SURVEY OF RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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INTRODUCTION

On January 1, 1994, Indiana codified its body of evidence law by adopting the Federal Rules of Evidence.[1] Since then, the Indiana Rules of Evidence (the "Rules") have been part of a dynamic interplay. Practitioners, judges, and lawmakers rely on the Rules to guide their daily work; similarly, judicial and statutory changes progressively shape the Rules. This Article details pertinent developments regarding the Rules during the survey period, which spans from October 1, 2010 to September 30, 2011. Topics of discussion are arranged in the same order as the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

A. Scope of the Rules and Preliminary Questions

The Indiana Rules of Evidence are high-minded in purpose and broad in scope; they are intended to promote fairness, efficiency, and the ideal "that the truth may be ascertained and proceedings justly determined."[2] Rule 101(a) states that the Rules "apply in all proceedings in the courts of the State of Indiana except as 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."[3] The Indiana Supreme Court has long espoused the view that when statutes and Rules are at odds, the Rule prevails.[4] However, if a particular evidentiary issue arises for which the Rules do not control, common or statutory law governs.[5]

As a general rule, trial courts have broad discretion when ruling on the admissibility of evidence. Reviewing courts will reverse an evidentiary ruling only for an abuse of discretion by the trial court.[6] This is consistent with Rule 103, which states that if error is to be predicated upon a decision to admit or exclude evidence, two conditions must be present. First, the decision to admit or

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1. Romo v. State, 941 N.E.2d 504, 506 (Ind. 2011).

2. IND. R. EVID. 102.

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

4. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: INDIANA EVIDENCE § 101.101 (3d ed. 2007) (citing McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998)).

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

6. Deloney v. State, 938 N.E.2d 724, 728 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1210 (Ind. 2011).

exclude the evidence must affect a substantial right of the party in question.[7] Second, if the ruling is to admit evidence, a timely objection to the evidence must appear in the record, accompanied by specific grounds for such objection.[8] If the ruling is to exclude evidence, an offer of proof must be on record to show the court the substance of the evidence.[9]

Rule 104 is another important general rule because it concerns preliminary questions of admissibility.[10] Practitioners seeking a tutorial on this "gateway" rule should consult the *Courtroom Handbook on Indiana Evidence*.[11] Authored by Judge Robert Miller of the United States District Court for the Northern District of Indiana, this handbook provides a useful set of questions that readily summarizes admissibility as follows:

> • Is the issue of admissibility one for court (*i.e.*, in which relevancy is not dependent on the fulfillment of a condition of fact)? If so:
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> > • The judge must be persuaded of the facts necessary to admissibility.
> > • Rules of evidence other than privilege do not limit the evidence the judge may consider.
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> • Is the issue of admissibility one in which the relevancy of evidence depends upon the fulfillment of a condition of fact? If so:
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> > • The judge does not weigh the evidence, but only decides whether the trier of fact could find that the conditional fact exists.
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> • If the admissibility of a confession is being challenged, is the jury out of the court room?[12]

B. Limitations on Use of the Rules of Evidence

Despite their widely acknowledged breadth, use of the Rules is limited in certain situations. Rule 101(c)(2) sets forth the exceptions; it states that the Rules cease to govern "[p]roceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings."[13] These exceptions can best be understood in the context of rights. Where a proceeding is not imbued with full constitutional rights, or where it involves "a favor granted by the State," the Rules are

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

8. *Id.*

9. *Id.*

10. IND. R. EVID. 104.

11. *See* Paul C. Sweeney & Emmanuel V.R. Boulukos, *Recent Developments in Indiana Evidence Law October 1, 2009—September 30, 2010*, 44 IND. L. REV. 1207, 1207 & n.4 (2011).

12. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE § 104 cmt. 7 (2011).

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

inapplicable.[14] The Indiana Court of Appeals recently stated this concept in *Butler v. State* by noting that "[a] probationer faced with a petition to revoke his probation is not entitled to the full panoply of rights he enjoyed before the conviction."[15]

Similarly, in *Williams v. State*,[16] the court of appeals discussed limitations on use of the Rules in the context of home detention hearings. *Williams* involved a defendant who, after pleading guilty to operating while intoxicated and admitting that he was a habitual substance offender, was sentenced to four years of in-home detention. He tested positive for marijuana on a urinalysis drug screen nearly one year after the imposition of his sentence.[17] Accordingly, the correctional consultants who supervised his detention filed a notice of violation of home detention.

At the hearing on his notice of violation, Williams objected to the State's use of the urinalysis and a "daily summary report" indicating that he had tampered with the home detention monitoring device he was required to use.[18] The trial court overruled his objection and sentenced him to serve the rest of his sentence in jail.[19] He argued on appeal that this evidence had been inappropriately admitted because the State had not established a "foundation of trustworthiness" for its monitoring technology.[20] The court of appeals first established that hearings on petitions to revoke home detention are to be handled in the same manner as hearings on petitions to revoke probation. As the court acknowledged, the Due Process Clause applies to both situations. But the court also noted that there is no right to probation, commenting that "[i]t should not surprise . . . that probationers do not receive the same constitutional rights that defendants receive at trial."[21]

In justifying the use of different evidentiary standards, the *Williams* court stressed the importance of flexibility greater than what is typically present in criminal prosecutions. Such flexibility, according to the court, "allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods."[22] The result may therefore be that evidence unavailable in a criminal trial is admissible in a probation or home detention revocation hearing. This ruling "does not mean that hearsay evidence may be admitted willy-nilly" in such situations; rather, the court reiterated that the "substantial trustworthiness" standard is to be applied.[23] Despite the trial court's failure to make an explicit finding that the evidence at

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14. *See* Butler v. State, 951 N.E.2d 255, 259 (Ind. Ct. App. 2011).
15. *Id.*
16. 937 N.E.2d 930 (Ind. Ct. App. 2010).
17. *Id.* at 931.
18. *Id.* at 932.
19. *Id.*
20. *Id.*
21. *Id.* at 933 (quoting Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007)).
22. *Id.*
23. *Id.* (quoting *Reyes*, 868 N.E.2d at 440).

issue was substantially trustworthy, the court of appeals held that this type of error "is not fatal where the record supports such a determination."[24]

C. Rulings on Evidence

Rule 103(a) provides that a court's decision may only be reversed because of an evidentiary ruling if the ruling affected a "substantial right" of the party and the party either objected or made a timely offer of proof, depending on the situation.[25] The language of "substantial rights" also appears in the Indiana Trial Rules, which state that "[t]he court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[26] Thus, unless substantial rights are affected, such an error is to be treated as harmless.

In *Gaby v. State*,[27] the Indiana Court of Appeals assessed whether cumulative errors that include an evidentiary ruling can warrant reversal. The defendant in this case was charged with Class A felony child molestation and convicted after a two-day trial. During the victim's testimony, the trial court allowed the prosecutor to refresh the victim's recollection, thereby eliciting further details of the molestation over Gaby's objection.[28] The court of appeals later determined that this evidence had been improperly admitted because the prerequisites for refreshing a witness's recollection had not been met. On its own, this might have been harmless error. However, the prosecutor in this case had also vouched for the victim's credibility during trial, stating that she was "confident" the jury would reach the same conclusion she had drawn about the case and that she would not have brought a charge she thought was false.[29] The court of appeals deemed it inappropriate for this attorney to have couched her argument in these terms, as she should not have "asserted . . . personal knowledge of the facts at issue."[30]

Faced with cumulative errors made by the prosecution, the court of appeals next assessed whether the defendant's substantial rights had been affected. The court noted that error is only harmless "if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor."[31] As it considered the impact of the prosecutor's actions on the jury, the court was ultimately unable to conclude that they would have a cumulatively harmless impact. Here, because the victim's credibility was the central issue at trial, the trial court's evidentiary rulings had more than a de minimis effect on the jury, and they certainly affected Gaby's substantial rights.[32] The court was "compelled" to reverse Gaby's

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24. *Id.* at 935.
25. IND. R. EVID. 103(a).
26. IND. TRIAL R. 61 ("Harmless error").
27. 949 N.E.2d 870 (Ind. Ct. App. 2011).
28. *Id.* at 878.
29. *Id.* at 880.
30. *Id.* at 881.
31. *Id.*
32. *Id.* at 882.

conviction, although it also concluded that he could be retried.[33]

D. Jury Instructions for Evidence with Limited Admissibility

Rule 105 addresses the way a court must handle evidence that is admissible only as to certain parties or purposes—namely, "the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly."[34] *State v. Velasquez*,[35] a child molestation case, dealt with this rule in the context of preliminary jury instructions. Before either side presented evidence, the trial court addressed the jury as follows:

> Evidence may be presented to you of incidents unrelated to the offenses charged. These incidents are only to be considered as they describe the relationship between . . . [the victim and defendant]. You may not consider it for any other reason. Specifically, you may not consider it as being evidence of . . . [the defendant's] character, nor may it be considered as evidence that . . . [he] acted in conformity with the acts charged.[36]

Following a three-day trial, the jury found Velasquez not guilty on two molestation charges. The State appealed, arguing that the trial court had abused its discretion by giving a "confusing and misle[ading]" preliminary instruction on character evidence before this evidence was presented.[37] In the State's view, such an instruction should only have been tendered at the time the State sought to admit character evidence.

Because the appeal involved interpreting a rule of evidence, the appellate court applied a de novo standard of review. The court looked to *Humphrey v. State*,[38] a 1997 Indiana Supreme Court decision in which the court parsed the verbiage of Rule 105. Instructive to the court was the *Humphrey* court's determination that Rule 105 "enable[s] a party to request a limiting admonishment at the time the evidence is offered, rather than waiting until the jury instructions."[39] Further, the *Humphrey* court had focused on the Indiana rule's use of the term "admonish" rather than "instruct" to support its ultimate holding that Rule 105 admonitions were distinguishable from post-argument limiting instructions.[40] The *Velasquez* court thus concluded that even if the typical practice is to admonish a jury when character evidence is actually offered, what the trial court did was no abuse of discretion.[41] In light of the State's notices

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33. *Id.*
34. IND. R. EVID. 105.
35. 944 N.E.2d 34 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 637 (Ind. 2012).
36. *Id.* at 37.
37. *Id.* at 38.
38. 680 N.E.2d 836 (Ind. 1997).
39. *Velasquez*, 944 N.E.2d at 39 (quoting *Humphrey*, 680 N.E.2d at 839 n.7).
40. *Humphrey*, 680 N.E.2d at 839 n.7.
41. *Velasquez*, 944 N.E.2d at 39.

of intent to introduce character evidence, the trial court's decision to admonish the jury sua sponte had not been speculative. Moreover, the preliminary Rule 105 admonishment was neither confusing nor misleading because "jurors are presumed to follow the instructions of the trial court."[42]

II. JUDICIAL NOTICE (RULE 201)

Pursuant to Rule 201, courts may take judicial notice of facts or laws. The Indiana Court of Appeals's holding in *Christie v. State*[43] reminds practitioners that judicial notice contemplates a broad understanding of the term "laws." In this case, a Henry County trial court took judicial notice of materials in the records of the Knightstown Town Court, and the defendant argued on appeal that this constituted error.[44] The appellate court chided both parties for not paying close attention to Rule 201, which defines "law" to include records of any court in Indiana[45] and permits a court to take judicial notice of such law "at any stage of the proceeding."[46] Because the trial court was within its rights to take judicial notice of another court's records, defense counsel was not ineffective for failing to object to such notice at trial.

Graham v. State, an opinion on rehearing, addressed "comments . . . [the court] made regarding the creation and preservation of evidentiary records in post-conviction relief ('PCR') proceedings."[47] One specific issue in this case was that the PCR court had told the defendant that it could obtain part of the record from the superior court; however, this material was never properly entered into evidence or transmitted to the court of appeals. In its original opinion, the court of appeals held that "it was improper for the PCR court to have done so under . . . [then-existing] precedent."[48] The court had been alluding to the fact that Rule 201 did not permit courts to take judicial notice of "records of a court of this state" until January 1, 2010.[49] Nevertheless, the court also stated in its first opinion that "any material relied upon by the trial court . . . should be made part of the record for appeal purposes."[50] On rehearing, the court emphasized that if a PCR court does take judicial notice of another court's records, it should make these records part of the PCR record.[51] Doing so will avoid "plac[ing] a substantial burden upon . . . [the] court on appeal to either track down those

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42. *Id.* (citing Buckner v. State, 867 N.E.2d 1011, 1016 (Ind. Ct. App. 2006)).

43. 939 N.E.2d 691 (Ind. Ct. App. 2011).

44. *Id.* at 693.

45. IND. R. EVID. 201(b).

46. IND. R. EVID. 201(f).

47. Graham v. State, 947 N.E.2d 962, 963 (Ind. Ct. App.), *aff'g* 941 N.E.2d 1091 (Ind. Ct. App. 2011).

48. *Id.* at 964.

49. *Id.* (citation omitted).

50. *Id.* (citation omitted).

51. *Id.* at 964-65.

records . . . or to attempt to decide the case without benefit of those records."[52]

In re Paternity of P.R.[53] dealt with a party's right to be heard regarding the "propriety of taking judicial notice," as provided in Rule 201(e).[54] Here, the trial court in a custody modification proceeding took judicial notice of a protective order the mother had obtained against an ex-boyfriend. The mother appealed the custody order, contending that the trial court had committed error because "[n]o party requested the court to take judicial notice . . . . [and she] was given no opportunity to object to the extrajudicial inquiry."[55] Noting that Rule 201(c) permits a court to take judicial notice even if it is not requested, the Indiana Court of Appeals also reminded the mother that "a party does not have to be notified *before* a court takes judicial notice."[56] The court acknowledged that parties do have the opportunity to be heard regarding judicial notice, but only upon timely request, which may occur after the court takes judicial notice. In reviewing the case below, the court held that it did not matter that judicial notice was taken after the hearing was over; "[the m]other could have made a timely request . . . . She, however, did not do this."[57] Therefore, her appeal did not constitute a timely request as contemplated by Rule 201(e) because it was not actually made to the trial court.

III. RELEVANCY AND ITS LIMITS (RULES 400-413)

A. Relevant and Irrelevant Evidence

Relevant evidence, the linchpin of any lawsuit, is evidence that has "any tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence."[58] Whereas irrelevant evidence is inadmissible, all relevant evidence is admissible.[59] *In re Paternity of A.S.*[60] involved a father who had recorded telephone conversations he had with the mother of the child in question. At the conclusion of these conversations, he recorded himself ranting about the mother and calling her several profane names.[61] When he appealed the order giving him parenting time every other weekend, he asserted that the post-conversation recordings were irrelevant. The court of appeals disagreed, opining that the father's remarks were "indicative of . . . [his] attitude toward co-

52. *Id.* at 965.
53. 940 N.E.2d 346 (Ind. Ct. App. 2010).
54. IND. R. EVID. 201(e).
55. *Paternity of P.R.*, 940 N.E.2d at 349 (citation omitted).
56. *Id.* at 349-50.
57. *Id.* at 350.
58. IND. R. EVID. 401.
59. IND. R. EVID. 402.
60. 948 N.E.2d 380 (Ind. Ct. App. 2011).
61. *Id.* at 381, 385-86.

parenting."[62] Even if the mother had not heard his insults, the court found them relevant to the issue of whether "his restraint ha[d] its limits" despite the mother's attempts to reach an agreeable solution for the child.[63]

In *Flores v. Gutierrez*, plaintiff Flores brought a personal injury lawsuit after defendant Gutierrez's vehicle struck his vehicle from behind at an intersection.[64] A jury determined that although Gutierrez was liable in the collision, he owed Flores no damages. Flores filed a motion to correct error that was denied; on appeal, he challenged that denial as well as the trial court's admission of certain evidence. Specifically, before trial, Flores had filed a motion to exclude Gutierrez's "Exhibit D," which was a photograph of Flores's vehicle after the accident depicting very little property damage.[65] He challenged the trial court's admission of this photograph on appeal, as well as its exclusion of other medical records he had sought to have admitted.

With regard to the photograph of his vehicle, Flores asserted that it was inadmissible because "it was irrelevant to any determination of his bodily injury."[66] No Indiana precedent existed on whether trial courts could properly admit photos representing property damage to establish bodily injury; thus, Flores used Delaware authority to support his claim. He cited *Davis v. Maute*,[67] a case in which the Delaware Supreme Court reversed such an admission when no expert had testified about the photos. The Indiana Court of Appeals rejected Flores's argument, noting that *Davis* had subsequently been limited to its facts and that other jurisdictions had "reject[ed] the *Davis* reasoning that property damage, without expert testimony to show a link, is not relevant to bodily injury."[68] In the instant litigation, the court concluded that the trial court had properly admitted a duly authenticated and relevant piece of evidence. The court observed that because there is a "commonsense relationship between property damage and personal injury," the trial court correctly concluded that the lack of damage to Flores's vehicle "had some tendency to prove . . . facts relating to his personal injury claim."[69] In other words, according to the Indiana Court of Appeals, "Exhibit D" was relevant evidence.

B. Balancing Required Under Rule 403

Even if a particular piece of evidence is relevant, a court may exclude it pursuant to Rule 403 if its probative value is outweighed by, inter alia, "the

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62. *Id.* at 386.

63. *Id.*

64. Flores v. Gutierrez, 951 N.E.2d 632, 634 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1116 (Ind. 2012).

65. *Id.* at 635.

66. *Id.* at 637.

67. 770 A.2d 36 (Del. 2001).

68. *Flores*, 951 N.E.2d at 638.

69. *Id.* at 638-39.

danger of unfair prejudice."[70] *Sigo v. Prudential Property & Casualty Insurance Co.*,[71] a breach of insurance contract claim, addressed the nuances of this rule. This lawsuit arose out of a fire loss; Sigo sued his insurance company for refusing to pay the claim when his home burned down. There was a concurrent criminal trial in which Sigo was charged with, tried for, and acquitted of arson.[72] At the civil trial, Prudential filed a motion in limine to exclude any reference to the criminal trial and Sigo's acquittal. The trial court granted the motion and certified the order for interlocutory appeal at Sigo's request.[73]

It was Sigo's position that any evidence regarding his criminal trial and acquittal of arson was admissible in the civil trial under Rules 401 and 403. He argued that: (1) the same witnesses would be featured in both trials; (2) evidence of the criminal trial was relevant to show bias against him; and (3) any prejudice resulting from such evidence would not be "unfair prejudice."[74] The court of appeals held otherwise, first noting that trial courts have significant latitude when performing Rule 403 balancing. According to the court, unfair prejudice "addresses the way in which the jury is expected to respond to the evidence; it looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis."[75] The court explained that at old common law, records in criminal cases were inadmissible in civil actions because of a "want of mutuality"—that is, the differences in rules and degrees of proof required in each setting.[76] Although the Indiana Supreme Court later adopted an exception to this rule, which allows a criminal felony conviction as evidence in a civil action, "it is not necessarily conclusive proof in the civil action of the facts upon which the conviction was based."[77]

Without controlling Indiana case law on whether evidence of an acquittal posed the danger of unfair prejudice in a civil trial, the court of appeals looked to decisions in other state and federal courts. The federal cases more directly dealt with evidence of non-prosecution, but the court argued by analogy that they were "instructive and persuasive insofar as Indiana's pertinent Evidence Rule[] mirror[ed] . . . [its] federal counterpart[]."[78] Ultimately, the court of appeals decided both that the trial court had properly excluded evidence of Sigo's acquittal under Rule 403 and that it was in no position to make new law on this point. Chief Judge Robb wrote that the court "presume[d] that had the drafters of the statute or Rule intended acquittal evidence to be admissible, they would have expressly said so."[79] However, she also included a footnote indicating that

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70. IND. R. EVID. 403.
71. 946 N.E.2d 1248 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 649 (Ind. 2011).
72. *Id.* at 1249.
73. *Id.* at 1250.
74. *Id.*
75. *Id.* at 1251 (quoting Ingram v. State, 715 N.E.2d 405, 407 (Ind. 1999)).
76. *Id.*
77. *Id.* at 1252 (citing Kimberlin v. DeLong, 637 N.E.2d 121, 124 (Ind. 1994)).
78. *Id.* at 1253. The state cases did directly discuss evidence of acquittal in civil trials.
79. *Id.* at 1254.

a proper limiting instruction might lessen the danger of unfair prejudice in cases like *Sigo*.[80]

In *Granger v. State*,[81] the defendant appealed her convictions on several counts of felony child molestation and one count of felony child solicitation. She asked the court of appeals to consider whether the trial court had abused its discretion by admitting certain evidence of a sexual nature: photographs of her body, playing cards depicting naked figures, various sex toys, and condoms.[82] In particular, she believed that these items were introduced to inflame the jury, thereby unfairly prejudicing her case. The court of appeals affirmed the trial court and reminded the defendant that "[e]ven grisly autopsy photographs, which could prejudice a jury against a defendant, are admissible when they are relevant to an issue the State must prove."[83] The defendant's argument that she could have stipulated to the contents of the photographs was to no avail, as she did not so stipulate. Accordingly, the trial court was within its discretion to find that Rule 403's balancing test permitted introduction of the photographs.[84] With respect to the other items, the court determined that the victims' testimony belied the defendant's argument that the danger of unfair prejudice outweighed the items' probative value. The court stated that excluding these items would have "left the State with more than just 'a credibility contest'" and did not disturb the trial court's admission of any disputed pieces of evidence.[85]

C. Other Crimes, Wrongs, or Acts

Indiana law generally forbids the admission of "propensity evidence" in court.[86] As a practical matter, this means that evidence of a person's other crimes, wrongs, or acts may not be used to prove that he has acted similarly in the instant matter.[87] However, propensity evidence is admissible for certain limited purposes "such as proof of motive, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."[88] The Indiana Supreme Court decided *Turner v. State*[89] during this year's survey period, a case that involved a horrific group shooting and presented several evidentiary issues. With respect to Rule 404(b), the court readily decided that testimony relating the defendant's expressed hope to commit robbery at or near the crime scene was admissible to show motive. Proclaiming that evidence of motive is always relevant, the court concluded that

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80. *Id.* at 1254 n.3.
81. 946 N.E.2d 1209 (Ind. Ct. App. 2011).
82. *See id.* at 1212.
83. *Id.* at 1218.
84. *Id.*
85. *Id.* at 1220 (quoting Rafferty v. State, 610 N.E.2d 880, 884 (Ind. Ct. App. 1993)).
86. Payne v. State, 854 N.E.2d 7, 18 (Ind. Ct. App. 2006).
87. IND. R. EVID. 404(b).
88. *Id.*
89. 953 N.E.2d 1039 (Ind. 2011).

this testimony evinced motive to obtain property from the decedents.[90] This case also reviewed what courts do in assessing "404(b) evidence"; first, they determine that the evidence relates to a matter other than the defendant's propensity to commit the charged offense, and second, they engage in the balancing required by Rule 403.[91] Finding no errors at either step, the court held that the challenged testimony regarding Turner was admissible.

The application of Rule 404(b) extends beyond defendants. In *Davis v. State*,[92] the defendant hoped to benefit from this rule when appealing his conviction for possession of cocaine. Law enforcement officers searching for Davis on an outstanding warrant apprehended him in a sport utility vehicle. Having observed his attempt to hand Daniels, the passenger, a bag they suspected to be cocaine, the officers ordered them to stop the car.[93] They determined that the bag was cocaine and found amounts of money on Davis that suggested drug dealing. Davis denied that the bag was his; before trial, he tried to admit evidence of Daniels's prior drug convictions to show that Daniels was inclined to possess cocaine. The trial court granted the State's motion to exclude these convictions.[94]

On appeal, Davis asserted that evidence of Daniels's criminal history was admissible to establish the identity of the person who possessed cocaine on the day in question. He further alleged that her criminal history "[made] it more likely that *she* was the owner of the drugs."[95] The court of appeals agreed, remarking that "Rule 404(b) applies to persons other than defendants."[96] In this instance, "it was the State's intent to show that Davis was a cocaine dealer" and that "a drug transaction occurred between Davis and Daniels. Accordingly, from the State's theory, it follow[ed] that Daniels's record as a user and possessor was indeed relevant."[97] Somewhat unfortunately for Davis, though, the court also concluded that excluding this evidence caused Davis no prejudice, and it affirmed the trial court.

It is rare for an error predicated on Rule 404(b) to serve as grounds for a mistrial. In *Owens v. State*,[98] a defendant convicted of child molestation moved for a mistrial when, in violation of an order to exclude "any mention of his prior domestic battery conviction and any evidence of prior uncharged misconduct," a witness testified that Owens "abused us."[99] The court of appeals characterized the defendant's request as "an extreme remedy that is warranted only when less

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90. *Id.* at 1057.

91. *Id.* (citing Wilson v. State, 765 N.E.2d 1265, 1270 (Ind. 2002)).

92. 948 N.E.2d 843 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

93. *Id.* at 845-46.

94. *Id.* at 846.

95. *Id.* at 848 (emphasis added).

96. *Id.* (citing Garland v. State, 788 N.E.2d 425, 430 (Ind. 2003)).

97. *Id.*

98. 937 N.E.2d 880 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1205 (Ind. 2011), *opinion vacated by* 964 N.E.2d 845 (Ind. 2012).

99. *Id.* at 884, 894.

severe remedies will not satisfactorily correct the error."[100] By contrast, the court deemed the challenged testimony too vague to have put the defendant in peril. The court did not believe this brief statement had been offered as propensity evidence and concluded that the judge's instruction to disregard the witness's statement cured any error.[101]

D. Subsequent Remedial Measures

Rule 407 provides that "[w]hen after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."[102] The Indiana Court of Appeals considered this rule in the insurance context in *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*,[103] which was also transferred to the Indiana Supreme Court during the survey period. In this case, State Auto sought a declaration that it owed no coverage when its insured, Flexdar, was found to have leaked the industrial solvent trichloroethylene (TCE) from its premises. The original State Auto insurance policy excluded from coverage damage caused by "pollutants," defined rather vaguely as irritants or contaminants.[104] Flexdar contended that the policy exclusion was ambiguous as written. While the case was pending on a summary judgment ruling, Flexdar sought to admit as evidence a new policy endorsement form that State Auto drafted after Flexdar became its insured. This form, which the trial court excluded, specifically identified TCE as a pollutant subject to State Auto's policy exclusion. Although the trial court granted summary judgment for Flexdar, one issue on appeal was whether the later endorsement form should have been admitted into evidence.[105]

The Indiana Court of Appeals set forth the two foci of Rule 407 as follows: "The first is that permitting proof of subsequent remedial measures will deter a party from taking action that will prevent future injuries. The second is doubt over the probative value of subsequent measures in proving omission or misconduct."[106] Next, the court relied on the Seventh Circuit Court of Appeals's holding in *Pastor v. State Farm Mutual Automobile Insurance Co.*[107] to support its view that Rule 407 called for excluding the endorsement form. In *Pastor*, the court opined that the insured "wanted to use the evidence that State Farm, to avert future liability to persons in the position of the plaintiff, changed the policy to establish State Farm's 'culpable conduct.'" The Seventh Circuit believed that

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100. *Id.* at 895 (quoting Francis v. State, 758 N.E.2d 528, 532 (Ind. 2001)).

101. *Id.*

102. IND. R. EVID. 407.

103. 937 N.E.2d 1203 (Ind. Ct. App. 2010), *trans. granted*, 950 N.E.2d 1205 (Ind. 2011), *rev'd on other grounds by* 964 N.E.2d 845 (Ind. 2012).

104. *Id.* at 1205.

105. *Id.*

106. *Id.* at 1207.

107. 487 F.3d 1042, 1045 (7th Cir. 2007).

allowing this revision as evidence would "discourag[e] efforts to clarify contractual obligations," thereby violating Rule 407.[108] Thus, in the instant litigation, the Indiana Court of Appeals affirmed the trial court's exclusion of State Auto's new endorsement form.[109]

E. Evidence of Liability Insurance

Just as evidence of subsequent remedial measures is generally inadmissible to show negligence or culpability, "[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."[110] *Wisner v. Laney*,[111] a negligence action alleging failure to diagnose a patient's transient stroke, concerned the Rules' stance on addressing evidence of liability insurance in voir dire. Here, the plaintiff's counsel asked prospective jurors whether they worked for or owned stock in ProAssurance Insurance Company. Counsel also sought prospective jurors' opinions on injured parties seeking damages.[112] Despite a motion in limine against discussing insurance at trial, the defendants did not argue that the jury pool had been corrupted.

The Indiana Court of Appeals admonished the defendants for having waived their objection to insurance questions but considered the objection nonetheless.[113] Even though the defendants recognized precedent allowing insurance questions during voir dire, they argued that such questions must be posed in good faith and disputed the plaintiff's good faith.[114] As it considered Rule 411's import, the court stated:

> The rationale for not allowing evidence of insurance is that if the jury becomes aware that the defendant carries liability insurance and will not carry the brunt of any judgment, the jury may be prejudiced in favor of an excessive verdict. On the other hand, if the jury becomes aware that the defendant does not have insurance and will bear the burden of any judgment, the jury may be prejudiced in favor of a minimal verdict. . . . Rule 411 does not limit the allowable evidence regarding insurance only to financial interest, but also allows evidence going to bias or prejudice.[115]

Bearing in mind the underlying rationale of Rule 411, and noting that it is not

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108. *Id.* at 1045.

109. *State Auto. Mut. Ins. Co.*, 937 N.E.2d at 1208. The Indiana Supreme Court's 2012 reversal of this decision focused on contested policy language rather than the admissibility of the endorsement form.

110. IND. R. EVID. 411.

111. 953 N.E.2d 100 (Ind. Ct. App. 2011), *trans. granted*, 963 N.E.2d 1115 (Ind. 2012).

112. *Id.* at 109.

113. *Id.*

114. *Id.* at 109-10 (citing Stone v. Stakes, 749 N.E.2d 1277, 1281 (Ind. Ct. App. 2001)).

115. *Id.* at 110 (citations omitted).

strictly applicable to voir dire, the court found the challenged questions "legitimate attempts to ascertain any potential for bias or prejudice."[116] The court also found no evidence that these questions had been asked in bad faith. As a result, the court concluded that the voir dire questions regarding insurance did not support the defendant's motion to correct errors.

F. Evidence of Past Sexual Conduct

The "rape shield rule," Rule 412, reflects the policy and underlying principles of the Indiana Rape Shield Act.[117] This rule provides that, with limited exceptions, evidence of the past sexual conduct of a victim or witness is inadmissible; it also provides specific procedures for parties seeking to introduce such evidence.[118] "Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes."[119]

In *Conrad v. State*,[120] the victim attended a party, fell asleep on the host's sofa, and woke up to find Conrad violating her sexually. Conrad was charged with two counts of criminal deviate conduct. During the jury trial, he made three unsuccessful offers of proof to introduce testimony that the victim had been "making out" with another party guest "just before" he encountered her.[121] Conrad was convicted and sentenced to twelve years in prison. When he appealed, he claimed that his proffered evidence of the victim's conduct with other party guests was not barred by Rule 412.[122]

Examining the ambit of Rule 412, Judge Bailey wrote that "[e]vidence 'of the classic sort precluded by the Rape Shield Rule' seeks to draw the fact-finder's attention to prior sexual conduct 'simply to show that the victim has consented in the past in the hope the inference will be drawn that she consented here.'"[123] It is noteworthy that Conrad disputed neither the policy of the rape shield rule nor the sexual nature of his victim's alleged conduct with the other individual. What he did argue was that her alleged activity with this person was "contemporaneous with any activity involving Conrad[,] and thus Rule 412's proscription against 'past sexual conduct' did not apply."[124] Nevertheless, Judge Bailey and the rest of the court did not find his argument persuasive. The court dismissed the notion that Rule 412 was as time-sensitive as Conrad suggested. "These events occurred in 'a very close period of time,'" wrote the court, "[b]ut they were not

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116. *Id.*

117. *See* State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999). The Indiana Rape Shield Act is codified at IND. CODE § 35-37-4-4 (2012).

118. IND. R. EVID. 412.

119. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

120. 938 N.E.2d 852 (Ind. Ct. App. 2010).

121. *Id.* at 854.

122. *Id.* at 855.

123. *Id.* (quoting *Williams*, 681 N.E.2d at 200).

124. *Id.* at 855-56 (internal citation omitted).

contemporaneous, as Conrad does not claim that he and . . . [the other partygoer] were simultaneously engaged in activity of a sexual nature with S.L."[125] The court declined to examine any possible intricacies of the word "past" and held that Conrad's proffered testimony could only constitute evidence of the victim's past sexual conduct, which Rule 412 bars.[126]

Additionally, the *Conrad* court determined that the evidence at issue could not have been introduced under any of the exceptions to Rule 412. Earlier in the opinion, the court explicitly stated the exceptions as follows: "unless that evidence would establish evidence of prior sexual conduct with the defendant, would bring into question the identity of the defendant as the assailant, or would be admissible . . . under Rule 609."[127] None of these applied to Conrad's situation, and the court did not create a new exception "based on a perceived need to impeach testimony."[128] As such, the court affirmed the trial court's exclusion of the evidence.

IV. PRIVILEGES (RULES 501-502)

On September 20, 2011, the Indiana Supreme Court published an order amending the Indiana Rules of Evidence.[129] Most notably affecting the rules regarding privilege, this order amended Rule 501, the general rule regarding privilege, and added Rule 502, which governs the attorney-client privilege and work product protection. The new versions of these rules took effect beginning January 1, 2012.

Rule 501 changed only marginally due to the supreme court's order. The current text of the rule is as follows:

> Rule 501. Privileges
> (a) General Rule. Except as provided by constitution or statute as enacted or interpreted by the courts of this State or by these or other rules promulgated by the Indiana Supreme Court or by principles of common law in light of reason and experience, no person has a privilege to:
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.
> (b) Waiver of Privilege by Voluntary Disclosure. Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder

125. *Id.* at 856 (citation omitted).

126. *Id.*

127. *Id.* at 855. "A common-law exception exists . . . where the victim has admitted the falsity of a prior accusation of rape or where a prior accusation is demonstrably false." *Id.*

128. *Id.* at 856.

129. IND. SUPREME CT., ORDER AMENDING INDIANA RULES OF EVIDENCE (Sept. 20, 2011), *available at* http://www.floydcounty.in.gov/SupremeCourtFilings/94S00-1101-MS-17e.pdf.

> of the privilege voluntarily and intentionally[130] discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
> (c) Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.
> (d) Comment Upon or Inference from Claim of Privilege; Instruction. Except with respect to a claim of the privilege against self-incrimination in a civil case:
>
> (1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding, or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> (2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> (3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.[131]

Rule 502 tracks its federal counterpart to some degree. Federal Rule of Evidence 502 was designed to address the "widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive," especially in cases involving significant electronic discovery.[132] Although it strives to set manageable standards, it "does not purport to supplant applicable waiver doctrine."[133] The text of Indiana's rule, which does not contain the federal version's definitions or references to state proceedings, is as follows:

> Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Intentional disclosure; scope of a waiver. When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
>
> (1) the waiver is intentional;

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130. The words "and intentionally" represent the only change to Rule 501 besides the reference to new Rule 502.

131. IND. R. EVID. 501.

132. FED. R. EVID. 502 (Advisory Committee Note No. 2).

133. *Id.*

> (2) the disclosed and undisclosed communications or information concern the same subject matter; and,
> (3) they ought in fairness to be considered together.
> (b) Inadvertent disclosure. When made in a court proceeding, a disclosure does not operate as a waiver if:
> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and,
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).
> (c) Controlling effect of a party agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
> (d) Controlling effect of a court order. If a court incorporates into a court order an agreement between or among parties on the effect of disclosure in a proceeding, a disclosure that, pursuant to the order, does not constitute a waiver in connection with the proceeding in which the order is entered is also not a waiver in any other court proceeding.[134]

V. WITNESSES (RULES 601-617)

A. Competency of Witnesses

Under Rule 601, every person is competent to be a witness at trial unless the Rules or Indiana General Assembly state otherwise.[135] Even children are treated as competent witnesses, although special proceedings must occur to establish their competency to testify at trial. A child's competency is established by a showing that she (1) can distinguish between telling the truth and telling a lie; (2) knows she is required to tell the truth; and (3) understands what a true statement is.[136] In *D.G. v. State*,[137] the Indiana Court of Appeals concluded that a trial court's failure to conduct this line of inquiry for a six-year-old witness was not harmless error. Because a year had passed since the child testified, the court determined that a competency assessment at this late date would not cure the error, and it reversed and remanded the action.[138]

The Rules also address when juror competency may be attacked. "It has long been established in Indiana that a jury's verdict may not be impeached by the testimony or the affidavit of the jurors who return it."[139] This longstanding rule

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134. IND. R. EVID. 502.
135. IND. R. EVID. 601.
136. *See* Kien v. State, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007).
137. 947 N.E.2d 445 (Ind. Ct. App. 2011).
138. *Id.* at 450.
139. Sienkowski v. Verschuure, 954 N.E.2d 992, 995 (Ind. Ct. App. 2011), *trans. denied*, 963

is designed to avoid juror harassment and prevent lawsuits from becoming "contest[s] of affidavits and counter-affidavits and arguments and re-arguments as to why . . . a certain verdict was reached."[140] Nevertheless, Rule 606(b) permits a juror to "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."[141]

Sienkowski v. Verschuure, a negligence case arising out of a motor vehicle accident, involved a plaintiff's attempt to skirt the contours of Rule 606(b).[142] After trial, the jury deliberated and initially returned a verdict for Sienkowski in the amount of $336,300. The trial court found a mathematical error in the jury's calculation, and after further deliberation, the jury replaced the first amount on the verdict form with $128,712.[143] Sienkowski filed a motion to vacate the judgment. Accompanying his motion were an affidavit and letter from two jurors, both stating that the number appearing on the final verdict form was not the number to which the jurors had agreed during their deliberations. Verschuure moved to strike these pieces of evidence, and the trial court struck them from the record.[144]

When his case reached the Indiana Court of Appeals, Sienkowski asserted that the affidavit and letter were admissible to show that "the verdict entered by the trial court . . . [was] not the actual verdict 'which all of the jurors unanimously agreed be entered.'"[145] He debated the semantics of the term "verdict," arguing as follows:

> The verdict is not the mere paper upon which such agreement is written. If the writing on the paper is wrong because of inadvertence, oversight or mistake, the verdict form does not contain the jury's actual verdict. When bringing such an error to the trial court's attention, the inquiry is not into the "validity" of the verdict[;] the inquiry is whether the information written on the verdict form is in fact the verdict.[146]

The court of appeals firmly disagreed with Sienkowski's approach to Rule 606 and the exceptions contained in subpart (b). In affirming the trial court's refusal to admit the affidavit and letter, the court ruled that disputing a number on the verdict form was no different from directly attacking the validity of the verdict.[147] Despite Sienkowski's attempt to distinguish the number from the jurors' ultimate

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N.E.2d 1115 (Ind. 2012); *see generally* Ward v. St. Mary Med. Ctr., 658 N.E.2d 893 (Ind. 1995); Karlos v. State, 476 N.E.2d 819 (Ind. 1985).

140. Stinson v. State, 313 N.E.2d 699, 704 (Ind. 1974).

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

142. *Sienkowski*, 954 N.E.2d at 993.

143. *Id.* at 993-94.

144. *Id.* at 994-95.

145. *Id.* at 995 (citation omitted).

146. *Id.* at 995-96.

147. *Id.* at 996.

agreement, the court deemed these pieces of evidence inadmissible to impeach the verdict.[148]

B. Impeachment

Pursuant to the Rules, a witness's credibility may be attacked by any party—even the party who called the witness.[149] The typical prohibition on evidence of other crimes is also suspended for the purpose of impeaching a witness. Rule 609 specifies that "evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted[,] but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement."[150] *Britt v. State*[151] allowed the court of appeals to address impeachment with respect to Rules 607 and 609. In this case, the defendant appealed several convictions and argued that the trial court improperly prevented him from introducing evidence of one of his witness's prior criminal convictions. He argued that because Rule 609's "mandatory language regarding impeachment by former convictions" should not have limited the questions he opted to ask his own witness, the trial court lacked discretion to exclude this evidence.[152]

With respect to Britt's reading of Rule 609(a), the court of appeals partially agreed. Because Indiana's version of this rule is not subject to the balancing test of Rule 403,[153] the court held that Britt was correct about its language being mandatory. The court cautioned him, however, that "Rule 609(a) is expressly limited to those circumstances where the evidence of the prior conviction is being offered 'for the purpose of attacking the credibility of a witness.'"[154] The circumstances of this case did not persuade the court that Britt had intended to introduce the witness's convictions to impeach his credibility. Rather, the court believed that he had offered the convictions as propensity evidence—that is, to suggest that the witness was more likely than Britt to have committed the robbery at issue.[155] Britt ultimately conceded that he had not attempted to attack this witness's credibility, which rendered Rule 609(a) inapplicable. The court added in a footnote that "[e]ven though . . . Rule 607 authorizes a party to impeach the credibility of his own witness, a party is forbidden from placing a witness on the stand if his sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment."[156] Put otherwise, although Britt was otherwise

148. *Id.*
149. IND. R. EVID. 607.
150. IND. R. EVID. 609(a).
151. 937 N.E.2d 914 (Ind. Ct. App. 2010).
152. *Id.* at 915.
153. *See* Jenkins v. State, 677 N.E.2d 624, 627 (Ind. Ct. App. 1997).
154. *Britt*, 937 N.E.2d at 916 (quoting IND. R. EVID. 609(a)).
155. *Id.* at 916-17.
156. *Id.* at 917 n.3.

permitted to impeach his own witness under Rule 607, he had not done so within the confines of Rule 609.

C. Refreshing a Witness's Recollection

Although Rule 612 permits a witness to use a writing or object to refresh his or her memory, it does not specify a method for refreshing recollection.[157] Judge Miller has written that only a "simple colloquy" is required and instructs practitioners along these lines:

> The witness first must state that he does not recall the information the questioner seeks. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.
>
> If the witness replies that the writing has refreshed his memory, he may be examined on the subject but may not testify from the writing itself.[158]

In *Gaby v. State*,[159] as discussed above, the Indiana Court of Appeals examined a trial transcript to determine whether the prosecution had properly refreshed a witness's recollection. The colloquy at issue was between a child victim and the prosecuting attorney, who was questioning her about the details of her alleged molestation. Without hesitation, the victim declared that the defendant had not made any noises, asked her to "touch his private parts," or touched parts of her body besides her genitals during the alleged molestation.[160] The prosecutor, ostensibly flustered, continued direct examination as follows:

> Q. Okay. Let me jump ahead for a second. Do you remember when—this time last year, April of '09 when you finally told what he had done many, many years ago and you were interviewed at a special house called Hartford House, do you remember that?
> A. Yes.
> Q. Okay. And do you remember seeing a copy of your statement, of your interview?
> A. Yes.
> Q. Okay. Did I in fact give you a copy?
> A. Yes, ma'am.
> Q. If I showed you a copy of that do you think that would refresh your memory as to some of these questions I just asked?
> A. Yes.[161]

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157. IND. R. EVID. 612; *see* Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000).

158. MILLER, *supra* note 4, § 612.101.

159. 949 N.E.2d 870 (Ind. Ct. App. 2011).

160. *Id.* at 877-78.

161. *Id.* at 878.

Defense counsel objected to this attempt to refresh the child's recollection, averring that she had not demonstrated any lack of recollection of events. However, the trial court permitted the child to review her statement; she subsequently provided slightly different answers.[162]

In reviewing the record, the Indiana Court of Appeals "agree[d] with Gaby that the transcript clearly show[ed] that . . . [the victim] did not testify as to any lack of recollection regarding the events before the prosecutor showed her the transcript . . . . [but] simply gave answers the prosecutor neither expected nor desired."[163] The court recognized that before Indiana adopted the Rules, precedent permitted counsel to refresh a witness's recollection if the witness had "inadvertently omitted certain crucial facts" due to time or circumstantial pressure.[164] Nevertheless, the court insisted that it was bound by *Thompson v. State*,[165] which indirectly nullified pre-Rules decisions by requiring a witness to affirmatively state a lack of recollection before counsel could refresh her recollection.[166] As in *Thompson*, the court chided the trial court for admitting testimony that changed "on the pretext of refreshing the witness'[s] recollection."[167] The court ultimately believed the witness had testified clearly enough to foreclose the need to refresh her recollection, and it reversed the trial court.

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

A. Lay and "Skilled" Witnesses

When a witness does not testify as an expert, his testimony "is limited to those 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."[168] Rule 701 therefore governs the testimony of lay witnesses. This rule informed the Indiana Court of Appeals in *Lesh v. Chandler*, a private nuisance case in which the trial court enjoined Lesh from targeting a flood light at the Chandlers' home and playing loud, disturbing music.[169] The trial court had relied on neighbors' testimony in making its findings of fact; Lesh contended that the neighbors lacked knowledge sufficient to provide a volume standard. In denying Lesh's request to reweigh the evidence, the appellate court noted that Rule 701 affords trial courts broad discretion in determining whether lay witness testimony has a rational basis and lends clarity

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162. *Id.*

163. *Id.* at 879.

164. *Id.* at 879 n.7 (citing Poore v. State, 501 N.E.2d 1058, 1061 (Ind. 1986); King v. State, 296 N.E.2d 113, 115 (Ind. 1973)).

165. 728 N.E.2d 155 (Ind. 2000).

166. *See Gaby*, 949 N.E.2d at 879 n.7 (citing *Thompson*, 728 N.E.2d at 160).

167. *See id.* at 879-80.

168. IND. R. EVID. 701.

169. Lesh v. Chandler, 944 N.E.2d 942, 946 (Ind. Ct. App. 2011).

to the proceedings.[170]

Rule 701 also pertains to "skilled witnesses," who are persons "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.'"[171] *Davis v. State*,[172] discussed above in the context of relevancy, was also reviewed on appeal through the lens of Rule 701. Here, the other disputed issue was whether a detective should have been allowed to testify that the denominations of money found on the defendant suggested drug dealing.[173] The appellate court compared his situation to a 2003 case where such testimony was considered "helpful in determining the issue of intent to deliver."[174] Because the instant litigation involved felony possession of—and not dealing in—cocaine, the court deemed the 2003 case comparison inapposite.[175] Finding the detective's conclusion "too speculative," the court did not find his testimony "helpful to a determination of a fact in issue."[176]

B. Expert Testimony

Pursuant to Rule 702(a), a witness "qualified as an expert by knowledge, skill, experience, training, or education" may testify if his specialized knowledge will help the court understand the evidence or a disputed fact.[177] *In re Estate of Lee*[178] dealt with attorneys who provided expert witness testimony in an appeal of a legal malpractice action. The case arose when decedent Lee's personal representative filed a complaint against Colussi, Lee's attorney, and alleged that Colussi had committed malpractice in his treatment of estate assets. Colussi rejoined that it was not his duty to monitor the estate's checking account. In response to Colussi's answer and counterclaim, the estate relied on depositions of two other attorneys—Bigley and Finnerty—who had testified that Colussi's failure to control and monitor the estate's checking account breached the applicable standard of care.[179] The trial court granted summary judgment for Colussi.

The Indiana Court of Appeals focused on selected excerpts of the record in determining whether summary judgment was proper, including the following:

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170. *Id.* at 949 n.5.

171. Linton v. Davis, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008) (quoting Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997)).

172. 948 N.E.2d 843 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

173. *Id.* at 847.

174. *Id.* (quoting Davis v. State, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003)).

175. *See id.*

176. *Id.* at 847-48. As noted above, the court nevertheless declined to reverse Davis's conviction.

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

178. 954 N.E.2d 1042 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 967 N.E.2d 1034 (Ind. 2012).

179. *Id.* at 1045, 1048 n.3.

> While expert testimony is appropriate in a legal malpractice case to determine if the defendant's actions fall below the standard of care application to a recognized duty, experts may not testify to conclusions of law. . . . The testimony of Bigley and Finnerty as to their practice as attorneys in monitoring an estate bank account are simply their personal opinions based on their own experiences which renders their opinions as to Colussi's actions lacking foundation and inadmissible conclusions of law.[180]

The court responded to the foregoing statements by characterizing the trial court as "confuse[d]," noting specifically that "[t]he trial court's statement that Bigley's testimony lacked foundation because it was based on his personal opinions and experiences is puzzling. . . . [P]ersonal experience is very often the source of a witness's expertise."[181] Bigley's legal credentials were undisputed; accordingly, the court believed there was proper foundation for his opinion testimony.[182] Furthermore, the court clarified that "although experts may not testify as to conclusions of law, such as the existence of a duty, expert witnesses are permitted to testify to the standard of practice within a given field."[183] In the court's view, Bigley's testimony did not concern the existence of Colussi's duty; indeed, the court imputed such a duty by virtue of Colussi's employment by the estate.[184] Bigley's testimony was instead meant to establish the standard of care that Colussi should have observed. As such, the court deemed the testimony admissible for that purpose and reversed the grant of summary judgment.[185]

Indiana's version of Rule 702 is not identical to its federal counterpart, which was amended in 2000 to codify elements embodied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[186] Unlike Federal Rule 702, Indiana's rule provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the *scientific principles* upon which the expert testimony rests are reliable."[187] The Indiana Supreme Court has stated that its intent in adopting this version of Rule 702 is to "liberalize . . . the admission of reliable scientific evidence," not to add unnecessary roadblocks for trial courts.[188] To be sure, Indiana courts may—and indeed, often do—consider factors from *Daubert* in determining reliability. But "there is no specific 'test' or set of 'prongs' which *must* be considered in order to satisfy Indiana Evidence Rule 702(b)."[189]

In *Turner v. State*, the Indiana Supreme Court reiterated that "*Daubert* is

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180. *Id.* at 1046 (internal citation omitted).
181. *Id.* at 1047.
182. *Id.*
183. *Id.*
184. *Id.* at 1047-48.
185. *Id.* at 1047-48, 1050.
186. 509 U.S. 579 (1993).
187. IND. R. EVID. 702(b) (emphasis added).
188. Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001).
189. Carter v. State, 766 N.E.2d 377, 380 (Ind. 2002) (citation omitted).

merely instructive in Indiana, and we do not apply its factors as a litmus test for admitting evidence under . . . Rule 702(b)."[190] At issue when the court accepted the case was the testimony of Michael Putzek, a firearms and tool mark examiner. Putzek provided testimony regarding the source of tool marks on cartridge casings; he opined that the marks came from "the 'same tool' of 'unknown origin.'"[191] Because Turner objected to the introduction of Putzek's testimony, the trial court held a preliminary hearing at which Putzek presented his qualifications to testify as an expert. The trial court denied Turner's motion to exclude the expert testimony, applying the *Daubert* factors as it came to its decision.[192]

Turner alleged on appeal that Putzek's opinion did not satisfy Rule 702(b)'s requirements for scientific reliability. He took particular issue with the subjective nature of firearms tool mark identification and characterized the process as rife with flaws and inconsistencies.[193] However, the supreme court dashed his hopes when it ruled that "it is not dispositive . . . whether Putzek's . . . technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study."[194] To be sure, the court recognized the shortcomings of Putzek's methods and testimony and clearly noted his uncertainty and inability to cite other research to support his findings.[195] But the court ultimately ruled that these drawbacks "all inform[ed] the fact finder's judgment on weighing this evidence . . . [and did] not render the evidence inadmissible."[196] The court was informed by other jurisdictions that have analyzed evidence like Putzek's "as something other than 'scientific,'" and it observed the similarity of his techniques to "other observational . . . characteristics which this [c]ourt has found to be 'on the margins of testimony governed by Rule . . . 702(b) as expert scientific testimony.'"[197] With respect to Turner's other challenge, the court concluded that Turner's cross-examination of Putzek provided an ample foundation for the trial court to evaluate Putzek's credibility and assign proper weight to the testimony.[198] The court affirmed the trial court's ruling on this piece of evidence, underscoring the concept that Rule 702(b) gives trial courts broad discretion.[199]

Experts have additional leeway due to Rule 703; they may base their testimony on inadmissible evidence if "it is of the type reasonably relied upon by

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190. Turner v. State, 953 N.E.2d 1039, 1051 (Ind. 2011).
191. *Id.* at 1045-46 (citation omitted).
192. *Id.* at 1048.
193. *Id.* at 1049.
194. *Id.* at 1051.
195. *See id.*
196. *Id.*
197. *Id.* at 1052-53 (quoting West v. State, 755 N.E.2d 173, 181 (Ind. 2001)).
198. *See id.* at 1053.
199. *Id.* at 1053-54.

experts in the field."[200] In *Jackson v. Trancik*,[201] the Indiana Court of Appeals explored the contours of this rule. Dr. Trancik, who initiated this action to collect an outstanding balance on Ms. Jackson's medical bill, employed the theory of account stated and moved for summary judgment. In her response, Jackson designated as evidence the affidavit of Lewis, who owned a firm specializing in the review of medical bills. This affidavit stated, inter alia, that Dr. Trancik had billed three of four procedures incorrectly, thereby overcharging Jackson by $3700.[202] The trial court issued an order to strike the affidavit and granted Dr. Trancik's motion for summary judgment.

As a preliminary matter, the Indiana Court of Appeals ruled that Lewis, although not a medical doctor, was nevertheless an "expert" as contemplated by the Rules.[203] The court classified medical billing as "a proper subject for expert opinion" given its extension "beyond the knowledge of ordinary lay persons."[204] Next, the court addressed Dr. Trancik's contention that the affidavit improperly relied on hearsay sources of information. The critical issue was therefore whether any otherwise inadmissible evidence in the affidavit was generally relied upon by other medical billing experts. For purposes of Rule 703, the court was satisfied by Lewis's use of an official coding system employed by the American Medical Association—"the nation's official . . . (HIPAA) compliant code set."[205] The court cautioned that this showing pertained only to admissibility, not the weight to be given Lewis's affidavit, but it concluded that the trial court erred by striking the affidavit.

C. Opinion on Ultimate Issue

Witness testimony in criminal trials is limited by Rule 704(b); a witness "may not testify to opinions concerning intent, guilt, or innocence . . . [or] the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."[206] *Steinberg v. State*[207] addressed this rule when the defendant appealed his murder conviction and sixty-five year prison sentence. Steinberg had placed three collect calls to his parents as he awaited trial in the Floyd County Jail, and the trial court admitted the recordings of these calls over his objection. He ostensibly wanted these calls excluded in part because of "his mother's statements explicitly expressing doubt about his mental health, credibility, and innocence."[208] Indeed, he alleged that "his mother's tone of voice and repetitive questioning expressed disbelief," thus violating Rule 704(b) by "directly . . .

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200. IND. R. EVID. 703.
201. 953 N.E.2d 1087 (Ind. Ct. App. 2011).
202. *Id.* at 1090.
203. *Id.* at 1092-93.
204. *Id.* at 1093.
205. *Id.* at 1092-93.
206. IND. R. EVID. 704(b).
207. 941 N.E.2d 515 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).
208. *Id.* at 522-24.

[attacking his] truthfulness, sanity and innocence."[209] The court of appeals was unconvinced, opining in a footnote that "[t]he practical difficulties of scrutinizing a witness's tone of voice for purposes of Evidence Rule 704(b) are too numerous to mention."[210] In the court's view, nothing about the mother's comments suggested a direct opinion as to Steinberg's guilt. The evidence was perfectly permissible even if it could lead to an inference because it did not otherwise go against Rule 704(b).[211]

VII. HEARSAY (RULES 801-806)

A. Hearsay Generally

Rule 801(c) defines hearsay as "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."[212] Except as provided by law, or as accommodated by the many exceptions in the Rules, hearsay is not admissible.[213] In *Sandefur v. State*,[214] the defendant addressed the hearsay rule while appealing his convictions of invasion of privacy and misdemeanor battery. At trial, a police officer testified that the non-testifying victim had mouthed the words "he hit me" to the officer while pointing at the defendant.[215] The trial court overruled the defendant's hearsay objection but instructed the jury members to evaluate the officer's interpretation of the victim's facial movements as they would any piece of testimony.

In determining whether the trial court had incorrectly decided that the officer's testimony was not hearsay, the Indiana Court of Appeals consulted the Rules to determine whether a "statement" had been made. Rule 801(a) provides that a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[216] The court first held that pointing to a perpetrator is a prime example of nonverbal conduct serving as an assertion.[217] Next, the court dismissed the defendant's argument that the officer's testimony was not hearsay because he was not "completely certain" of what the victim intended to say.[218] "The import of Officer Thompson's testimony," Judge Crone wrote, "was that . . . [the victim] was trying to communicate to him, without allowing Sandefur to hear, that Sandefur hit her."[219]

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209. *Id.* at 525 (citation omitted).
210. *Id.* at 525 n.12.
211. *Id.* at 525-26.
212. IND. R. EVID. 801(c).
213. IND. R. EVID. 802.
214. 945 N.E.2d 785 (Ind. Ct. App. 2011).
215. *Id.* at 787.
216. *Id.* at 788 (quoting IND. R. EVID. 801(a)).
217. *Id.* (citing Hall v. State, 284 N.E.2d 758, 762 (Ind. 1972)).
218. *Id.*
219. *Id.*

As a result, the court of appeals concluded that the officer's testimony about mouthed words was hearsay.

B. Excited Utterance

Despite the court's holding in *Sandefur* that Officer Thompson's testimony was hearsay, the court found it appropriately admitted under Rule 803(2), the excited utterance exception to the hearsay rule.[220] The court explained the exception as follows:

> In order for a hearsay statement to be admitted as an excited utterance, three elements must be present: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. This is not a mechanical test, and the admissibility of an allegedly excited utterance turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications.[221]

In this situation, Officer Thompson had arrived on the scene to find the victim in tears while the defendant yelled at her. The victim was cowering in a corner, bleeding, and struggling to make eye contact when she mouthed "he hit me" to Officer Thompson. Viewing her unwillingness to accuse her attacker aloud in the context of these observations, the court believed that "[h]er demeanor showed that she was still under stress, and her statement related to the startling event."[222] Thus, her otherwise excludable hearsay statement was admissible under Rule 803(2).

C. Then Existing State of Mind

The defendant in *Stewart v. State*[223] argued against employing one of the hearsay exceptions when he appealed his conviction on sixteen counts of various crimes. After the murders at issue, one of Stewart's friends received a call from Turner, a man similar in appearance to Stewart. Turner, who obviously knew of Stewart, said that he needed to "deal with Stewart before the police did because Turner was afraid that Stewart was going to" blame the murders on him.[224] At trial, the court admitted testimony concerning Turner's statements over Stewart's hearsay objection based on the hearsay exception contained in Rule 803(3). This rule permits as evidence statements "of the declarant's then existing state of mind . . . . [and] applies to statements of any person to show his or her intent to act in a particular way."[225] The court of appeals agreed with the State with very little

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220. *See id.*

221. *Id.* (quoting Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010)).

222. *Id.* at 789.

223. 945 N.E.2d 1277 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 646 (Ind. 2011).

224. *Id.* at 1284.

225. *Id.* at 1286 (quoting IND. R. EVID. 803(3)).

analysis. Judge Kirsch wrote, "Turner[] . . . wanted to find Stewart to deal with him before the police found Stewart. In this statement, Turner was expressing his own intent to act in a particular way."[226] After a quick discussion of the testimony's relevance, the court found that the trial court properly admitted the evidence.

D. Medical Diagnosis Exception

In the same order in which it amended Rules 501 and 502, the Indiana Supreme Court also amended Rule 803(4).[227] The amended rule reads, "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."[228]

Prior to the amendment of this rule, the Indiana Court of Appeals decided *A.J. v. Logansport State Hospital*.[229] This case involved a man who was charged with child molestation, found incompetent to stand trial, and committed to Logansport State Hospital for competency restoration services in 2009. Later that year, the hospital filed a petition for his involuntary commitment; the trial court held a hearing on the petition in September 2010. At the hearing, the hospital submitted "Exhibit 1," a psychological testing report that included a sexual risk assessment and expressed that A.J. was likely to sexually reoffend.[230] The trial court considered this piece of evidence in its decision committing A.J. for further sexual rehabilitative services.

One of the issues A.J. raised on appeal was an objection to "Exhibit 1" as inadmissible hearsay. The Indiana Court of Appeals summarily disregarded his argument, observing that A.J.'s doctors had established a foundation that "Exhibit 1" was part of his treatment record.[231] Because the psychological testing report was intended to assess the risk of A.J.'s sexual recidivism, it was admissible as "both a statement made for the purposes of medical treatment pursuant to Evidence Rule 803(4) and a record of regularly conducted business activity pursuant to Evidence Rule 803(6)."[232] The court thus quickly held that the hearsay rule did not bar the inclusion of "Exhibit 1" at the commitment hearing.

Perry v. State[233] addressed the purpose and application of Rule 803(4) in somewhat more detail. Here, Perry appealed convictions on several counts, and part of the action involved an accusation that he had assaulted N.D., his ex-

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226. *Id.*

227. IND. SUPREME CT., *supra* note 129.

228. IND. R. EVID. 803(4). Previously, the words "for purposes of" appeared in place of the words "by persons who are seeking." IND. SUPREME CT., *supra* note 129.

229. 956 N.E.2d 96 (Ind. Ct. App. 2011).

230. *Id.* at 103.

231. *Id.* at 110.

232. *Id.*

233. 956 N.E.2d 41 (Ind. Ct. App. 2011).

girlfriend. After N.D. told an emergency room nurse that Perry had sexually assaulted and strangled her, the nurse prepared a medical report documenting N.D.'s treatment and naming Perry as the assailant.[234] The nurse's report was admitted as evidence at trial over Perry's hearsay objection.

As a preliminary matter, the court of appeals determined that multiple levels of hearsay[235] were involved: (1) N.D.'s out-of-court statements to the nurse, and (2) the nurse's out-of-court document reporting what N.D. said to her.[236] The court first addressed whether N.D.'s statements to the nurse were admissible under Rule 803(4), stating the rationale for this rule as follows: "a declarant's self-interest in seeking treatment reduces the likelihood that she will fabricate information that she provides to those who treat her."[237] Rule 803(4) requires a court to determine the declarant's motive—namely, whether it was to provide information furthering diagnosis and treatment—and whether an expert would reasonably rely on the declarant's statement in providing care.[238] The court observed that although statements attributing fault are not generally covered by Rule 803(4), courts may exercise discretion to admit such statements in sexual abuse and domestic violence cases. Quoting its own precedent, the court wrote that "[t]he physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ"[239] when the abuser and victim are in a close relationship.

In affirming the trial court's ruling, the court of appeals determined that N.D.'s case warranted admitting statements describing her attack and identifying Perry as the perpetrator. The court held that her statements to the nurse directly pertained to diagnosing and treating N.D.'s physical injuries and possible sexually transmitted diseases, as well as referring her to domestic abuse counseling and determining how she would be discharged from the hospital.[240] Although the court acknowledged that some of N.D.'s statements exceeded the scope of the medical diagnosis exception and should have been redacted, it did not view the error as one mandating reversal.[241] The court also determined—with little analysis—that the second level of hearsay comported with Rule 803(6), as the nurse's report was properly considered a business record.[242]

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234. *Id.* at 46.

235. Hearsay within hearsay is admissible only if each level of hearsay comports with an exception to the hearsay rules. IND. R. EVID. 805.

236. *Perry*, 956 N.E.2d at 49.

237. *Id.* (citing McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996)).

238. *Id.* (citing *In re* Paternity of H.R.M., 864 N.E.2d 442, 446 (Ind. Ct. App. 2007)).

239. *Id.* (quoting Nash v. State, 754 N.E.2d 1021, 1024-25 (Ind. Ct. App. 2001)).

240. *Id.* at 50.

241. *See id.*

242. *Id.* at 50-51.

E. Statements Against Interest

In *Lanham v. State*,[243] the defendant appealed convictions for possession of marijuana and other paraphernalia, contending that the search warrant police officers had used was based on uncorroborated hearsay. The court reminded the parties that for affidavits, "[t]he trustworthiness of hearsay . . . can be established in a number of ways . . . . One such . . . consideration is whether the informant has made a declaration against penal interest."[244] Here, the hearsay declarant was a minor who admitted to a police officer that she had smoked marijuana with the defendant and noticed drug paraphernalia at the defendant's home. The defendant argued that the minor had made this statement not against penal interest, but to win favor with police officers. The court, however, found no evidence of an attempt to "curry favor" with law enforcement; the minor had neither been caught in an illegal act nor been charged with any sort of violation.[245] Because she had admitted drug activity in front of her mother and a police officer, the court viewed her statement as "one that tends to subject the declarant to civil or criminal liability such that a reasonable declarant would not have made the statement unless believing it to be true,"[246] thus placing her affidavit within the ambit of Rule 804(b)(3).

State v. Chavez[247] dealt with Rule 804(b)(3) in somewhat greater detail. In this murder case, the State filed an interlocutory appeal of the trial court's order excluding statements that implicated Chavez in the crime. One of the statements came from Redmon, a friend and co-worker of Chavez's brother Mark. Redmon declared that Mark had confided in him, revealing that Chavez had shot one of the victims and fled from police with two dead bodies in his truck.[248] The trial court did not indicate whether it had excluded Redmon's statement based on the Rules or Chavez's right to confront witnesses against him.

It was the State's position that Redmon's statement containing Mark's account of the crime was admissible as a statement against interest. In considering this argument, the Indiana Court of Appeals walked through the mechanics of Rule 804 hearsay exceptions. First, the court deemed Mark "unavailable" for purposes of the rule because of his Fifth Amendment right not to testify.[249] The court then examined the text of Rule 804(b)(3) and paid particular to its second sentence: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception."[250] The State argued that the purpose of this sentence was to protect a defendant's right to

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243. 937 N.E.2d 419 (Ind. Ct. App. 2010).

244. *Id.* at 424 (citations omitted).

245. *Id.*

246. *Id.*

247. 956 N.E.2d 709 (Ind. Ct. App. 2011).

248. *Id.* at 711.

249. *Id.* at 712.

250. IND. R. EVID. 804(b)(3).

confrontation and urged the court to consider it with an eye toward *Crawford v. Washington*.[251] Noting *Crawford*'s holding that the Sixth Amendment bars "testimonial" hearsay, the State argued that Mark's "non-testimonial" statements should not be excluded.

The Indiana Court of Appeals rejected the State's call to admit the contested statements. "[A]lthough many of our evidence rules mirror the Federal Rules," Judge Crone wrote, "Federal Evidence Rule 804(b)(3) does not include a provision excluding statements from codefendants. Thus, our supreme court's addition of this provision . . . appears to be a deliberate choice."[252] The court cautioned that despite the similar issues involved in the Sixth Amendment and hearsay rules, the two authorities are not interchangeable. Without considering whether Mark's admissions about the crime were "testimonial" as contemplated by *Crawford*, the court explained that "reliability remains a fundamental concern of our hearsay rules."[253] It appeared to the court that the contested statements were not sufficiently reliable for purposes of Indiana's Rule 804(b)(3). Hence, the court concluded that the State had failed to show any abuse of discretion by the trial court in excluding these statements.

F. Past Recollection Recorded

A recorded statement or memorandum that is otherwise hearsay may nevertheless be admitted under Rule 803(5), the "past recollection recorded" hearsay exception, if:

> (a) the memorandum or record relates to a matter about which a witness once had knowledge, (b) the witness has insufficient recollection at trial to enable the witness to testify fully and accurately, (c) the witness is shown to have made or adopted the memorandum or record, (d) the memorandum or record was adopted when the matter was fresh in the witness's memory, and (e) the memorandum or record is shown to reflect the witness's knowledge correctly.[254]

In *Horton v. State*,[255] the Indiana Court of Appeals considered the defendant's argument that the trial court had improperly allowed the jury to view a videotaped interview. The video consisted of testimony of a child molestation victim describing her abuse in detail. When the child took the stand at trial, she struggled to remember details and hence was permitted to watch her interview. The trial court let the video go before the jury based on Rule 803(5) when the child still foundered in her testimony, and Horton raised this as an error on

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251. 541 U.S. 36 (2004).

252. *Id.* at 713 (internal footnote omitted).

253. *Id.* at 714 (citing Jackson v. State, 925 N.E.2d 369, 374-75 (Ind. 2010)).

254. Impson v. State, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000).

255. 936 N.E.2d 1277 (Ind. Ct. App. 2010), *vacated on other grounds by* 949 N.E.2d 346 (Ind. 2011).

appeal.[256]

In his argument, Horton contended that the video was improperly admitted on several bases. The court of appeals disagreed and walked through various aspects of Rule 803(5). First, the court found that "[t]he video clearly [depicted a matter about which the victim had knowledge] . . . because the video . . . [was] of a DCS employee interviewing R.M. about the molestation, and the trial judge and attorneys discussed what the video might reveal prior to the video's admission."[257] Next, the court dismissed Horton's assertion that his victim had a complete, accurate memory of the events, observing that she had frequently answered questions by saying she did not remember.[258] The court then refuted Horton's argument that the video did not correctly reflect the victim's knowledge, stating that

> where R.M.'s statements in the video covered the same issues as her testimony prior to admission of the video, they were largely consistent with her live testimony. The video filled in many of her live testimony's gaps as to details R.M. did not remember, adding specific details one might expect a child to more vividly remember days after the incidents but perhaps not remember as vividly months later at a trial.[259]

Finding the core components of Rule 803(5) satisfied, the court deemed it particularly persuasive that the child victim had failed to recall details of her molestation after watching her taped interview during a break in the trial. She had, however, timely adopted the video statement that was otherwise consistent with her testimony, and the court saw no error in the trial court's decision to admit the video under the "past recollection recorded" hearsay exception.

G. Public Records and Reports

Another issue debated in *Perry v. State* was the admissibility of the actual medical records containing hearsay statements.[260] Before concluding that Rule 803(6) permitted the trial court to consider them, the appellate court consulted Rule 803(8). This rule governs the admissibility of public records and reports; it clearly excludes from its scope "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case."[261] The court of appeals rationalized this exclusion as follows: "[O]bservations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in

256. *Id.* at 1281.
257. *Id.* at 1282.
258. *Id.*
259. *Id.* at 1283.
260. Perry v. State, 956 N.E.2d 41, 50 (Ind. Ct. App. 2011).
261. IND. R. EVID. 803(8)(a).

criminal cases."[262] Even so, the court declined to find that Rule 803(8) covers treating medical personnel who cooperate with law enforcement officers.[263] Finding the rule inapplicable to the case at bar, the court of appeals found no error in its admission as a business—not public—record.[264]

VIII. AUTHENTICATION AND IDENTIFICATION (RULES 901-903)

An important prerequisite for admitting any piece of evidence is proper authentication or identification. The Rules declare that this condition precedent is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims."[265] In *Taylor v. State*,[266] the Indiana Court of Appeals was asked to rule on whether a defendant's letter to a judge had been properly authenticated before the trial court admitted it. The court first stated that Rule 901 requires a showing of (1) "[e]vidence demonstrating a reasonable probability" that the matter is what it proponent claims it to be, and (2) a condition "substantially unchanged as to any material feature."[267] Examining the defendant's letter, the court then concluded that Rule 901 had been satisfied. The envelope housing the letter bore the defendant's return address, a state facility, and its date corresponded to when the defendant was in custody. Additionally, the letter was written in the first person and provided details about the crime at issue that "only someone who had been involved would be likely to know."[268] Based on this information, the court of appeals held that the State had set a proper foundation for admitting this letter under Rule 901; similarly, the trial court had not erred by admitting the letter.

IX. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1002—known as the "best evidence rule"—instructs that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required."[269] The terms "writings" and "recordings" are defined as "letters, words, sounds, or numbers, or their equivalent," set down by various methods.[270] In *Romo v. State*,[271] the Indiana Supreme Court dealt with the application of the best evidence rule when a trial court admitted English translations of Spanish recordings as substantive evidence. The defendant had conducted three drug transactions with a confidential informant who was secretly

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262. *Perry*, 956 N.E.2d at 51 (quoting Fowler v. State, 929 N.E.2d 875, 879 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010)).

263. *Id.*

264. *Id.*

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

266. 943 N.E.2d 414 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1207 (Ind. 2011).

267. *Id.* at 418 (citing Herrera v. State, 710 N.E.2d 931, 938 (Ind. Ct. App. 1999)).

268. *Id.* at 419.

269. IND. R. EVID. 1002.

270. IND. R. EVID. 1001.

271. 941 N.E.2d 504 (Ind. 2011).

recording the conversations. Because the defendant and informant communicated in Spanish, a bilingual specialist with the police department transcribed the conversations into a written English translation.[272] A jury found the defendant guilty on all charges, and the supreme court granted transfer after the court of appeals affirmed the convictions.

Writing for the court, Justice Dickson acknowledged that the Rules do not specifically discuss the admissibility of written translations. He also noted that Rule 1004,[273] which offers exceptions to the best evidence rule, does not authorize the use of transcripts in lieu of original recordings.[274] Next, he reviewed three recent cases[275] in which the Indiana Supreme Court considered the role transcripts of recordings might play at trial and summarized their holdings:

> Although *Small*, *Tobar*, and *Roby* view the function of transcripts of recordings purely as an aid to assist the jury's understanding of the actual recording, and Evidence Rule 1002 requires the original of a recording, if available . . . both *Small* and *Roby* leave open the possibility of a more robust role for transcripts where the recording is inaudible or indistinct. For juries without appropriate foreign language comprehension, audio recordings of foreign language speakers may . . . require special consideration.[276]

The court also compared this case to *United States v. Estrada*,[277] a 2001 Seventh Circuit case in which it was deemed appropriate for a trial court to admit English translations of Spanish recordings without also playing the recordings for the jury.[278] However, the court observed that *Estrada* made such an allowance as an aid for the jury, not as substantive evidence.[279] Thus, the court also discussed the Fifth Circuit's handling of similar situations and noted that "[t]he Fifth Circuit has expressly allowed a transcript of a taped conversation to be admitted as substantive evidence."[280] The court similarly relied on the Eighth Circuit's directive in *United States v. Placensia* that "where the discussions were in Spanish, transcripts of the discussions as translated into English *are* evidence."[281] Bearing in mind the aforementioned persuasive federal authority,

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272. *Id.* at 506.

273. An original is not required if it: (1) was lost or destroyed; (2) is not obtainable by judicial process; (3) is in the hands of the party against whom it is offered; or (4) relates only to collateral matters. IND. R. EVID. 1004.

274. *Romo*, 941 N.E.2d at 506.

275. Roby v. State, 742 N.E.2d 505 (Ind. 2001); Tobar v. State, 740 N.E.2d 106 (Ind. 2000); Small v. State, 736 N.E.2d 742 (Ind. 2000).

276. *Romo*, 941 N.E.2d at 507.

277. 256 F.3d 466 (7th Cir. 2001).

278. *Romo*, 941 N.E.2d at 507.

279. *Id.*

280. *Id.* (citing United States v. Onori, 535 F.2d 938 (5th Cir. 1976)).

281. *Id.* at 508 (emphasis added) (quoting United States v. Placensia, 352 F.3d 1157, 1165 (8th Cir. 2003)).

the court ultimately concluded that English translation transcripts of recorded statements in foreign languages are indeed substantive evidence.[282] The court made this determination independently of Rule 1002, rationalizing that "the original recording, being solely in Spanish, would not likely convey to the jury the content of the recorded conversations. Applying the rule to limit the evidence of content to the original Spanish recordings would not serve the purpose of the rule because it could not prove any content."[283] As an aside, the court noted that although such transcripts may be used as substantive evidence, "it is generally the better practice to play such foreign language recordings to the jury upon a reasonable request by a party."[284]

Arlton v. Schraut,[285] a medical malpractice action, concerned the best evidence rule with respect to photographs. To remedy his choroidal neovascularization, Arlton became a patient of Dr. Schraut and underwent laser photocoagulation surgery. Dr. Schraut took a series of angiogram photos of Arlton's retina in the course of treatment.[286] At trial, the court admitted—with no objection—three discs containing high-resolution enlarged duplicate images of the angiograms. When Arlton offered six printouts consisting of enlargements of the discs' photos, defense counsel did object, and the trial court sustained the objection.[287]

On appeal, Arlton argued that his enlargements of the angiograms were admissible because they were enlargements, and the other side had presented no evidence that they had been otherwise altered. His opponent claimed that Arlton lacked the requisite skill to have interpreted the angiograms and created these images as proper exhibits.[288] The court of appeals defined Arlton's images as "duplicates"[289] and noted that Rule 1003 permits duplicates in evidence "to the same extent as . . . [originals] unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[290] Here, the court found neither a true question of authenticity nor any indication of unfairness. Arlton's expert witness had adequately established a proper foundation for the enlarged angiograms by testifying that they accurately reflected the images in the discs—to which the defendant had not objected.[291] Seeing no evidence as to alteration of the angiograms, the court of appeals decided that the trial court had abused its discretion by excluding Arlton's proffered evidence.[292] The court ultimately

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282. *Id.*
283. *Id.*
284. *Id.*
285. 936 N.E.2d 831 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1200 (Ind. 2011).
286. *Id.* at 834.
287. *Id.* at 835-36.
288. *Id.* at 836-37.
289. The term "duplicate" contemplates enlargements. *See* IND. R. EVID. 1001.
290. *Id.* at 837 (quoting IND. R. EVID. 1003).
291. *Id.* at 838.
292. *Id.*

reversed the decision of the lower court and remanded Arlton's case for a new trial.

CONCLUSION

Now well into their third decade of usage, the Indiana Rules of Evidence continue to develop and interact with the Federal Rules of Evidence as well as with common and statutory law. The ubiquitous nature of the Internet is likely to spur on future evolution of the Rules, and our state courts will necessarily respond by reinterpreting or otherwise clarifying previous holdings concerning various Rules. Because glancing at the text of the Rules is unlikely to help attorneys considering practical application of the Rules, regular consultation of emerging decisions will be a vital part of any litigator's practice.