X. Evidence

*William Marple**

A. Hearsay

1. Prior Inconsistent Statements

A clear departure from the traditional hearsay rule was announced by the Indiana Supreme Court in *Patterson v. State.*[1] The supreme court affirmed the trial court which had allowed the prior inconsistent statements of two witnesses for the State to be introduced not only for purposes of impeachment but also as substantive evidence. Although disclaiming any abandonment of the hearsay rule, the supreme court said that it was making a "clear pronouncement of our departure from an ancient application of the hearsay rule . . . ."[2]

The defendant in *Patterson* was convicted of involuntary manslaughter. At trial two witnesses called by the State had given signed statements to the police immediately following the homicide. On direct examination the testimony of one of the witnesses differed in a minor aspect from her prior statement. This testimony, since it surprised the State, allowed the prosecuting attorney to offer the pretrial statement—apparently for impeachment pur-

*Member of the Indiana Bar. Law Clerk for the Honorable S. Hugh Dillin. A.B., Indiana University, 1970; J.D., Indiana University Indianapolis Law School, 1973.

The author wishes to thank Phyllis McGurk for her assistance in preparing this discussion.

[1]324 N.E.2d 482 (Ind. 1975).

[2]*Id.* at 484. The traditional rule, still followed in most jurisdictions, is that a witness' prior inconsistent statements are hearsay and, as such, are inadmissible as substantive evidence unless they fall within one of the exceptions to the hearsay rule. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 251, at 601 (2d ed. E. Cleary 1972) [hereinafter cited as McCORMICK]. The traditional rule has been subjected to increasing attack in recent years. *Id.* The attack gained momentum when the Model Code of Evidence abandoned the traditional rule. MODEL CODE OF EVIDENCE rule 503(b) (1942). Support for the minority rule soon appeared in court decisions. *See, e.g.*, Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946). The constitutionality of the rule adopted in *Patterson* was tested and upheld by the Supreme Court of the United States in California v. Green, 399 U.S. 149 (1970). Indiana's adoption of the minority rule was intimated in a prior case. Skaggs v. State, 293 N.E.2d 781 (Ind. 1973). In *Skaggs* out-of-court assertions were categorized on the basis of whether or not the asserter was presently available for cross-examination. The *Skaggs* court observed that in all previous cases where the asserter was unavailable, the prior statement had been excluded.

poses. The trial court admitted the statement over the defendant's objection and did not instruct the jury that the prior statement should be considered for impeachment purposes only. On cross-examination of the other witness, defense counsel confronted her with excerpts from her prior written statement. On redirect the trial court permitted the State to introduce the entire written statement.

The supreme court began its analysis by repeating what it considered to be the accepted definition of hearsay:

> Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, *and thus resting for its value upon the credibility of the out-of-court asserter.*[3]

The supreme court found that the absence of the asserter during the trial was the crucial factor in the rule excluding statements made out of court. In *Patterson,* since each declarant was present and on the stand when her prior statement was offered, her credibility, both prior and present, was subject to cross-examination at trial. The supreme court said "there was no reason to reject the statements, as substantive evidence, simply because they had been made at a time when the witnesses were not subject to cross-examination."[4]

The practical significance of this new rule of evidence is that the State can survive a motion for acquittal at the close of its case, even when its witnesses, because of intimidation or for other reasons, change their stories at trial. Previously, the prior inconsistent statements could not be considered as evidence on a motion for a directed verdict, and the State would have failed to establish a prima facie case.[5] Prior inconsistent statements will now be considered as substantive evidence by the appellate courts in their view of the "evidence most favorable to the state." The new rule

---

[3]324 N.E.2d at 484, *quoting from* Harvey v. State, 256 Ind. 473, 476, 269 N.E.2d 759, 760 (1971) (emphasis added by the *Patterson* court). The definition is that of Dean McCormick. MCCORMICK § 225, at 584.

[4]324 N.E.2d at 484-85. The Indiana Supreme Court pointed out that its position is in accord with, but more liberal than, that of other authorities. *Id.* at 485, *citing* MCCORMICK § 251; 3A J. WIGMORE, EVIDENCE § 1081 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]; UNIFORM RULE OF EVIDENCE 63(1); MODEL CODE OF EVIDENCE rule 503(b) (1942).

[5]United States v. Rainwater, 283 F.2d 386 (8th Cir. 1960) (directed verdict); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967) (prior inconsistent statements of one defendant are not admissible against co-defendant). *See generally* Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality,* 3 IND. LEGAL F. 309 (1970).

is also applicable to civil cases although the problem of turncoat witnesses is not as significant as in criminal cases.

This new rule in Indiana was adopted with reference to Federal Rule of Evidence 801(d)(1), which provides that a prior statement is not hearsay if the declarant testifies and is subject to cross-examination. The federal rule further requires that the prior statement be inconsistent with the witness' present testimony and have been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."[6] The supreme court noted, however, that the Advisory Committee on the Proposed Federal Rules of Evidence thought the requirement of an oath was unnecessary.[7] The court concluded that the availability of the declarant for cross-examination is the "safeguard [that] is of paramount importance and is adequate."[8]

Justice DeBruler, dissenting, stated the fear expressed by the majority of courts which have considered this issue in the past—that the party against whom the prior statement is offered will be deprived of meaningful cross-examination of the statement.

> Under the principle created by the majority, the cross-examination . . . by necessity will focus on the recollection of the witness of the circumstances in which the statement was made rather than upon the recollection of the witness of the events described in the statement.[9]

Justice DeBruler concluded that cross-examination is meaningful only if the cross-examiner can probe the witness' present recollection of the relevant events.[10]

The approach of the dissent hypothesizes a speculative prejudice to a defendant in a criminal case. Two commonsense reasons support the approach of the majority in *Patterson*. Both reasons

---

[6]FED. R. EVID. 801(d)(1) provides in part:

A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

[7]324 N.E.2d at 485. *See* Proposed Fed. R. Evid. 801(d) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972).

[8]324 N.E.2d at 485.

[9]*Id.* at 488 (DeBruler, J., dissenting).

[10]*Id.* Justice DeBruler cited the reader to a "helpful discussion of the problems surrounding the use of former statements of witnesses as substantive evidence." *Id.* at 489 n.1, *referring to* Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

make it more likely that a trial will arrive at the truth. First, prior inconsistent statements, in any event, come into evidence on the issue of the witness' credibility. A limiting instruction is "a mere verbal ritual."[11] As Judge Friendly so persuasively pointed out:

> To tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable.[12]

Secondly, whether or not the prior inconsistent statement is more likely to be true because it was made nearer in time to the matter to which it relates, the jury can presently observe the demeanor of the witness under the pressure of cross-examination. "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court."[13]

2. *Admissions of a Party*

In *Jethroe v. State*[14] the defendant was convicted of the murder of his girl friend with whom he had lived for about two years. At trial the defendant contended that the killing was in self-defense. The deceased's daughter, a witness for the State, testified that on the day of the killing the deceased telephoned the defendant's mother in the defendant's presence and asked her to come and move the defendant out of the house. The deceased also stated in this telephone conversation, "Jethroe said he is going to kill me before Friday."[15] Defendant then "snatched" the phone from the deceased and told the person on the line not to come over.

On appeal the defendant contended that this testimony was hearsay.[16] The supreme court held that the accusation and reply were admissible "as a tacit or adoptive admission" since the defendant was present at the time the deceased's statement was made

---

[11]C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 39, at 77 (1954), *quoted in* Beaver & Biggs, *supra* note 10, at 321.

[12]United States v. De Sisto, 329 F.2d 929 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 979 (1964).

[13]Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925) (Hand, J.). *Accord*, Proposed Fed. R. Evid. 801(d) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972); McCORMICK § 251, at 602-03.

[14]319 N.E.2d 133 (Ind. 1974).

[15]*Id.* at 137.

the State made no objection to the issue in its brief. *Id.* at 138.

[16]Although the hearsay issue was not properly preserved for appeal,

and his reply and conduct were equivocal.[17] The court said that "[t]he defendant should ask for instructions to the effect that, if the jury finds defendant's response to be a denial, they should ignore the testimony entirely."[18]

In *Matthew v. State*,[19] a case that is clearly wrong in its application of the undisputed law to the facts, the Third District Court of Appeals held that evidence of the defendant's testimony before the grand jury was not admissible as an admission by conduct because the "state did not succeed in establishing the truth as to the antithesis" of the defendant's grand jury testimony.[20] The defendant was convicted of reckless homicide while driving under the influence of alcohol. The defendant testified before the grand jury that he had dinner at the home of his secretary on the night in question and that he had nothing to drink while there. At trial his secretary testified that she had supported this story before the grand jury because the defendant impliedly threatened to fire her, but that in fact her grand jury testimony was not true—the defendant had not had dinner at her house. This testimony was important because there was evidence that the defendant had drunk three martinis in the afternoon and two drinks after the alleged dinner. The interjection of the full dinner between drinks would, of course, have lessened the impact of the alcohol on his body and have tended to negate the evidence that he was intoxicated at the time of the fatal accident.[21]

Both the majority, and Judge Garrard who dissented, agreed that *Wilson v. United States*[22] correctly established that a defend-

---

[17]*Id.* The court pointed out that testimony about the deceased's statement standing alone would have been excluded as hearsay.

When a criminal accusation is made in the presence of the person accused, the person's silence or failure to contradict or explain the statement may be proved as an admission. The circumstances must be such as to afford him an opportunity to speak and such as would naturally call for some action or reply from persons similarly situated. Robinson v. State 309 N.E.2d 833 (Ind. Ct. App. 1974), *aff'd*, 317 N.E.2d 850 (Ind. 1974), *noted in* Marple, *Evidence - Criminal, 1974 Survey of Indiana Law*, 8 IND. L. REV. 186, 208 (1974) [hereinafter cited as *1974 Survey of Indiana Law*]; Diamond v. State, 195 Ind. 285, 144 N.E. 466 (1924). Since the most important element of this rule is the accused's failure to deny, the equivocal response may be used as an admission. MCCORMICK § 270, at 652.

[18]319 N.E.2d at 139.

[19]318 N.E.2d 594 (Ind. Ct. App. 1974) (third district).

[20]*Id.* at 596.

[21]There was no breathalyzer test given.

[22]162 U.S. 613 (1896).

Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right, not only to take such statements into consideration, in connection with

ant by giving a false statement about a matter in litigation gives reason for believing he is guilty—in effect an admission by conduct. The majority was correct that the State in *Matthew* did not prove the "antithesis" of the defendant's story—that the defendant engaged in the consumption of alcohol during the time he said he was having dinner at the home of his secretary. The State did, however, prove that he did not have dinner at the home of his secretary and, therefore, the consumed alcohol would have had a greater effect on him. The majority's conclusion, that the antithesis of having dinner is consuming alcohol rather than *not* having dinner, is simply illogical factually. It is unclear whether the case is an attempt to limit the use of admissions by conduct against a defendant who does not testify at trial.

3. State of Mind Exception

In *Oberman v. Dun & Bradstreet Inc.*,[23] a suit for libel, the plaintiff, a prospective purchaser of real property, testified at trial to a telephone conversation wherein the owner of the property told the plaintiff that he would not sell or lease him the property because of an unfavorable and allegedly false credit report given by the defendant Dun & Bradstreet. The sole issue was whether the owner refused to sell the property because of the credit report, and this testimony was the only evidence favorable to plaintiff on the issue. The Seventh Circuit Court of Appeals held that the conversation with the owner was hearsay, "but under the state of mind exception to the hearsay rule, an out of court declaration of a present existing motive or reason for acting is admissible, even though the declarant is available to testify."[24] The court cited the then proposed Federal Rule of Evidence 803(3)[25] and the famous *Mutual*

> all the other circumstances of the case, in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defence made or procured to be made, as in themselves tending to show guilt.

Id. at 620-21, *quoted in* Matthew v. State, 318 N.E.2d 594, 596 (Ind. Ct. App. 1974). *Accord,* Perfect v. State, 197 Ind. 401, 141 N.E. 52 (1923); McCORMICK § 237, at 661 (stating that the "spoiliation" admissions should "entitle the proponent to an instruction that the adversary's conduct may be considered as tending to corroborate the proponent's case generally, and as tending to discredit the adversary's case generally.").

[23]507 F.2d 349 (7th Cir. 1974).

[24]*Id.* at 351.

[25]Proposed Fed. R. Evid. 803 provided in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then existing mental, emotional, or physical condition. A

Life Insurance Co. v. Hillmon[26] case and its progeny as the focus of its extended discussion of the state of mind exception to the hearsay rule.

B. Opinions and Expert Testimony

The First District Court of Appeals in *Rieth-Riley Construction Co. v. McCarrell*[27] followed Federal Rule of Evidence 704,[28] which permits a witness to give an opinion about an ultimate question to be decided by the trier of fact. In so doing, it abrogated the previous rule in Indiana that excluded, per se, such an opinion by

---

> statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

56 F.R.D. 183, 300 (1972). The adopted federal rule is identical.

[26]145 U.S. 285 (1892). The Seventh Circuit relied on Shepard v. United States, 290 U.S. 96 (1933), to limit the state of mind exception to "[d]eclarations of intention, casting light upon the future" as opposed to "declarations of memory, pointing backwards to the past." 507 F.2d at 352, *quoting from* Shepard v. United States, *supra* at 105-06. The *Oberman* court went on to note:

> For present purposes, *it is of no moment* whether the facts which gave *rise to Rance's* [the owner of the real estate] *declaration were true or actually occurred*, because the concern here is only with the reason for Rance's refusal to lease the Hamlin Avenue property. Thus, there are no problems of memory and perception of the declarant to be tested, and therefore, as in the usual state of mind situation, Oberman's recollection of the statement is as likely to be correct as Rance's recollection.

507 F.2d at 352 (emphasis added). It is interesting to note that the Seventh Circuit stated that the statements were not offered to prove the truth of the matters asserted therein. Thus, pursuant to the definition of hearsay in Federal Rule of Evidence 801(c), the owner's statements were simply not hearsay at all. *Cf.* Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951) (complaining letters from customers, offered to show that cancellation of dealer's franchise was not motivated by dealer's refusal to finance car sales through defendant's affiliate); Proposed Fed. R. Evid. 801(c) (Advisory Committee Note), 56 F.R.D. 183, 295 (1972) (if "the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights" the statement is not hearsay but is a "category of 'verbal acts' and 'verbal parts of an act'"); McCormick § 249, at 589-90 ("When it is proved that D made a statement to X with the purpose of showing the probable state of mind thereby induced in X, . . . or motive, . . . the evidence is not subject to attack as hearsay") (footnotes omitted).

[27]325 N.E.2d 844 (Ind. Ct. App. 1975) (first district).

[28]Fed R. Evid. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

a lay witness.[29] In *Rieth-Riley* plaintiff's automobile collided with a pipe which was being dragged along a highway behind defendant's tractor. The plaintiff's attorney was permitted to read a statement made previously by the only eyewitness to the collision in which the witness said: "If I had been driving that automobile and that pipe had popped in front of me like that there would have been nothing I could have done about it."[30] The court of appeals first found, in accord with another newly announced rule of evidence in Indiana,[31] that the prior statement was admissible as substantive evidence. The court also held the statement was admissible despite the fact that it expressed a lay opinion on an ultimate issue in the case—whether or not the accident was unavoidable. Since the witness was the only eyewitness and since he had previously testified both as to his experience as an operator of motor vehicles and to the facts forming the basis of his statement, it was not an abuse of the trial court's discretion to permit the lay witness' inference "based upon his perception of the totality of the circumstances."[32]

The focus of the issue when a question solicits an opinion from a witness will now be whether or not the opinion, by a lay person or an expert, is helpful to the trier of fact.[33] Questions calling for

---

[29] *E.g.*, Southern Ind. Power Co. v. Miller, 185 Ind. 35, 111 N.E. 925 (1916); New Jersey, I. & I.R.R. v. Tutt, 168 Ind. 205, 80 N.E. 420 (1907).

[30] 325 N.E.2d at 851.

[31] *See* Patterson v. State, 324 N.E.2d 482 (Ind. 1975).

[32] 325 N.E.2d at 853.

[33] *Id.* at 852. *Cf.* FED. R. EVID. 701 & 702; Proposed Fed. R. Evid. 704 (Advisory Committee Note).

Rule 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences 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 his testimony or the determination of a fact in issue.*

(Emphasis added).

Rule 702 provides:

> If scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue,* a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added).

The Note of the Advisory Committee to Proposed Rule 704 states in part:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude

legal conclusions will not be permitted, except perhaps when the legal conclusion is also an opinion of general understanding.[34]

C. *Privilege*

The new rape shield law[35] provides that in prosecutions for sexual offenses evidence of the victim's past sexual conduct may not be admitted except in two circumstances, and then only if it is material to a fact in issue and its inflammatory nature does not outweigh its probative value. The statutory exceptions are:

(a) evidence of the victim's past sexual conduct with the defendant; or

(b) evidence which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded.[36]

But even in the two limited exceptions, a written motion accompanied by an affidavit containing an offer to prove must be made not less than ten days before trial; if the court finds the offer to prove sufficient, it will order questioning of the victim outside the presence of the jury. Upon a finding that the evidence is admissible, the court will issue an order stating what evidence may be introduced and the nature of the permitted questions.

The impulse of the new statute is an enlightened attempt to make it less likely that a jury will acquit a defendant because of its judgment of the victim's character. It has the collateral benefit of making the victim's appearance on the stand less embarrassing, thus encouraging a victim to testify. However, the statute is constitutionally questionable in at least one respect. If, for example, a defendant contends that the sexual act did not take place or was consented to, and further, offers to prove prior similar instances in which the victim charged other persons falsely of a similar crime, the statute prohibits the evidence per se. In these situations the defendant's right of confrontation and cross-examination cannot be subordinated merely to prevent embarrassment to the vic-

---

opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

56 F.R.D. 183, 195 (1972), *citing* McCormick § 12. *See also* Frase v. Henry, 444 F.2d 1228 (10th Cir. 1971) (wherein the court allowed an opinion on an ultimate issue of fact by applying the "aid to the jury test").

[34] *See* McCormick § 12, at 29.

[35] Ind. Code §§ 35-1-32.5-1 to -4 (Burns Supp. 1975).

[36] *Id.* § 35-1-32.5-2.

tim.[37] There may be other instances in which consent is in issue wherein a pattern of conduct by the victim involving other persons might be crucial to the defendant's case. In any event, if the same elaborate pretrial procedures were required before the evidence could be received, these additional exceptions would not be subject to abuse.

Interestingly, while the victim's prior sexual conduct is now shielded, that of the defendant, in many cases, is not. Prior similar acts of the defendant "showing a depraved sexual instinct" are admissible.[38] The acts do not have to be with the same person. It should also be noted that the new statute does not mention the common, but discretionary, practice of requiring a pretrial mental examination to determine the credibility of a sex-crime victim. Since the practice has been clearly sanctioned by previous case law,[39] presumably the legislators were aware of it and chose not to prohibit it.

D. Original Document Rule

A new statute provides that the recording of hospital medical records by electronic data processing systems is an original written record, and that printouts of retrieved information in written or printed form shall be treated as original records for the purpose of admissibility into evidence.[40] Pursuant to this statute an objection that a computer printout of a patient's hospital records is not the "best evidence" should not be sustained. In order to authenticate the records, however, the proponent must show:

(1) the electronic data processing equipment is standard equipment in the hospital;

(2) the entries were made in the regular course of business at or reasonably near to the happening of the event or order, opinion, or other information recorded;

---

[37]*See* State v. Nab, 245 Ore. 454, 421 P.2d 388 (1966); People v. Scholl, 225 Cal. App. 2d 588, 37 Cal. Rptr. 475 (1964); People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1958); McCORMICK § 196, at 466; 3A WIGMORE § 963 n.2; Annot., 75 A.L.R.2d 508 (1961).

[38]Austin v. State, 319 N.E.2d 130 (Ind. 1974) (Justice Prentice said he would exclude such evidence but felt bound by the earlier decision of Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971)); Pieper v. State, 321 N.E.2d 196 (Ind. 1975) (Justice DeBruler said he would exclude such evidence but felt bound by *Austin*); Gilman v. State, 258 Ind. 556, 282 N.E.2d 816 (1972), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 199 (1973) [hereinafter cited as *1973 Survey of Indiana Law*].

[39]Burton v. State, 232 Ind. 246, 111 N.E.2d 892 (1953). *Burton* has been limited to make it clear that a pretrial mental examination is not required upon defendant's request. Allen v. State, 152 Ind. App. 284, 283 N.E.2d 557 (1972), *noted in 1973 Survey of Indiana Law* 185.

[40]IND. CODE §§ 34-3-15.5-1 to -4 (Burns Supp. 1975).

(3) the security of the entries from unauthorized access can be demonstrated through the use of audit trails; and
(4) records of all original entries and subsequent access to the information are maintained.[41]

The person who prepared the original entry need not authenticate it.

The new Federal Rules of Evidence provide that all printouts of data stored in a computer or similar device are "original" documents.[42] The Indiana courts would be well-advised to follow the federal rule and decisions of other jurisdictions which allow all computer printouts into evidence as original documents.[43] A lesser degree of necessity for their use in other areas does not detract from their accuracy, especially if the same foundation showing contained in Indiana Code section 34-3-15.3-3 is required.

E. Demonstrative Evidence

1. Tape Recordings

The Third District Court of Appeals strictly followed the foundation requirements for the admissibility of tape recordings in *Larimer v. State.*[44] The tape involved was made during a four and one-half hour interrogation of Larimer in the prosecutor's office. In addition to a confession of incest, the recording contained references to Larimer's prior homosexual conduct as well as to his institutional treatment for mental illness. When the State attempted to introduce the entire recording during its case-in-chief, the trial court sustained the defendant's objection that the tape contained prejudicial matters which were immaterial to the confession. Larimer, on the stand in his own behalf, denied both the act of

---

[41] *Id.* § 34-3-15.5-3. Authentication is an additional hurdle once over the original document barrier.

[42] FED. R. EVID. 1001(3) provides: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" FED. R. EVID. 901(b)(9) provides for authentication as follows: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."

[43] *E.g.*, United States v. Russo, 480 F.2d 1228 (6th Cir. 1973) (upholding admission of computer printouts of an insurance company against a criminal defendant to show that he had filed fraudulent claims with the company); United States v. De Georgia, 420 F.2d 889, 895 (9th Cir. 1969) (emphasizing the necessity that a court "be satisfied with all reasonable certainty that both the machine and those who supply its information have performed their functions with utmost accuracy."). *See also* King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393 (Miss. 1969); Transport Indem. Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

[44] 326 N.E.2d 277 (Ind. Ct. App. 1975) (third district).

incest and the confession. In rebuttal, over defendant's objection, the entire tape was admitted into evidence to impeach Larimer's testimony. The defendant's request for an *in camera* review of the tape to delete prejudicial and immaterial matters not required for impeachment was denied. However, after the entire tape was played in the jury's presence, the court admonished the jury to disregard the statements on the tape pertaining to Larimer's history of homosexuality and mental illness.

The court of appeals, in reversing the conviction of incest and remanding for a new trial, relied on the foundation requirements for the admissibility of tape recordings as set forth in *Lamar v. State*.[45] One of the five *Lamar* requirements is that the party offering the tape recording show that it "does not contain matter otherwise not admissible into evidence."[46] The *Larimer* court held that the trial court should have reviewed the tape out of the presence of the jury and taken steps to delete the prejudicial material.[47]

Judge Hoffman, dissenting, thought that the evidence showed the confession was voluntary, and, even if not voluntary, the taped confession was admissible for impeachment purposes.[48] Furthermore, the trial court had admonished the jury to disregard the prejudicial material, presumably all that was neces-

[45]258 Ind. 504, 282 N.E.2d 795 (1972), *noted in 1973 Survey of Indiana Law* 182. The requisite foundation must show:

> (1) That it is authentic and correct;
> (2) That the testimony elicited was freely and voluntarily made, without any kind of duress;
> (3) That all required warnings were given and all necessary acknowledgments and waivers were knowingly and intelligently given;
> (4) That it does not contain matter otherwise not admissible into evidence; and
> (5) That it is of such clarity as to be intelligible and enlightening to the jury.

Id. at 513, 282 N.E.2d at 800.

[46]326 N.E.2d at 280, *quoting from* Lamar v. State, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972).

[47]326 N.E.2d at 280.

[48]*Id.* at 282 (Hoffman, J., dissenting). Judge Hoffman cited Oregon v. Hass, 420 U.S. 714 (1975), and Harris v. New York, 401 U.S. 222 (1971), both of which held that confessions obtained without the requisite showing of voluntariness are admissible to impeach a defendant who takes the stand and denies or contradicts the confession. *But see* Jackson v. Denno, 378 U.S. 368 (1964). *See also* IND. CODE § 35-5-5-1 (Burns 1975):

> In any criminal prosecution brought by the state of Indiana, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence and hearing of the jury, determine any issue as to voluntariness.

sary to satisfy the *Lamar* requirements.[49] Since the majority did not even consider whether or not the error of failure to delete immaterial or prejudicial matters was harmless, the case indicates that this *Lamar* requirement must be strictly adhered to.

In *Jackman v. Montgomery*[50] the First District Court of Appeals held that a voicewriter recording of a telephone conversation was properly admitted into evidence. At trial the defendant called an insurance adjuster who testified that he had telephoned one of the plaintiff's witnesses (Bailey) and had recorded the conversation. The adjuster obtained Bailey's telephone number from the directory. When Bailey answered, Bailey identified himself. This circumstantial authentication, coupled with the fact that the adjuster personally took the statements contained in the recording and could, therefore, testify to the accuracy of the recording and the exact time and place it was taken, was sufficient to qualify the adjuster to identify the voice as that of Bailey.[51] Judge Robertson, writing for the court, also stated that the requirement in *Lamar* that " 'all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given' "[52] is applicable only to criminal cases.[53]

2. *Scientific Evidence*

Failure to follow the strict technical foundation requirements for the admissibility of breathalyzer test results, coupled with the lack of other evidence, caused the reversal of a conviction for reckless homicide and involuntary manslaughter in *Jones v. State*.[54] "The three requirements for a proper foundation are that the test operator be certified, that the equipment be inspected and approved, and that the techniques used by the operator be

---

[49]326 N.E.2d at 283 (Hoffman, J., dissenting). *See* Martin v. State, 306 N.E.2d 93 (Ind. 1974).

[50]320 N.E.2d 770 (Ind. Ct. App. 1974) (first district).

[51]*Id.* at 774. The *Jackman* court relied on Gibbs v. Miller, 283 N.E.2d 592 (Ind. Ct. App. 1972); Epperson v. Rostatter, 90 Ind. App. 8, 168 N.E. 126 (1929); and McCormick § 226, at 554. Federal Rule of Evidence 901 specifically permits authentication by "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called."

[52]320 N.E.2d at 775, *quoting from* Lamar v. State, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972).

[53]320 N.E.2d at 775.

[54]315 N.E.2d 403 (Ind. Ct. App. 1974) (third district). The elaborate foundation requirements were outlined in Klebs v. State, 305 N.E.2d 781 (Ind. Ct. App. 1974), *noted in 1974 Survey of Indiana Law* 191-92.

approved."[55] Since the statutory mandate that the device be inspected and approved was not established by the State, the test results were inadmissible.[56] The Third District Court of Appeals distinguished *Klebs v. State,*[57] wherein the court found fatal evidentiary absences germane to each of the three foundation requirements, but nevertheless, did not reverse since there was other substantial evidence of the driver's intoxication.[58] In *Jones* the only other evidence of defendant's intoxication was testimony of the smell of intoxicants; this standing alone was insufficient to support a finding of intoxication.[59]

The *Jones* case indicates that, as in the case of tape recordings, the statutory and regulatory foundation requirements must be strictly adhered to.

3. Bodily Invasions

In *Ewing v. State*[60] the Second District Court of Appeals held that the results of an urinalysis are admissible as "real or physical" evidence. The urine sample was obtained from the defendant after his arrest for possession of narcotics. The court correctly noted that the fifth amendment privilege against self-incrimination applies only to testimonial compulsion.[61] Further, obtaining the sample was not an unreasonable search and seizure, since the process used was apparently free from coercion and the sample was obtained as a result of a routine bodily function.[62]

---

[55] *1974 Survey of Indiana Law* 191, *citing* Klebs v. State, 305 N.E.2d 781, 783 (Ind. Ct. App. 1974).

[56] IND. CODE § 9-4-4.5-6 (Burns Supp. 1975). The *Jones* court expressly reserved the question whether or not *certification* of devices per se has become a requirement for an admissible test result. 315 N.E.2d at 404. Certification is not mandated by statute but is required by regulation. IND. AD. RULES & REG. (47-2003h)-2 (Burns Supp. 1975). *See 1974 Survey of Indiana Law* 191 & n.23.

[57] 305 N.E.2d 781 (Ind. Ct. App. 1974), *noted in 1974 Survey of Indiana Law* 191.

[58] Other evidence of intoxication in *Klebs* sufficient to make errors in establishing the foundation requirements harmless was eyewitness testimony of Klebs' erratic driving and consumption of eight to ten drinks in 3½ hours at a restaurant a close distant from the collision. 305 N.E.2d at 782.

[59] 315 N.E.2d at 405.

[60] 310 N.E.2d 571 (Ind. Ct. App. 1974) (second district).

[61] *Id.* at 578, *citing* Schmerber v. California, 384 U.S. 757 (1966); Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972). The fifth amendment "does not shield against compulsory submission to tests that are merely physical or produce evidence that is only physical in nature, such as fingerprints, measurements, voice or handwriting exemplars, or physical characteristics or abilities." Hollars v. State, *supra* at 232, 286 N.E.2d at 168. For a discussion of the Indiana and United States Supreme Court decisions concerning bodily searches see *1974 Survey of Indiana Law* 186-89 & nn.1-11.

[62] 310 N.E.2d at 578.

4. Photographs

A police "mug shot" of a criminal defendant was held admissible under very narrow circumstances in *Saffold v. State.*[63] During the routine booking procedure following his arrest for robbery, Saffold was photographed with a sign hung around his neck that included a number, the date the photo was taken, and the words "Police Dept., Hammond Ind." It is the general rule that mug shots are inadmissible when the defendant has not testified or otherwise placed his character in issue because the introduction of such photographs would likely indicate to the jury that the defendant had previously been convicted of a crime. Since direct evidence of prior conviction would be inadmissible, mug shots implying the same are also inadmissible. This rule has been held applicable even when the mug shot is taken after the current arrest.[64] The court distinguished *Blue v. State*[65] and *Vaughn v. State,*[66] which had held mug shots inadmissible.

The *Saffold* court first noted that the introduction of the single photograph was necessary to explain an apparent inconsistency in the testimony of the state's witnesses. Each witness had described a suspect who differed in appearance from the defendant in the courtroom, and the defense probed this identity problem vigorously on cross-examination. The State used the mug shots at the conclusion of its case-in-chief as proof that the defendant had appeared at the time of his arrest as the witnesses described him at the time of trial.

In addition, to avoid any doubt in the jury's mind as to the source of the mug shots, a police detective testified that he photographed Saffold following his arrest. The date on the photograph corroborated this testimony. The *Vaughn* case held that

---

[63]317 N.E.2d 814 (Ind. Ct. App. 1974) (third district).

[64]Blue v. State, 250 Ind. 249, 235 N.E.2d 471 (1968). *But cf.* Vaughn v. State, 215 Ind. 142, 19 N.E.2d 239 (1939). In *Vaughn* the date was covered but the classic front and profile views were shown together. Thus the jury could still suspect a previous criminal record.

[65]250 Ind. 249, 235 N.E.2d 471 (1968). In *Blue* two witnesses positively identified the defendants as the persons who had robbed them. Therefore the photographs were not necessary. The supreme court in *Blue* made no distinction between current arrest photographs and photographs taken in connection with prior crimes. The court said:

> A careful investigation of the cases dealing with the question of the introduction of "mug shots" into evidence shows abundantly clear [*sic*], that *when* the photos were taken is not material. . . . These photographs [three classic poses] are highly prejudicial upon sight and may very easily create an unfavorable automatic reaction in a juror's mind without further investigation by him.

Id. at 255, 235 N.E.2d at 474 (emphasis in original).

[66]215 Ind. 142, 19 N.E.2d 239 (1939). *See* note 64 *supra.*

prejudicial matter, such as a sign around the defendant's neck, must be removed from the photographs.[67] In *Saffold*, however, the sign around the defendant's neck could not be removed from the photographs without also removing the distinctive features of the defendant.[68] The State attempted to minimize the prejudice to the defendant by introducing only one mug shot instead of the two or three of the classic post office pose.

The Third District Court of Appeals stated that the *Blue* and *Vaughn* holdings generally prohibiting the admissibility of mug shots were still intact.[69] However, there is no doubt that the blanket prohibition in *Blue* against post-arrest photographs as well as photographs taken in connection with prior crimes has been modified. The *Saffold* case clearly establishes that in order for mug shots to be admissible, the State must show a necessity resulting from the substantially changed appearance of the defendant. The photographs must tend to establish the nexus between the prior appearance of the defendant and the witnesses' descriptions at trial. The likelihood of the influence of prior crimes in the jury's mind must be minimized by either covering the prejudicial material or identifying the mug shots as *current arrest* photographs. The prejudice to the defendant can be further minimized if the prosecution does not draw particular attention to the source or implications of the photograph.[70]

The Indiana Supreme Court in *Robertson v. State*[71] held that the introduction of a photograph of the defendant to show that he had changed his appearance since the alleged crime was permissible. It is not clear from the case whether identification or impeachment was the purpose of the introduction. The defendant objected that the photograph depicted him as a "hippie" and, therefore, was prejudicial. If impeachment was the only purpose of the photograph, it should have been excluded as irrelevant. The

[67]215 Ind. at 145, 19 N.E.2d at 241. Dictum in *Vaughn* suggested that there may be a valid use of such photographs to show change in appearance. *Id.*

[68]317 N.E.2d at 818.

[69]*Id.* at 816.

[70]United States v. Harrington, 490 F.2d 487 (2d Cir. 1973), cited by the *Saffold* court, 317 N.E.2d at 819, held this additional safeguard was required. The Seventh Circuit held in United States v. Scott, 494 F.2d 298 (7th Cir. 1974), that it was *constitutional* error for the government to introduce mug-type photographs into evidence. In this instance, however, the error was harmless because other evidence was overwhelming for guilt. *Id.* at 301, *citing* United States v. Gimelstob, 475 F.2d 157 (3d Cir. 1973). In United States v. Reed, 376 F.2d 226 (7th Cir. 1967), the Seventh Circuit held that testimony with respect to a mug shot of the defendant violated his fifth amendment privilege against self-incrimination.

[71]319 N.E.2d 833 (Ind. 1974).

prosecution should not be encouraged to look for unflattering photographs of defendants to display to the jury. Such use is an indirect method of placing the defendant's character in issue.

5. *Chain of Custody*

Hopper v. State[72] and *Loza v. State*[73] limited the chain of custody foundation requirement of *Graham v. State*[74] in cases involving nonfungible goods. In *Graham* the Indiana Supreme Court held that an unexplained gap in the exact whereabouts of suspected heroin between the time it was taken from the defendant and the time it was tested in the laboratory rendered inadmissible both the substance itself and testimony about the substance. In *Loza* eight spent .45 caliber shell casings were introduced by the State. Although there was a break in the chain of custody and apparently no testimony specifically identifying the casings as the ones found in the immediate area where the crime had occurred, they were held properly admissible.[75]

In *Hopper*, an appeal from a conviction of forgery, the First District Court of Appeals reached the correct result but applied a rule unduly harsh to the State. The State introduced a check which the defendant attempted to cash at a tavern and the driver's license which he presented as identification to the arresting officer. Prior to the admission of the exhibits, a bartender in the tavern and the arresting officer positively identified the check and driver's license as the items presented to them at the scene of the crime. The court stated that the chain of custody doctrine is not limited solely to fungible evidence.[76] However, since there was direct testimony identifying the exhibits as the items obtained from the defendant, the court should have applied the rule that establishing a chain of custody is not necessary when a witness

---

[72]314 N.E.2d 98 (Ind. Ct. App. 1974) (first district).

[73]325 N.E.2d 173 (Ind. 1975).

[74]253 Ind. 525, 255 N.E.2d 652 (1970). *See 1974 Survey of Indiana Law* 194 n.32.

[75]The break in the chain occurred when the casings were marked by the duty officer rather than by the officers who found them at the scene. The duty officer also failed to seal the envelope containing the casings before putting them in the property room. 325 N.E.2d at 177. *See* Frasier v. State, 312 N.E.2d 77 (Ind. 1974) (a mere possibility that the evidence could have been tampered with is insufficient to deny admission into evidence).

[76]314 N.E.2d at 104, *citing* Bonds v. State, 303 N.E.2d 686 (Ind. Ct. App. 1973), *noted in 1974 Survey of Indiana Law* 196. Where there is only a mere possibility of tampering, other evidence relating to the whereabouts of the exhibit may be sufficient. The appellant in *Hopper* did not contend that the exhibits might have been tampered with.

with knowledge testifies that "a matter is what it is claimed to be."[77]

Both the *Hopper* and *Loza* courts failed to state clearly that there are two independent ways to establish the foundation for the introduction of nonfungible goods: either establish an unbroken chain of custody or present a witness who can identify the exhibit as the same one connected to the crime. Since memories fail, however, the safest policy for the prosecution and police is to establish a chain of custody for all demonstrative evidence relating to a crime.

In *Mayes v. State*[78] the Second District Court of Appeals, after discussing extensively the leading chain of custody cases, held that testimony concerning the nature of an exhibit identified as heroin was proper even though the introduction of the substance itself was improper. In *Mayes* a substance was seized from the defendant and accounted for through the time it was tested in the state toxicology laboratory and conclusively determined to be heroin. A break in the chain of custody occurred after testing which rendered the substance itself inadmissible under the holding in *Graham*. The court held, however, that the crucial chain of custody time period for the admission of testing results runs from the time of seizure from the defendant through the time the substance is conclusively tested.[79] Thus, *Graham* can be distinguished in that the break occurred before the time of testing. The court also noted the elementary proposition that a conviction for narcotics does not depend upon producing the narcotic at trial.[80]

6. *Polygraph Tests*

In *McDonald v. State*,[81] the First District Court of Appeals squarely decided for the first time in Indiana the question whether the fifth amendment privilege against self-incrimination is violated by the disclosure of polygraph testing in a criminal case. In the course of a bench trial prosecution for statutory rape, the defendant took the stand and denied the act of intercourse. The

[77] FED. R. EVID. 901(b)(1). This same criticism was made last year in a discussion of Bonds v. State, 303 N.E.2d 686 (Ind. Ct. App. 1973), a case similar to *Hopper*, and decided by the same court of appeals. *See 1974 Survey of Indiana Law* 196 & n.37.

[78] 318 N.E.2d 811 (Ind. Ct. App. 1974) (second district).

[79] *Id.* at 820.

[80] *Id.* at 819-20, *citing* Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945); Holler v. State, 219 Ind. 303, 38 N.E.2d 242 (1941). *But see* Shropshire v. State, 258 Ind. 70, 73, 279 N.E.2d 219, 221 (1972), *noted in 1973 Survey of Indiana Law* 180-81; Keiton v. State, 250 Ind. 294, 301, 235 N.E.2d 695, 698 (1968).

[81] 328 N.E.2d 436 (Ind. Ct. App. 1975) (first district).

trial judge asked the defendant if he would be willing to take a lie detector test. The prosecuting attorney volunteered that the prosecutrix already had taken a lie detector test. Defense counsel equivocated about allowing the defendant to take a lie detector test. The trial judge adjourned for the day and told defense counsel to "think it over." The next day defense counsel moved for a mistrial because of the judge's comment about lie detector tests.[82]

The appellate court held that polygraph examinations are testimonial rather than merely physical evidence.[83] Therefore information brought before the court concerning petitioner's refusal to take the test was constitutionally impermissible. The court of appeals relied on *Bowen v. Eyman*,[84] a federal district court opinion, for the proposition that "[p]roof of silence or invocation of the privilege violates the Fifth Amendment."[85]

In *Bowen*, however, the defendant did not take the stand as in *McDonald;* the evidence of the refusal to take a polygraph examination came from a prosecution witness. Since an accused taking the stand must answer all admissible questions, the real issue, which the *McDonald* court did not discuss, is whether the defendant's refusal to submit to a polygraph test may be used to *impeach* his testimony if he takes the stand. In an analogous case, *United States v. Hale*,[86] the Supreme Court of the United States held that a defendant's silence during police interrogation after his arrest could not be delved into on cross-examination of the defendant. The Supreme Court reasoned that

---

[82]Judge Pursley stated: "And, I would like to get at the absolute truth and I think a lie detector test, I've found them very successful myself." *Id.* at 438. The judge was concerned with the fact that in most rape cases there are only two witnesses and it is difficult to determine the truth from their statements.

[83]The court quoted "persuasive dictum" by the Supreme Court of the United States in reaching its conclusion.

> Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

328 N.E.2d at 441, *quoting from* Schmerber v. California, 384 U.S. 757, 764 (1966).

[84]324 F. Supp. 339 (D. Ariz. 1970).

[85]328 N.E.2d at 441, *quoting from* Bowen v. Eyman, 324 F. Supp. 339, 341 (D. Ariz. 1970).

[86]422 U.S. 171 (1975).

> [n]ot only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.[87]

The Supreme Court found that since the defendant had just been given his *Miranda* warnings, his silence lacked probative value. His failure to speak could "as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony [at trial] was a later fabrication."[88]

In *McDonald,* the refusal to submit to a polygraph examination came at trial while the defendant was on the stand. The speculative inference that he might be relying on his privilege against self-incrimination, as in *Hale,* is wholly lacking. The *McDonald* court found that the defendant's unwillingness to submit to testing "creates a[n] . . . inference that the results . . . might not bear favorably on the credibility of his testimony."[89] Thus no patent ambiguity is created by the defendant's refusal to submit to a polygraph test in contrast to the situation in *Hale.*

The vast majority of courts in the past have held polygraph examinations to be unreliable, and therefore, their results are inadmissible.[90] Recent decisions, however, have departed from the view that the results are per se unreliable and have admitted polygraph examination results if there is a stipulation or waiver of objection by the party against whom the results are being offered.[91] Since there was no stipulation or waiver of unreliability

---

[87] *Id.* at 180. The Court limited the impact of its statement in a footnote which explained:

> We recognize that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court. "But where such evidentiary matters have grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control."

Id. at 180 n.7, *quoting from* Grunewald v. United States, 353 U.S. 391, 423-24 (1957).

[88] 422 U.S. at 177.

[89] 328 N.E.2d at 442.

[90] *See generally* McCormick § 207. *See also 1974 Survey of Indiana Law* 174 & nn.9 & 10; *1973 Survey of Indiana Law* 181-82 & n.31.

[91] Reid v. State, 259 Ind. 166, 285 N.E.2d 279 (1972), *noted in 1973 Survey of Indiana Law* 181-82; Williams v. State, 314 N.E.2d 764 (Ind. Ct. App.

by the defendant in *McDonald,* this decision should have rested on that narrower ground. This approach would have avoided a decision on constitutional grounds, and further, would have avoided the illogic of a defendant asserting his privilege against self-incrimination on the stand after voluntarily testifying.[92]

F. Impeachment

In *Fletcher v. State,*[93] the First District Court of Appeals reached a result contrary to the earlier decision in *Lewis v. State*[94] by another panel of the court of appeals. In *Fletcher,* the court held that even though the defendant was cross-examined concerning his prior conviction for the crime of theft in violation of the landmark case of *Ashton v. Anderson,*[95] the error was not reversible because the trial was to the court.[96] The *Lewis* decision would require a bifurcated proceeding with a judge other than the trial judge making the preliminary determination whether or not the conviction sought to be used was one permitted by *Ashton.* If the trial judge became aware of a prior conviction not contemplated by *Ashton* any time prior to judgment, *Lewis* held it was reversible error. The *Fletcher* decision is the better approach because it avoids the necessity of a bifurcated proceeding in bench trials.

In *Mayes v. State*[97] the Second District Court of Appeals held that cross-examination for impeachment purposes concerning a prior conviction of assault and battery with intent to commit a felony (robbery) was a "crime involving dishonesty" within the meaning of *Ashton.*[98] Therefore the questioning was proper. In

---

1974); Freeman v. Freeman, 304 N.E.2d 865 (Ind. Ct. App. 1973), *noted in 1974 Survey of Indiana Law* 173-74.

[92]*See, e.g.,* Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[93]323 N.E.2d 261 (Ind. Ct. App. 1975) (first district).

[94]299 N.E.2d 193 (Ind. Ct. App. 1973) (third district), *noted in 1974 Survey of Indiana Law* 203. *Lewis* held that impeachment by prior convictions other than those permitted by Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972), was prejudicial error even in a judge-tried case.

[95]258 Ind. 51, 279 N.E.2d 210 (1972), *noted in 1973 Survey of Indiana Law* 178-89. *Ashton* was made applicable to criminal cases in Dexter v. State, 260 Ind. 608, 279 N.E.2d 817 (1973), *noted in 1974 Survey of Indiana Law* 203.

[96]The *Fletcher* court cited King v. State, 292 N.E.2d 843 (Ind. Ct. App. 1973), *noted in 1973 Survey of Indiana Law* 210, for the proposition "that harm arising from evidentiary error is lessened if not totally annulled when the trial is by the court sitting without a jury." 292 N.E.2d at 846.

[97]318 N.E.2d 811 (Ind. Ct. App. 1974) (second district).

[98]*Id.* at 822. The specific prior crimes admissible to impeach are: treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and willful and corrupt perjury. IND. CODE § 34-1-14-14 (Burns 1973). In addition, according

a vigorous dissent, Judge Buchanan reasoned that the *Ashton* case reflects a desire to limit the admissibility of a witness' prior crimes to those specifically enumerated by statute and those involving dishonesty or false statement.[99] Judge Buchanan would hold that the words "dishonesty or false statement" are to be narrowly construed so as to include "only those crimes involving such conduct as indicates lack of veracity or propensity to tell the truth;"[100] and, even though the crime of assault and battery with intent to commit robbery is a crime of violence, it does not necessarily indicate a lack of veracity.

Judge Buchanan's reluctance to allow cross-examination concerning the crime involved in *Mayes* appears to be more a product of his fear of prejudice to the defendant by "indiscriminate blackening of a witness' character"[101] than of the logical classification of the crime of assault and battery with intent to commit robbery. His reliance on the dictionary definition of "dishonesty" is flawed. The definition "inclination to mislead, lie, cheat, or defraud" must also contemplate the more serious form of dishonesty—robbery.

XI. Insurance

*G. Kent Frandsen**

A. Punitive Damages

In *Vernon Fire & Insurance Co. v. Sharp*,[1] the insured sued two insurers who had rejected his proofs of loss. The parties stipulated at trial that (1) the insurers were liable under their

to *Ashton*, convictions for crimes involving dishonesty or false statement are admissible for impeachment purposes. Ashton v. Anderson, 258 Ind. 51, 62, 279 N.E.2d 210, 216-17 (1972), *citing* IND. CODE §§ 34-1-14-13, -14 (Burns 1973); *id.* § 35-1-31-6 (Burns 1975). *Ashton* was applied to the impeachment on cross-examination of a defendant in a criminal case. Dexter v. State, 260 Ind. 608, 279 N.E.2d 817 (1973), *noted in 1974 Survey of Indiana Law* 203.

[99]318 N.E.2d 811, 824 (Ind. Ct. App. 1974) (Buchanan, J., dissenting).

[100]*Id.* at 825.

[101]*Id.* at 826.

*Assistant Dean, Associate Professor of Law, Indiana University School of Law—Indianapolis. B.S., Bradley University, 1950; J.D., Indiana University, 1965.

The author wishes to thank Kathryn Wunsch for her assistance in the preparation of this article.

[1]316 N.E.2d 381 (Ind. Ct. App. 1974). For additional discussion of *Vernon* see Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).