that he was the "keeper and custodian of the attendance record, which was admitted."[404] Gruzinsky contended that the State failed to "lay a proper foundation" to admit the records in question under the business records exception because the State provided "insufficient evidence that McFadden had personal knowledge of A.L.'s attendance[,]" and that the referral records admitted did not even constitute business records because "they were prepared in anticipation of litigation and, therefore, could not have been prepared in the regular course of business."[405]

In accordance with Rule 802, "Hearsay is not admissible except as provided by law or by these rules [exceptions]."[406] The business records exception to the hearsay rule states, in pertinent part,

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.[407]

"'To admit business records pursuant to this exception, the proponent of the exhibit may authenticate it by calling a witness who has a functional understanding of the record keeping process of the business with respect to the

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400. *Id.*

401. 957 N.E.2d 654 (Ind. Ct. App. 2011), *trans. denied*, 967 N.E.2d 1032 (Ind. 2012).

402. *Id.* at 656 (The court of appeals consolidated the appeals of Alesha Houston and Donna Gruzinksy even though they had separate trials.).

403. *Id.*

404. *Id.*

405. *Id.* at 657.

406. IND. R. EVID. 802.

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

specific entry, transaction, or declaration contained in the document.'"[408] "The witness need not have personally made or filed the record or have firsthand knowledge of the transaction represented by it in order to sponsor the exhibit."[409]

Here, the court of appeals found that the trial court did not abuse its discretion when at admitted the referral and attendance records under the business records exception.[410] It held that the State established a proper foundation for the admission of the records under the business records exception because McFadden had personal knowledge of the record, had a duty to keep the record, was the record keeper of the record, and testified that the record "was made in the ordinary course of business . . . at or near the time of the occurrence recorded."[411] Citing to Indiana Code section 20-33-2-26, the court of appeals rejected Gruzinsky's argument that McFadden created the referral and attendance records in anticipation of litigation rather than in the regular course of business "because McFadden was legally required to prepare them and to file them as part of the proceedings."[412]

In *Barrix v. Jackson*,[413] the court of appeals held that although otherwise inadmissible records—in this case medical records and bills that were not properly authenticated under Rule 901 for admission as business records under Rule 803(6)—may be relied upon in an expert's opinion testimony.[414] The expert cannot serve as a mere "conduit" for introducing the medical diagnoses of other care providers (that would otherwise be barred as hearsay), thereby depriving the opposing party of an opportunity for cross-examination.[415] The court of appeals pointed to the supreme court's 1991 decision in *Miller v. State*, in which it "concluded that a physician's opinion was inadmissible where that opinion was merely a repetition of another physician's statement without an independent evaluation of its veracity."[416] In the case at bar, the court of appeals ultimately found that the trial court had erred in excluding the records issue on the basis that the records were unauthenticated, but that the error was harmless because the plaintiff had "t[aken] the position that the admissibility of nearly the entirety of [their expert] Dr. Fulton's deposition testimony rose or fell with the admissibility of the medical records."[417] Consequently, the plaintiffs deprived the trial court of the opportunity to determine whether certain portions of Dr. Fulton's testimony

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408. *Houston*, 957 N.E.2d at 658 (quoting Rolland v. State, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006)).

409. *Id.* (citing *Rolland*, 851 N.E.2d at 1045).

410. *Id.*

411. *Id.*

412. *Id.* at 658-59 (citing *In re* Adoption of M.A.S., 815 N.E.2d 216, 223 (Ind. Ct. App. 2004)).

413. 973 N.E.2d 22 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).

414. *Id.* at 26.

415. *Id*.

416. *Id*. (citing Miller v. State, 575 N.E.2d 272, 274 (Ind. 1991)).

417. *Id.* at 27-28.

were admissible.[418]

The court of appeals in *Barrix* also examined the intersection of the business records exception and Rule 413's provision that "medical bills are admissible as prima facie evidence of the reasonableness of charges associated with medical diagnosis or treatment as 'occasioned by an injury.'"[419] The court rejected the plaintiff's argument that the medical bills at issue were admissible without being authenticated under Rule 901, and without qualifying for an exemption from the hearsay rule via Rule 803(6).[420] Nor was the court convinced that the bills were admissible under Rule 803(5) under the theory that they had been "received" by the plaintiff.[421]

F. Declarant Unavailable—Rule 804

As the court of appeals explained in *Berkman v. State*,[422] a court may find a declarant unavailable and allow her prior testimony to be introduced if, among other things, the declarant "is unable to be present or to testify at the hearing because of . . . then existing physical or mental illness of infirmity"[423] or when "the declarant . . . is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means."[424]

In *Berkman*, the declarant at issue, Arlene Timmerman, was called to testify that the defendant, her former boyfriend, had brought the body of the man he stood accused of murdering to her home, and that he had made admissions regarding his role in the murder.[425] The jury "acquitted Berkman of murder but failed to reach a verdict on the felony murder count."[426] In the defendant's second trial, the State again called Timmerman, but her testimony was interrupted when she became nauseous and thought she was developing a migraine headache.[427] Subsequently, the trial court declared Timmerman unavailable and allowed her testimony from the first trial to be introduced.[428] The court of appeals found that the trial court had not abused its discretion, noting both the symptoms that Timmerman complained of in court, and the fact that she had been hospitalized around the time of the trial for an unknown illness—possibly MS, a seizure, or a stroke.[429] Likewise, the *Berkman* court found the deposition

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418. *Id.* at 28.
419. *Id.* at 27.
420. *Id.* at 27-28.
421. *Id*. at 29.
422. 976 N.E.2d 68 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 221 (Ind. 2013).
423. *Id.* at 74 (quoting IND. R. EVID. 804(a)(1)) (internal quotation marks omitted).
424. *Id*. at 76 (alteration in original) (quoting IND. R. EVID. 804(a)).
425. *Id.* at 71.
426. *Id.*
427. *Id.*
428. *Id.* at 72.
429. *Id*. at 74-75.

testimony of another declarant, Paul Barraza, admissible after the State tried and failed to serve Barazza with a subpoena prior to the first or second trials.[430]

CONCLUSION

As evidenced by the Indiana appellate courts' decisions during the Survey Period, the Rules have been, and will continue to be, an adapting collection.

430. *Id*. at 72, 76-79.