

INDIANA’S PROBABLE-IMPACT TEST FOR REVERSIBLE ERROR

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ABSTRACT

This Article addresses the operation and effect of the reversible-error doctrine under the Indiana Rules of Appellate Procedure when applied to the review of non-constitutional trial court errors. In particular, this Article reviews the history of Indiana’s standards for reversible error under the Indiana Rules of Appellate Procedure and demonstrates that the Indiana Supreme Court adopted the probable-impact test to enable the court on appeal to assess whether it can say with confidence that the error more likely than not affected the outcome of the trial court proceeding. Specifically, this Article reviews the history leading up to the adoption of Indiana Appellate Rule 66(A), the text of that Rule, how the Indiana Supreme Court applied the probable-impact test in the seven years following the court’s adoption of the Rule, and how later opinions from the court have clarified the probable-impact test. However, some variance in the application of the probable-impact test has both persisted and re-emerged, and this Article identifies those deviations in the case law. This Article then concludes with advice for practitioners to tailor their arguments around the probable-impact test.

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INTRODUCTION

Article 7, Section 6, of the Indiana Constitution guarantees “an absolute right to one appeal.” Subject to the Indiana Rules of Appellate Procedure and the body of case law interpreting and applying those rules, the right to an appeal assures that every trial court judgment and agency determination is entitled to a second look by a panel of the Indiana Court of Appeals or by the Indiana Supreme Court before it becomes final.¹ For non-constitutional errors of Indiana law, that second look is taken through the lens of the probable-impact test for reversible error.² The question presented in such appeals, then, is whether the record discloses reversible error when that test is applied.

To prevail on appeal, the appellant must clear two hurdles. The appellant must first establish that an error occurred and, second, establish that the probable impact of the error is significant³ to such a degree that it requires a reversal or modification of the judgment.⁴ The appellee, on the other hand, will contend that there was no error, or the error, if any, was insignificant, or the alleged error is not reversible because it was invited or waived.⁵ From every vantage point, reversible error is at the heart of appellate practice.

As the Indiana Supreme Court has said, “[t]he challenge” for appellate courts “is in distinguishing the harmless error from the prejudicial one.”⁶ In Indiana, Appellate Rule 66(A) defines reversible error.⁷ The Rule provides that no error is reversible where its “probable impact . . . is sufficiently minor so as not to affect the substantial rights of the parties.”⁸ But the “probable impact”⁹ test has been mentioned only twenty-three times in reported cases in conjunction with Appellate Rule 66(A), and many of those cases simply quote the Rule without explanation.¹⁰ There has not been a consistent through-line in the case law

1. *See, e.g.*, *Ind. Newspapers, Inc. v. Miller*, 980 N.E.2d 852, 858 (Ind. Ct. App. 2012).

2. *See, e.g.*, *Fleener v. State*, 656 N.E.2d 1140, 1141-42 (Ind. 1995).

3. IND. R. APP. P. 66(A); *see also* IND. R. APP. P. 46(A)(8)(a).

4. *See, e.g.*, *Cundiff v. State*, 66 N.E.3d 956, 958 (Ind. Ct. App. 2016); *Crider v. Crider*, 15 N.E.3d 1042, 1061 (Ind. Ct. App. 2014).

5. *See, e.g.*, *Durden v. State*, 99 N.E.3d 645, 653 (Ind. 2018).

6. *Id.* at 651 (citing ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* ix (1970)).

7. IND. R. APP. P. 66(A).

8. *Id.*

9. *Id.*

10. A search on Westlaw for Indiana cases using both the terms “Appellate Rule 66(A)” and “probable impact” yielded twenty-three published opinions as of March 16, 2021. A broad search (indeed, an overly broad one for the reasons explained in note 102 *infra*) of all of Indiana’s published cases to use the term “probable impact” since the Indiana Supreme Court’s 1995 holding in *Fleener v. State*, in which the court expressly used that term in juxtaposition to prior standards, yields a result of 354 total cases as of March 16, 2021. *See Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995). For context, the Indiana Court of Appeals issues “approximately 2,000 written opinions each year.” *About the Court*, COURTS.IN.GOV, www.in.gov/courts/appeals/about [<https://perma.cc/>

articulating how the probable-impact test should be applied.¹¹ In other words, the Indiana doctrine of reversible error is still a work in progress.

This Article will explore the meaning of reversible error and the probable-impact test. The probable-impact test is a practical test, not an abstract or metaphysical one.¹² The test requires appellate judges to engage in an experience-based, more-likely-than-not determination.¹³ In this role, appellate judges are not unlike jurors instructed to use their “knowledge, common sense, and life experiences” to determine the value of the evidence.¹⁴ In other words, the probable-impact test illustrates what Justice Oliver Wendell Holmes meant when he famously wrote that “[t]he life of the law has not been logic: it has been experience.”¹⁵ The judges on appeal must draw upon both their personal and professional experience to determine whether they can say with confidence that a trial court’s judgment is correct notwithstanding an error.¹⁶

Although some cases strike appellate judges as obviously reversible or obviously not reversible,¹⁷ in which cases a probable-impact analysis is implied, many cases fall in the mid-range of the continuum, where a significant error exists, but whether that error is reversible is debatable. Those cases in the mid-range exemplify what Justice Benjamin N. Cardozo meant when he wrote that many judicial questions are “a question of degree.”¹⁸ It is at this point that a judge’s life and professional experience merge with the judicial process and the judge is called upon to determine whether he can say with confidence that the tipping point between mere error and reversible error has been reached.

Reversible error is a broad subject, and this Article cannot exhaust it. This Article does not discuss structural errors that are never harmless, such as a denial of the right to an impartial judge.¹⁹ Neither does this Article explore how Indiana’s appellate courts²⁰ have applied *Chapman v. California*, in which the Supreme Court of the United States held that a constitutional error does not

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11. *Compare* Day v. State, 560 N.E.2d 641, 643 (Ind. 1990) (applying the “with confidence” standard), *with* Tunstall v. Manning, 124 N.E.3d 1193, 1200 (Ind. 2019) (applying the “reasonable jury” standard).

12. *See, e.g., Fleener*, 656 N.E.2d at 1141-42.

13. *See, e.g., id.*

14. IND. PATTERN JURY INSTRUCTIONS CRIM. INSTRUCTION No. 1.1700 (Matthew Bender & Co. 2021).

15. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

16. *See* 9 IND. LAW. ENCYC. *Criminal Law* § 761 (2021).

17. For example, some errors are “structural,” which means that they affected the entirety of the proceedings such that, as a matter of law, an appellate court cannot have confidence in the outcome. *Durden v. State*, 99 N.E.3d 645, 653-56 (Ind. 2018).

18. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161 (22nd prtg. 1964).

19. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

20. Indiana has two appellate courts: the Court of Appeals of Indiana, the state’s intermediate court, and the Supreme Court of Indiana, the state’s highest court. IND. CONST. art. 7, § 1.

require reversal on appeal when the error is harmless beyond a reasonable doubt.²¹ The Indiana Supreme Court has made clear that a reversible-error determination under the Indiana Rules of Appellate Procedure requires a different test than the *Chapman* standard.²² However, the *Chapman* standard provides context for the meaning of Indiana's probable-impact test.²³

This Article instead addresses the operation and effect of the reversible-error doctrine under the Indiana Rules of Appellate Procedure when applied to the review of non-constitutional trial court errors, such as errors in the admission of evidence or procedural errors.²⁴ In particular, this Article reviews the history of Indiana's standards for reversible error under our Appellate Rules; demonstrates that the adoption of the probable-impact test was meant to clarify the law; and examines the text of the probable-impact test to conclude that that test requires the court on appeal to assess whether it can say with confidence that the error more likely than not affected the outcome of the trial court proceeding. This Article then considers how the Indiana Supreme Court has applied the probable-impact test, with the greater number of those cases occurring in the seven years following the court's adoption of the test, and later opinions clarifying that the probable-impact test is an assessment of the appellate court's confidence in the outcome in light of the likely weight given to the evidence by the fact-finder. However, some variance in the application of the probable-impact test has persisted, and this Article identifies those deviations in the case law. This Article then concludes with advice for practitioners to tailor their arguments around the probable-impact test.

I. REVERSIBLE ERROR IN AMERICAN LAW

The doctrine of reversible error emerged in American jurisprudence as a matter of necessity. Any error considered by a modern appellate court falls into one of two categories: reversible error or error that is not reversible, such as harmless error.²⁵ "Reversible error" is commonly defined as "[a]n error that affects a party's substantive rights or the case's outcome."²⁶ "Harmless error," on the other hand, is defined as "[a] trial-court error that does not affect a party's substantive rights or the case's outcome."²⁷

21. 386 U.S. 18, 24 (1967); *see also* *Bush v. State*, 775 N.E.2d 309, 311 (Ind. 2002) (applying the same standard for errors under the Indiana Constitution).

22. *Fleener v. State*, 656 N.E.2d 1140, 1141-42 (Ind. 1995).

23. *See, e.g.*, *Black v. State* 794 N.E.2d 561, 565 (Ind. Ct. App. 2003).

24. The final decisions of four Indiana administrative agencies—the Worker's Compensation Board, the Indiana Civil Rights Commission, the Indiana Utility Regulatory Commission, and the Review Board of the Department of Workforce Development—also may be appealed directly to the Indiana Court of Appeals. IND. R. APP. P. 2(A), 5(C)(1).

25. Some errors might be harmful yet not subject to reversal, such as invited errors. *See, e.g.*, *Durden v. State*, 99 N.E.3d 645, 653-56 (Ind. 2018).

26. *Reversible Error*, BLACK'S LAW DICTIONARY (11th ed. 2019).

27. *Harmless Error*, BLACK'S LAW DICTIONARY (11th ed. 2019).

As noted in the Introduction, the objective in every appeal is to determine, first, whether an error occurred in the trial court and, second, if so, whether that error is reversible.²⁸ If the error is harmless, the court on appeal will not disturb the trial court's judgment.²⁹ If, however, the error is reversible, the appellate court will be justified in modifying the trial court's judgment in whole or in part.³⁰

But it was not always this way. That a trial court's judgment might be affirmed on appeal notwithstanding an error was largely "[a]n early twentieth-century legal innovation."³¹ As the Indiana Supreme Court recently explained:

[T]he harmless-error rule developed in response to the strict presumption of prejudice adopted by a majority of appellate courts in the United States requiring automatic reversal for virtually any error, no matter how trivial. This approach often "led to absurd results, such as granting convicted murderers new trials because of the misspelling of non-essential words or other typographical errors in the indictment." *Id.* (citing cases). "So great was the threat of reversal, in many jurisdictions," the U.S. Supreme Court explained, "that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."³²

In contemporary practice, every appeal begins with the presumption that the trial court got it right.³³ It is then the appellant's burden to persuade the court on appeal to the contrary.³⁴ If an appellant can first demonstrate that an error occurred, the appellant must then persuade a majority of the appellate judges hearing the appeal³⁵ that the error is reversible.³⁶

Reversible error can be elusive.³⁷ Again, as Justice Cardozo explained, many judicial questions are "a question of degree."³⁸ The life and professional experiences of judges are essential to inform the judge of the point at which an

28. See 5 AM. JUR. 2D *App. Rev.* § 661 (2021).

29. See, e.g., *State v. Haldeman*, 919 N.E.2d 539, 543 (Ind. 2010).

30. E.g., *id.* at 543-44.

31. *Durden v. State*, 99 N.E.3d 645, 6522 n.7 (Ind. 2018).

32. *Id.* (citations omitted).

33. E.g., *Schwartz v. Heeter*, 994 N.E.2d 1102, 1105 (Ind. 2013).

34. *Id.*; see also IND. R. APP. P. 46(A)(8)(a). The appellant's burden is intertwined with the standard of appellate review—it will be easier for an appellant to show reversible error under a de novo standard of review than under a deferential standard. See, e.g., Jonathan B. Warner, *Reviewing Standards of Review*, 60 RES GESTAE 38 (Dec. 2016).

35. The Indiana Court of Appeals consists of fifteen judges who decide appeals in three-judge panels. IND. CODE § 33-25-1-1 (2021). The Indiana Supreme Court consists of five justices, who each sit on every appeal. *Id.* § 33-24-1-1.

36. See 5 AM. JUR. 2D *App. Rev.* § 661 (2021).

37. *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (citing ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* ix (1970)).

38. CARDOZO, *supra* note 18, at 161.

outcome might turn.³⁹ In determining the effect of an error on the final outcome, appellate courts may consider numerous factors,⁴⁰ such as the strength of a case apart from the error,⁴¹ the phase of the trial proceedings in which the error occurred,⁴² whether the complaining party invited the error,⁴³ the cumulative effect of multiple errors,⁴⁴ and any curative actions already taken in the trial court.⁴⁵

But the rationale for the doctrine of reversible error is that judicial economy does not sanction, and public confidence in the judiciary does not require, that a case be reversed or returned to the trial court based on a mere technical error or other insubstantial mistake that more likely than not did not affect the outcome.⁴⁶ There is a right to a fair trial, but there is no right to a perfect, error-free trial.⁴⁷ In other words, in finding an error not to be reversible, an appellate court acts like a football referee who *keeps the flag in his pocket* even though the action between the players might be subject to a penalty. On the other hand, to find reversible error, the appellate court must conclude, like our football referee, that the conduct *affected the play on the field* such that the outcome is no longer one in which the appellate court has confidence.

II. REVERSIBLE ERROR IN INDIANA PRIOR TO 1995

Unlike most other jurisdictions, Indiana has long placed limitations on reversing a trial court judgment for insubstantial errors.⁴⁸ In the 1874 opinion of *Smith v. Denman*, for example, the Indiana Supreme Court stated that an error

39. *See id.* Numerous commentators have acknowledged the human element of being a common-law judge. *See generally, id.* at 142-80. And other commentators have even attempted to identify the innumerable concerns that might influence such judges. *See generally*, RICHARD A. POSNER, *HOW JUDGES THINK* 19-121 (Reprint ed. 2010).

40. 5 AM. JUR. 2D *App. Rev.* § 620 (2021); *see, e.g.*, *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015).

41. 5 AM. JUR. 2D *App. Rev.* § 622 (2021); *see, e.g.*, *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014).

42. 5 AM. JUR. 2D *App. Rev.* § 620 (2021); *see, e.g.*, *Smith v. Taulman*, 20 N.E.3d 555, 565-67 (Ind. Ct. App. 2014).

43. 5 AM. JUR. 2D *App. Rev.* § 623 (2021); *see, e.g.*, *Brewington v. State*, 7 N.E.3d 946, 975 (Ind. 2014).

44. 5 AM. JUR. 2D *App. Rev.* § 624 (2021); *see, e.g.*, *Lainhart v. State*, 916 N.E.2d 924, 938-39 (Ind. Ct. App. 2009).

45. 5 AM. JUR. 2D *App. Rev.* § 625 (2021); *see, e.g.*, *Isom v. State*, 31 N.E.3d 469, 481 (Ind. 2015).

46. *See Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018); *see also* 5 AM. JUR. 2D *App. Rev.* § 660 (2021); *cf.* ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 50 (1970) (“Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.”).

47. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *see also Durden*, 99 N.E.3d at 651.

48. *Durden*, 99 N.E.3d at 652 n.7.

was “harmless” if “it did not in any manner prejudice the right of the appellants.”⁴⁹ Indiana’s “first harmless-error statute appeared in 1881” and used “terms nearly identical to its modern counterpart.”⁵⁰

However, Indiana’s appellate standard for determining whether reversible error exists has not developed in a consistent or linear fashion. Indiana’s case law invoked numerous, conflicting standards under Indiana Appellate Rule 15(E), the predecessor rule to the current rule on reversible error, Appellate Rule 66(A).⁵¹ Appellate Rule 15(E) provided that:

No judgment shall be stayed or reversed, in whole or in part, by the court on appeal for any defect in form, variance or imperfections contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below, but such defects shall be deemed to be amended in the court on appeal; *nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.*⁵²

The interpretation of that Rule by Indiana’s appellate courts was inconsistent.⁵³ In the 1980s, the Indiana Supreme Court applied no fewer than four tests under Rule 15(E) to determine whether an error was reversible.⁵⁴ In particular: the court considered whether the resulting prejudice was “so slight that we can justly say that it did not affect the jury verdict”;⁵⁵ it considered “a weighing of the evidence and an assessment of [witness] credibility . . . to assess the potential of the error for influencing the verdict”;⁵⁶ it considered whether erroneously admitted evidence was “minor and unlikely to weigh appreciably against the defendant”;⁵⁷ and it considered whether there was a “substantial likelihood that the questioned evidence contributed to the conviction.”⁵⁸

Absent a clearly defined standard under Appellate Rule 15(E), some appellate opinions applied more appellant-friendly standards than others. Significantly, in the 1976 opinion *Ewing v. State*, the Indiana Court of Appeals held that reversible error occurs whenever the error “affect[s], at least potentially, the merits of the

49. 48 Ind. 65, 70 (1874).

50. *Durden*, 99 N.E.3d at 652 n.7 (citing 1881 Ind. Acts 240, 264); *see also* IND. R. TR. P. 61.

51. *Compare* IND. R. APP. P. 15(E) (1972), *with* IND. R. APP. P. 66(A) (2000) (“[r]evised Appellate Rule 66 is analogous, in part, to former Appellate Rule . . . 15”).

52. IND. R. APP. P. 15(E) (1972) (emphasis added) (replaced by IND. R. APP. P. 66(A)(2000)).

53. *See* *Fleener v. State*, 656 N.E.2d 1140, 1142-43 (Ind. 1995).

54. *Id.*

55. *Williams v. State*, 426 N.E.2d 662, 671 (Ind. 1981).

56. *Miller v. State*, 436 N.E.2d 1113, 1114 (Ind. 1982).

57. *Mulligan v. State*, 487 N.E.2d 1309, 1313 (Ind. 1986).

58. *Jaske v. State*, 539 N.E.2d 14, 22 (Ind. 1989).

cause.”⁵⁹ That is, the *Ewing* rule asked whether there was a reasonable *possibility* that the error *might* have affected the outcome.⁶⁰ The Indiana Law Encyclopedia continues to recognize the *Ewing* rule as the general rule in Indiana for determining when an error requires reversal.⁶¹

Ewing’s reasonable possibility test is a common formulation of reversible error.⁶² Indeed, that approach is the reverse-side of the *Chapman* harmless-error coin.⁶³ Again, in *Chapman* the Supreme Court of the United States held that a constitutional error is not reversible error if it is harmless beyond a reasonable doubt.⁶⁴ In explaining that holding, the Court recognized:

An error in admitting plainly relevant evidence *which possibly influenced the jury . . . cannot . . . be conceived of as harmless. . . . There is little, if any, difference between . . . ‘whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction’ and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.* We, therefore, . . . hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.⁶⁵

The court in *Ewing* interpreted Appellate Rule 15(E) to mean there is reversible error if there is a reasonable possibility that the error might have affected the merits.⁶⁶ Conversely, then, under that formulation errors were *not* reversible only if the court on appeal could declare beyond a reasonable doubt that the error did not affect the merits.⁶⁷ This formulation of reversible error is as favorable for appellants as it gets.

59. 358 N.E.2d 204, 207 (Ind. Ct. App. 1976); *but cf. Fleener*, 656 N.E.2d at 1142-43 (Ind. 1995) (impliedly overruling this point); *see also* *Evans v. State*, 393 N.E.2d 246, 249 (Ind. Ct. App. 1979) (“We have not found any way in which the [alleged error] affected, *even potentially*, the merits of the cause.”) (emphasis added) (impliedly overruled on this point by *Fleener*, 656 N.E.2d at 1142-43).

60. *See Ewing*, 358 N.E.2d at 207.

61. *See* 9 IND. LAW ENCYC. *Criminal Law* § 738 (2021); *see also* *AGT, Inc. v. City of Lafayette*, 802 N.E.2d 1, 5 (Ind. Ct. App. 2003) (concluding that the admission of the testimony of certain witnesses was reversible error because it was “possible that the jury found [those witnesses] more credible.”).

62. *See* 5 AM. JUR. 2D *App. Rev.* § 621 (2021) (“if there is a reasonable possibility that the matter complained of might have contributed to a conviction, the error is not harmless”) (citing, *inter alia*, *Chapman v. California*, 386 U.S. 18 (1967)).

63. *See id.* (citing *Chapman*, 386 U.S. at 18).

64. *Chapman*, 386 U.S. at 24.

65. *Id.* at 23-24 (emphasis added) (footnote omitted).

66. *See Ewing v. State*, 358 N.E.2d 204, 206-07 (Ind. Ct. App. 1976).

67. *See Chapman*, 386 U.S. at 23-24.

III. *FLEENER V. STATE* AND THE PROBABLE-IMPACT TEST

The *Ewing* test and the various other formulations of reversible error under Rule 15(E) were overruled, at least implicitly, by the Indiana Supreme Court in its 1995 opinion of *Fleener v. State*.⁶⁸ In *Fleener*, the court stated that Indiana's standard for determining reversible error for procedural or evidentiary issues is different from the *Chapman* standard for constitutional errors.⁶⁹ The court further acknowledged a "variety in the language of our decisions" describing the proper standard for determining reversible error in Indiana.⁷⁰ The court then declared that, going forward, "an error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties."⁷¹

Appellate Rule 66(A), which became effective on January 1, 2001, as part of a substantial revision of Indiana's appellate rules,⁷² tracked the holding in *Fleener* nearly verbatim.⁷³ Appellate Rule 66(A) now provides Indiana's appellate practitioners and judges with the following definition of reversible error:

*No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.*⁷⁴

That standard contains three discrete components. First, of course, the Rule acknowledges that there must be an "error or defect."⁷⁵ If there is no error or defect, the appellate court may not grant relief or reverse. Second, the Rule directs the court to assess the "probable impact" of that error.⁷⁶ A "probable"

68. 656 N.E.2d 1140, 1142 (Ind. 1995). There are, to be sure, a handful of opinions from the Indiana Supreme Court prior to *Fleener* that use the term "probable impact" in the context of reversible error. See, e.g., *Short v. State*, 443 N.E.2d 298, 308 (Ind. 1982). This includes another 1995 opinion. See *Bonner v. State*, 650 N.E.2d 1139, 1141 (Ind. 1995). But *Fleener* is the landmark case here as it demonstrates an explicit acknowledgement by the court of the lack of consistency in its case law on this issue and an intentional break from that case law to use the probable-impact test going forward. *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995).

69. *Fleener*, 656 N.E.2d at 1141-42.

70. *Id.* at 1142.

71. *Id.*

72. See generally George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275, 1275-309 (2000) (describing, rule-by-rule, the turn-of-the-century overhaul of the Indiana Rules of Appellate Procedure).

73. IND. R. APP. P. 66(A).

74. *Id.* (emphasis added).

75. *Id.*

76. *Id.*

impact is an impact that is “[l]ikely to exist,”⁷⁷ that is, an impact that is more likely than not to have occurred. That impact is to be assessed “in light of all the evidence in the case.”⁷⁸ And, third, that probable impact is to be measured against the “substantial rights of the parties” such that, if the probable impact of the error is “sufficiently minor so as not to affect” those rights, there is no reversible error.⁷⁹ This is the probable-impact test.

The Rule’s reference to the “substantial rights of the parties” must refer to rights other than constitutional rights, as the Indiana Supreme Court stated in *Fleener* that the probable-impact standard differs from the *Chapman* standard,⁸⁰ and an error with respect to a constitutional right would simply require that the *Chapman* standard be applied.⁸¹ In the context of the probable-impact test, then, “substantial rights” are “essential rights” relevant to “the outcome of a lawsuit” and “capable of legal enforcement and protection”⁸² And “essential” in this context means “the essence or intrinsic nature of something.”⁸³ In other words, although Rule 66(A) uses the abstract term “substantial rights,” in its operation and effect the Rule speaks to actual claims, evidence, and outcomes.⁸⁴

Indeed, the probable-impact test directs the court on appeal to assess the error “in light of all the evidence in the case[.]”⁸⁵ That is, the appellate court should not focus on the error in isolation but in the context of the entire record on appeal.⁸⁶ This language also shows that the probable-impact test is different from the *Chapman* standard.⁸⁷ The *Chapman* standard asks an appellate court to consider whether a discrete error may have contributed to the judgment.⁸⁸ In contrast, the probable-impact test requires that the court on appeal consider the likely impact of the error in light of the evidence as a whole.⁸⁹ That is, under the Indiana rule, the error is not viewed as discrete, and the court on appeal should not view the record as if the error did not occur.⁹⁰

77. *Probable*, BLACK’S LAW DICTIONARY (11th ed. 2019).

78. IND. R. APP. P. 66(A).

79. *Id.*

80. *Fleener v. State*, 656 N.E.2d at 1142.

81. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Bush v. State*, 775 N.E.2d 309, 311 (Ind. 2002) (applying the same standard for errors under the Indiana Constitution).

82. *See Fleener*, 656 N.E.2d at 1142; *Substantial Right*, BLACK’S LAW DICTIONARY (11th ed. 2019).

83. *Essential*, BLACK’S LAW DICTIONARY (11th ed. 2019).

84. *See Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018).

85. IND. R. APP. P. 66(A).

86. *See, e.g., Fleener*, 656 N.E.2d at 1142.

87. *Compare* IND. R. APP. P. 66(A), *with Chapman v. California*, 386 U.S. 18, 23-24 (1967).

88. *Chapman*, 386 U.S. at 23-24.

89. IND. R. APP. P. 66(A).

90. *Id.*; *see, e.g., Lewis v. State*, 34 N.E.3d 240, 248 (Ind. 2015). This distinction between the *Chapman* standard, which focuses first on the discrete error, and the Appellate Rule 66(A) standard, which focuses on the totality of the record, has not always been clear in Indiana’s case law. Indeed, in one appeal, that lack of clarity resulted in four different appellate opinions across

Moreover, nothing in the language of the probable-impact test places the appellate burden of persuasion on a party other than the appellant.⁹¹ Thus, it is the appellant's burden under the probable-impact test to show not just error but reversible error in light of the entire record.⁹² This again shows a critical difference between Indiana's rule and the *Chapman* standard.⁹³ Under *Chapman*, once an appellant shows error, the burden on appeal shifts to the beneficiary of the error to show that the error was harmless.⁹⁴ Under the Indiana rule, the burden to show reversible error never shifts from the appellant.

Thus, the probable-impact test instructs the court on appeal not to reverse where the probable impact of an error, in light of the whole of the record on appeal, was "sufficiently minor" in its effect upon the outcome in the trial court.⁹⁵ Asking the court on appeal to determine whether an error is "sufficiently minor" is a command that the court assess its degree of confidence in the outcome despite the error. That is, if the court on appeal, after having reviewed the entirety of the record, inclusive of the error, can say with confidence that the outcome in the trial court was correct notwithstanding the error, the court on appeal must affirm.⁹⁶

Under the probable-impact test, the burden for an appellant to show reversible error is greater than the burden under *Ewing*, at least when the error is a non-constitutional error.⁹⁷ The probable-impact test requires the appellant to

Indiana's two appellate courts. Specifically, in *Hall v. State*, the majority opinion of the Indiana Court of Appeals reversed the trial court's denial of the defendant's constitutional right to cross-examine a witness, which prevented the defendant from presenting exculpatory evidence to the jury. 15 N.E.3d 1107, 1119-21 (Ind. Ct. App. 2014), *vacated*. In reversing, the majority focused on whether the erroneous omission may have contributed to the verdict. *Id.* at 1121. The dissent, however, concluded that any error was harmless based on the overwhelming value of the unchallenged evidence. *Id.* at 1124 (Vaidik, J., concurring in part and dissenting in part). On further appeal to the Indiana Supreme Court, a majority of that court, in a 3-2 opinion, agreed with Judge Vaidik that any error was "harmless beyond a reasonable doubt" in light of the whole of the record. *Hall v. State*, 36 N.E.3d 459, 468, 474 (Ind. 2015). In a dissent for himself and Chief Justice Rush, Justice Rucker stated: "I disagree with my colleagues' apparent view that in conducting a *Chapman* harmless-error analysis our focus is whether 'an error is harmless beyond a reasonable doubt . . . on review of the whole record.' Instead the question is whether 'the State can show beyond a reasonable doubt that the error *did not contribute to the verdict*.'" *Id.* at 474 (Rucker, J., dissenting) (citations omitted) (emphasis and ellipsis in original).

91. See IND. R. APP. P. 66(A).

92. *Id.*

93. Compare IND. R. APP. P. 66(A), with *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

94. *Chapman*, 386 U.S. at 23-24.

95. IND. R. APP. P. 66(A).

96. See, e.g., *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020) (affirming the decision of the trial court by concluding "[i]n light of all the evidence before the court, we can say with confidence that the probable impact of [the error] . . . was sufficiently minor so as not to affect [Plaintiff's] substantial rights").

97. Again, for constitutional errors, the *Chapman* standard applies. Compare e.g., *Bush v.*

demonstrate that an error's impact on the outcome was *probably* more than minor.⁹⁸ The *Ewing* rule, again, was a reasonable *possibility* test, not a reasonable *probability* test.⁹⁹ As the United States Court of Appeals for the Seventh Circuit has stated succinctly, a possibility is "less than a probability."¹⁰⁰

Accordingly, the probable-impact test rejects the *Ewing* reasonable possibility test. Under the probable-impact test, the appellant bears the burden to show, in light of the whole of the record, that the error more likely than not influenced the outcome in the trial court to such an extent that the appellate court should not have confidence in that outcome.¹⁰¹

IV. INDIANA SUPREME COURT CASE LAW APPLYING THE PROBABLE-IMPACT TEST

The Indiana Supreme Court has applied the probable-impact test in seventy-five opinions following the court's holding in *Fleener*.¹⁰² The vast majority of those opinions were in the seven years that immediately followed *Fleener*.¹⁰³ After 2002, there was a significant decline in the court's explicit use of the probable-impact test.¹⁰⁴ Around that same time, however, the court started applying a related "with confidence" standard to determine reversible error.¹⁰⁵ More recently, the court has invoked a reasonable-jury standard, which clarifies that the court on appeal neither asks how a fact finder actually weighed the evidence nor reweighs the evidence for itself but, instead, determines the likely weight assigned to the evidence by the fact finder.¹⁰⁶

State, 775 N.E.2d 309, 311 (Ind. 2002), with *Ewing v. State*, 358 N.E.2d 204, 204 (Ind. Ct. App. 1976)

98. See IND. R. APP. P. 66(A).

99. See *Ewing*, 358 N.E.2d at 206-07; see also *Chapman*, 386 U.S. at 23-24.

100. *Evenson v. Osmose Wood Preserving Co.*, 899 F.2d 701, 705 (7th Cir. 1990).

101. See IND. R. APP. P. 66(A).

102. A search of Westlaw for Indiana Supreme Court opinions after October 31, 1995 (the hand-down date of *Fleener v. State*) to use "probable impact" returned a total of seventy-eight opinions as of March 16, 2021. However, three of those seventy-eight opinions use the term only in the context of a Trial Rule 59 motion for a new trial based on newly discovered evidence. See *Kahlenbeck v. State*, 719 N.E.2d 1213, 1218 (Ind. 1999); see also *Reed v. State*, 702 N.E.2d 685, 691 (Ind. 1998); *Bradford v. State*, 675 N.E.2d 296, 302 (Ind. 1996); see *infra* Section V.D.

103. See *supra* note 102 (sorting by date) (search results as of March 16, 2021).

104. *Id.*

105. *E.g.*, *Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004) (noting that when a reviewing court "cannot say with confidence" that an error was sufficiently minor to lead to the same result, it should remand to the trial court for reconsideration or correct the error on appeal).

106. *E.g.*, *Ashworth v. State*, 901 N.E.2d 567, 574-75 (Ind. Ct. App. 2009) (holding that a reasonable jury could find the defendant guilty when there was "substantial independent evidence of guilt apart from evidence that was erroneously admitted").

A. 1995–2002: The High-Water Mark for the Probable-Impact Test

Of the Indiana Supreme Court's seventy-five opinions to have applied the probable-impact test, forty-seven were handed down by the court by the end of 2002.¹⁰⁷ That is approximately sixty-three percent of the court's opinions coming in the first seven years after *Fleener*, and several of those opinions use "probable impact," but do not engage in a substantial analysis of the probable-impact test.¹⁰⁸

Nonetheless, in twenty-two of those opinions, the Indiana Supreme Court did engage in a substantial analysis of the probable impact of an error or alleged error.¹⁰⁹ In one example, *Daniels v. State*, the defendant appealed his conviction for murder and related offenses following a shooting.¹¹⁰ At his trial, the State moved to admit into evidence a 9.5-by-15-inch calendar seized from the defendant's residence, which the trial court granted over the defendant's objection.¹¹¹ The calendar identified the defendant as "Jay-Dog," the name of the shooter that had been given to police by an eyewitness.¹¹² That same page also contained a drawing of a handgun, the defendant's initials, and "gang-related sayings" such as "West Side Gangsta," "Hell Bound," "Devilz Ain't [expletive]," "Gun Play," and "2TG."¹¹³ The back of the calendar had another drawing of a gun and named various types of firearms.¹¹⁴ In describing the calendar to the jury, the

107. See *supra* note 102 (sorting by date) (search results as of March 16, 2021).

108. See, e.g., *McClain v. State*, 675 N.E.2d 329, 331-32 (Ind. 1996) (concluding that there is no ground for reversal in the erroneous admission of evidence "where it is merely cumulative of other evidence admitted"). Indeed, of the court's seventy-five opinions since *Fleener* to use the term "probable impact" in the context of appellate review, twelve also state the rule that there is no reversible error in the erroneous admission of evidence that is "merely cumulative" of properly admitted evidence. See *supra* note 102 (searching within results for "merely cumulative").

109. See *Majors v. State*, 773 N.E.2d 231, 239 (Ind. 2002); *Wilson v. State*, 770 N.E.2d 779, 802 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275, 280 (Ind. 2002); *Buchanan v. State*, 767 N.E.2d 967, 970 (Ind. 2002); *Corbett v. State*, 764 N.E.2d 622, 628 (Ind. 2002); *Hopkins v. State*, 759 N.E.2d 633, 638-39 (Ind. 2001); *Stewart v. State*, 754 N.E.2d 492, 496 (Ind. 2001); *Stephenson v. State*, 742 N.E.2d 463, 490-91 (Ind. 2001); *Swingley v. State*, 739 N.E.2d 132, 134 (Ind. 2000); *Small v. State*, 736 N.E.2d 742, 749 (Ind. 2000); *Lowrimore v. State*, 728 N.E.2d 860, 868 (Ind. 2000); *Turben v. State*, 726 N.E.2d 1245, 1247-48 (Ind. 2000); *Miller v. State*, 720 N.E.2d 696, 705 (Ind. 1999); *Shane v. State*, 716 N.E.2d 391, 398 (Ind. 1999); *Berry v. State*, 715 N.E.2d 864, 867 (Ind. 1999); *Williams v. State*, 714 N.E.2d 644, 652 (Ind. 1999); *Willey v. State*, 712 N.E.2d 434, 442 (Ind. 1999); *Ford v. State*, 704 N.E.2d 457, 460 (Ind. 1998); *Timberlake v. State*, 690 N.E.2d 243, 260 (Ind. 1997); *Mason v. State*, 689 N.E.2d 1233, 1236-37 (Ind. 1997); *Daniels v. State*, 683 N.E.2d 557, 559 (Ind. 1997); *Cook v. State*, 675 N.E.2d 687, 691 (Ind. 1996).

110. 683 N.E.2d at 557.

111. *Id.* at 558-59.

112. *Id.* at 558.

113. *Id.* at 559.

114. *Id.*

State's witness referred to the writings on it as "gang graffiti."¹¹⁵

On appeal, the defendant argued that the trial court erred when it admitted the calendar into evidence because the probative value of the calendar was "substantially outweighed by the danger of unfair prejudice."¹¹⁶ The Indiana Supreme Court agreed.¹¹⁷ The court concluded that the calendar and the witness testimony about it "had a clear prejudicial effect" while presenting "only slight probative value in identifying the defendant" by the name given to police by the eyewitness.¹¹⁸

Nonetheless, the court held that the probable impact of the calendar and witness testimony on the jury did not affect the outcome.¹¹⁹ In reaching that holding, the court emphasized the relationship of the erroneously admitted calendar to the other, properly admitted evidence.¹²⁰ In particular, the court noted that the victim's sister was an eyewitness to the shooting, that "[s]he knew . . . the defendant . . . before the shooting," and that "she unequivocally identified the defendant in court as her brother's assailant."¹²¹ On balance, then, the court concluded that that testimony rendered "the admission and use of the calendar at trial" insignificant to the defendant's conviction.¹²²

Conversely, in *Mason v. State*, the court held that, in light of the whole of the record, the erroneous admission of evidence presented "an unacceptable risk" that the jury's verdict against the defendant was incorrect.¹²³ In *Mason*, a detective began surveilling the defendant after the detective had received a tip from a confidential informant that the defendant was dealing in heroin.¹²⁴ The detective observed people enter the defendant's apartment, stay a short time, and leave.¹²⁵ The detective then observed the defendant load his vehicle with clothes, suggesting a lengthy trip elsewhere.¹²⁶ Three weeks later, the confidential informant told the detective that the defendant had returned to town and was again dealing from his apartment.¹²⁷ The detective then obtained a search warrant for the defendant's vehicle, which led to the discovery of \$325 and 3.0705 grams of heroin.¹²⁸

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*; see also *Shane v. State*, 716 N.E.2d 391, 398 (1999) (holding that the jury was unlikely to have been "swayed" by the erroneously admitted evidence given the rest of the State's evidence).

123. 689 N.E.2d 1233, 1236-37 (Ind. 1997).

124. *Id.* at 1235.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

The State charged the defendant with dealing in a narcotic drug and possession of a narcotic drug, with the dealing charge as a Class A felony because there was more than three grams of heroin.¹²⁹ The confidential informant did not testify at the defendant's trial, but the detective, over the defendant's hearsay objections, twice testified that the confidential informant had identified the defendant as dealing in heroin.¹³⁰ The prosecutor then repeated that testimony during closing argument.¹³¹

On appeal, the defendant argued that the trial court erred when it overruled his hearsay objections.¹³² The Indiana Supreme Court agreed that the trial court erred.¹³³ The court stated that it had “long ago instructed that the content of an informant's tip should not be communicated to the jury as evidence that the fact asserted therein is true.”¹³⁴ The court noted that an exception to hearsay to explain the course of the State's investigation was not relevant here, as the defendant's defense was directed “toward establishing that he was not dealing heroin but was merely a user.”¹³⁵

The court then went on to assess the probable impact of the hearsay on the defendant's conviction for dealing in heroin,¹³⁶ and the court held that the probable impact was “unacceptable” for four reasons.¹³⁷ First, “the hearsay ‘directly implicated’” the defendant in the charge of dealing.¹³⁸ “Second, the facts asserted in the hearsay were not” otherwise in the record.¹³⁹

Third, and significantly, although “the evidence was sufficient to support” the defendant's conviction, the evidence “was not overwhelming.”¹⁴⁰ In particular, the evidence of dealing, as opposed to the evidence of possession—which the defendant had largely conceded by arguing he was a user, not a dealer—was “circumstantial” and turned on the detective's testimony that the amount of heroin seized under the warrant was a “three to five day supply,” which he testified “was more consistent with the amount to be found on a dealer rather than a user.”¹⁴¹ The circumstantial evidence also included the detective's “testimony that he observed no track marks or other indicia of heroin use” on the defendant.¹⁴² And, fourth, the court noted that the prosecutor had emphasized the erroneously

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1235-36.

133. *Id.* at 1238.

134. *Id.* at 1236 (citing, *inter alia*, *Glover v. State*, 251 N.E.2d 814, 818 (Ind. 1969)).

135. *Mason*, 689 N.E.2d at 1236.

136. *Id.* at 1236-37.

137. *Id.*

138. *Id.* at 1237.

139. *Id.*

140. *Id.*

141. *Id.* at 1236.

142. *Id.*

admitted hearsay during closing argument.¹⁴³

“Considering all of the above,” the court held, “admission of the informant’s tips prejudiced [the defendant’s] substantial rights.”¹⁴⁴ That is, the court concluded that the balance of the evidence was such that the probable impact of the erroneously admitted hearsay on the outcome was significant.¹⁴⁵ In so concluding, the court was saying that it could not trust the outcome in light of the likely weight the jury had assigned to the erroneously admitted evidence.¹⁴⁶ The court therefore reversed the defendant’s conviction for dealing and remanded for a new trial.¹⁴⁷

Daniels and *Mason* represent the Indiana Supreme Court’s application of the probable-impact test during the 1995-to-2002 era.¹⁴⁸ In both opinions, the court first determined whether there was an error.¹⁴⁹ Finding error, the court then assessed those errors considering all the evidence.¹⁵⁰ And, finally, the court measured the likely impact the errors had on the outcomes in light of the whole record.¹⁵¹ In *Daniels*, the court concluded that the erroneously admitted evidence had an insubstantial effect on the verdict in light of the likely persuasive value of an eyewitness’s testimony and in-court identification of the defendant as the assailant.¹⁵² Conversely, in *Mason*, the court concluded that, as the error was prejudicial, and the remainder of the evidence was thin, the erroneously admitted evidence rendered the outcome unreliable.¹⁵³

Notably, those opinions use language that reflects the likely weight given by the fact finder to pieces of evidence and to the evidence as a whole.¹⁵⁴ Similarly, in several other opinions from this era the court held that erroneously admitted evidence likely only had a “slight(ly),”¹⁵⁵ “minimal,”¹⁵⁶ or “negligible”¹⁵⁷ impact on the outcome. In other opinions, the court stated that the remainder of the evidence was “overwhelming,”¹⁵⁸ thereby reducing the likely impact of the error.

143. *Id.*

144. *Id.*

145. *See id.*

146. *See id.* at 1236-37.

147. *Id.* at 1237-38.

148. *See id.* at 1233; *Daniels v. State*, 683 N.E.2d 557 (1997).

149. *Mason*, 689 N.E.2d at 1236; *Daniels*, 683 N.E.2d at 559.

150. *Mason*, 689 N.E.2d at 1236; *Daniels*, 683 N.E.2d at 559.

151. *Mason*, 689 N.E.2d at 1237; *Daniels*, 683 N.E.2d at 559.

152. 683 N.E.2d at 559.

153. 689 N.E.2d at 1237.

154. *Id.* at 1236-37; *Daniels*, 683 N.E.2d at 559.

155. *Daniels*, 683 N.E.2d at 559; *see also* Willey v. State, 712 N.E.2d 434, 442 (Ind. 1999); Ford v. State, 704 N.E.2d 457, 460 (Ind. 1998).

156. *Majors v. State*, 773 N.E.2d 239, 239 (Ind. 2002).

157. *Small v. State*, 736 N.E.2d 742, 749 (Ind. 2000).

158. *Wilson v. State*, 770 N.E.2d 799, 802 (Ind. 2002); *see also* *Buchanan v. State*, 767 N.E.2d 967, 970 (Ind. 2002) (affirming based on “the substantial quantity of incriminating evidence presented”); *Lowrimore v. State*, 728 N.E.2d 860, 868 (Ind. 2000) (affirming based on the State’s

In other words, in engaging in the probable-impact analysis, at least for evidentiary errors, the court routinely assessed the likely weight a reasonable fact finder would have given to the evidence in question and the evidence as a whole.¹⁵⁹

Further, and significantly, the court's opinion in *Mason* makes clear that the probable-impact test is not equivalent to a review for the sufficiency of the evidence supporting the judgment.¹⁶⁰ The court in *Mason* found that the evidence there was sufficient to support the judgment; nonetheless, the court reversed because the State's evidence was not overwhelming, and the probable impact of the error undermined the court's trust in the outcome.¹⁶¹ And that analysis is consistent with the language of the probable-impact test itself, which directs the court on appeal to assess the error together with the whole of the record.¹⁶² Thus, the probable-impact test is not simply a sufficiency-of-the-evidence test.

Finally, the court's conclusion in *Mason* that the impact of the error presented an "unacceptable risk" of an erroneous judgment is not unusual in the court's opinions from this era.¹⁶³ In another opinion, the court held that the erroneously admitted evidence did not "cast[] doubt on the reliability of the trial result."¹⁶⁴ The terms "unacceptable risk" and "casts doubt" reflect a fundamental proposition that the court would soon make more clear: the probable-impact test is a test of the appellate court's confidence in the outcome.¹⁶⁵

B. The "With Confidence" Standard

Among the various standards for reversible error promulgated under former Appellate Rule 15(E), in *Day v. State* the Indiana Supreme Court held that, "[w]hen a reviewing court cannot say with confidence" that a trial court would have imposed the same sentence for a conviction following some impermissible sentencing consideration, the court on appeal should remand for resentencing "or correct the sentencing on appeal."¹⁶⁶ *Day* is one of only two Indiana Supreme

"strong evidence" of the defendant's guilt, namely, multiple eyewitnesses and the defendant's own confession); *Cook v. State*, 675 N.E.2d 687, 691 (Ind. 1996) (affirming based on the "overwhelming" evidence of guilt).

159. *See also* *Tunstall v. Manning*, 124 N.E.3d 1193, 1200 (stating that the probable impact of evidence requires a consideration of "the evidence's likely impact on a reasonable, average jury").

160. 689 N.E.2d at 123; *see also* *Hopkins v. State*, 759 N.E.2d 633, 638-39 (Ind. 2001) (finding reversible error even though the State presented sufficient evidence); *but see infra* Section V.B.

161. 689 N.E.2d at 1237.

162. *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995); *see also supra* Part III.

163. 689 N.E.2d at 1236-37.

164. *Timberlake v. State*, 690 N.E.2d 243, 260 (Ind. 1997).

165. *See, e.g., Day v. State*, 560 N.E.2d 641, 643 (Ind. 1990).

166. *Id.* at 643; *see also* IND. R. APP. P. 7(B).

Court opinions prior to *Fleener* to apply this “with confidence” standard in the context of appellate review.¹⁶⁷

Day’s “with confidence” standard appeared to be implicitly overruled by the holding in *Fleener* along with the other Rule 15(E) standards.¹⁶⁸ Indeed, less than one year after *Fleener*, the court made clear that appellate review of a trial court’s sentencing considerations requires the court on appeal to assess the “probable impact” of erroneous considerations, bringing appellate review of criminal sentences into the same probable-impact framework as *Fleener*.¹⁶⁹

But the with-confidence standard quickly reappeared in the court’s opinions.¹⁷⁰ In the 1997 opinion of *Angleton v. State*, the court applied the with-confidence standard in reviewing an erroneous sentence.¹⁷¹ In doing so, the court cited *Day* and made no mention of *Fleener*.¹⁷² The court did the same in the 2001 opinion of *McCann v. State*, but citing *Angleton* instead of *Day*.¹⁷³ From that point, the with-confidence standard became more commonplace, with nine opinions from the court applying that standard in lieu of the probable-impact test between 2001 and 2007.¹⁷⁴ Those opinions include the court’s landmark opinions in *Trusley v. State*¹⁷⁵ and *Anglemyer v. State*.¹⁷⁶

The reemergence of the with-confidence standard made good sense: the probable-impact test measures the appellate court’s confidence in the outcome.¹⁷⁷ The *Mason* court alluded to this when it concluded that the probable impact of the trial court’s error presented an “unacceptable risk” to the integrity of the outcome.¹⁷⁸ Likewise, the court’s assessment in another opinion that erroneously admitted evidence did not “cast[] doubt on the reliability of the trial result” spoke

167. A search on Westlaw of Indiana Supreme Court opinions prior to October 31, 1995 (the hand down date of *Fleener*) to use the term “with confidence” results in two opinions to use that term in the context of reversible error. The second opinion, *Lamb v. Wenning*, used the term in the context of not being able to say with confidence what legal standard the trial court used to decide the case. 600 N.E.2d 96, 99 (Ind. 1992).

168. See *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995).

169. *Williams v. State*, 669 N.E.2d 1372, 1385-86 (Ind. 1996).

170. See, e.g., *Angleton v. State*, 686 N.E.2d 803, 815 (Ind. 1997).

171. *Id.*

172. *Id.*

173. 749 N.E.2d 1116, 1121 (Ind. 2001).

174. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007); *Haas v. State*, 849 N.E.2d 550, 552 (Ind. 2006); *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001); *McDonald v. State*, 868 N.E.2d 1111, 1114 (Ind. 2007); *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007); *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002); *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007); *Trusley v. State*, 829 N.E.2d 923, 927 (Ind. 2005); *Witmer v. State*, 800 N.E.2d 571, 572-73 (Ind. 2003).

175. 829 N.E.2d 923.

176. 868 N.E.2d 482.

177. See *supra* Part III.

178. 689 N.E.2d at 1236-37.

to the court's confidence in the outcome.¹⁷⁹ The with-confidence standard and the probable-impact test are not at odds; the with-confidence standard implements the probable-impact test.

C. The Reasonable-Jury Standard

The case law after 2007 has been more sparse in explaining how the Indiana Supreme Court assesses that an error is or is not reversible. Only twenty-eight opinions from the court since 2002 use the term "probable impact," slightly more than one per year on average.¹⁸⁰ Another five opinions after 2007 use the with-confidence standard in discussing reversible error.¹⁸¹

The majority of those probable-impact opinions keep with the theme of the prior opinions. Although, as before, several opinions simply state the rule without analysis,¹⁸² eleven of the twenty-eight opinions do engage in a substantial analysis of the probable-impact test, and those analyses are in line with *Daniels, Mason*, and the court's body of law.¹⁸³

One of these more recent opinions is especially notable not just for applying the probable-impact test but for adding greater clarity to it. In *Tunstall v. Manning*, the defendant rear-ended the plaintiff's vehicle.¹⁸⁴ The plaintiff suffered pain from that accident for more than one year afterward.¹⁸⁵ She saw a medical doctor, and he concluded that she was physically impaired as a result of the collision.¹⁸⁶

At the ensuing jury trial, the defendant sought to introduce evidence that plaintiff's doctor had a history of professional discipline, including having had his license previously placed on probation.¹⁸⁷ The trial court denied the defendant's request on the ground that that information was not relevant because the doctor's license "was in good standing at the time of trial."¹⁸⁸

On appeal, the Indiana Supreme Court concluded that the trial court abused its discretion when it denied the defendant the opportunity to introduce "an expert

179. *Timberlake v. State*, 690 N.E.2d 243, 260 (Ind. 1997).

180. *See supra* note 102 (sorting by date) (search results as of March 16, 2021).

181. *See supra* note 167 (sorting by date) (search results as of March 16, 2021);

182. *E.g.*, *Gibson v. State*, 133 N.E.3d 673, 695 (Ind. 2019).

183. *Tunstall v. Manning*, 124 N.E.3d 1193, 1200 (Ind. 2019); *McAllister v. State*, 91 N.E.3d 554, 562-63 (Ind. 2018); *Lewis*, 34 N.E.3d at 248; *Blount v. State*, 22 N.E.3d 559, 568-69 (Ind. 2014); *Kane v. State*, 976 N.E.2d 1228, 1232-33 (Ind. 2012); *Gonzalez v. State*, 929 N.E.2d 699, 702-03 (Ind. 2010); *Camm v. State*, 908 N.E.2d 215, 228 (Ind. 2009); *Gault v. State*, 878 N.E.2d 1260, 1268 (Ind. 2008); *Rohr v. State*, 866 N.E.2d 242, 247 (Ind. 2007); *Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005); *Bassett v. State*, 795 N.E.2d 1050, 1054 (Ind. 2003).

184. 124 N.E.3d at 1195.

185. *Id.*

186. *Id.* at 1195-96.

187. *Id.* at 1196.

188. *Id.*

witness's professional licensure status and the reasons for professional discipline," as that information "may be admissible to impeach that expert's credibility."¹⁸⁹ However, the court held that the trial court's error was not reversible.¹⁹⁰ In so holding, the court stated, "[w]hen making [the probable-impact] determination, we consider the evidence's likely impact on a reasonable, average jury."¹⁹¹ The court then assessed the likely impact of the erroneously excluded evidence in light of the totality of the record, noting, first, that the defendant "methodically attacked" the doctor's credibility "throughout trial" even without the professional-discipline evidence.¹⁹² And the court noted, second, that the plaintiff had "presented substantial and consistent testimony" about how the injury "had a significant, permanent impact on her life," which was evidence that was independent of the doctor's testimony.¹⁹³

In other words, as it had done in *Daniels* and *Mason*, in *Tunstall*, the court first found there was error. The court then assessed that error in light of the whole record.¹⁹⁴ And the court then measured that error's likely impact on "a reasonable, average" fact finder.¹⁹⁵ The court's holding to affirm notwithstanding the trial court's error reflected Indiana's Supreme Court's confidence that the judgment for the plaintiff was not incorrect when the defendant had attacked the doctor's credibility, albeit on other grounds, and when the fact finder also was already in a position to assess the plaintiff's injuries, again, albeit on other grounds.

The *Tunstall* court's use of a "reasonable jury" standard confirms that the probable-impact test assesses the likely weight, not the actual weight, assigned to evidence by the fact finder.¹⁹⁶ As noted earlier, in the court's probable-impact analyses, the court often uses language that suggests an assessment of the weight a fact finder assigned to evidence or would have assigned to evidence.¹⁹⁷ The reasonable-jury standard clarifies that the court on appeal does not ask how a fact finder actually weighed the evidence, and the court does not reweigh the evidence for itself.¹⁹⁸ Instead, the court determines the *likely* weight assigned to evidence by the fact finder.¹⁹⁹ Just as the with-confidence standard clarified the probable-impact test,²⁰⁰ so too does the reasonable-jury standard.

189. *Id.* at 1201.

190. *Id.* at 1195.

191. *Id.* at 1200.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See supra* Part IV.

197. *See supra* Section IV.A.

198. *See Tunstall*, 124 N.E.3d at 1200.

199. *See id.*

200. *See supra* Section V.B.

V. INCONSISTENCIES WITHIN IN THE POST-*FLEENER* CASE LAW

The great majority of the Indiana Supreme Court's opinions since *Fleener* demonstrate consistent application of the probable-impact test.²⁰¹ However, more than a quarter of a century later, a handful of outliers have emerged. There have been four inconsistencies in particular that have occurred since *Fleener*: conflating the probable-impact test with the *Chapman* standard;²⁰² confusing the probable-impact test with sufficiency review;²⁰³ suggesting that the measurement of an error's impact is different than a probability;²⁰⁴ and relying on the Indiana Rules of Trial Procedure as authority for an appellate standard of review.²⁰⁵

A. Conflating the Probable-Impact Test with the Chapman Standard

In *Fleener*, the Indiana Supreme Court made clear that the probable-impact test is a test apart from the *Chapman* standard for determining reversible error in a constitutional context.²⁰⁶ Similarly, not even six years later in *Stephenson v. State*, the court again expressly distinguished the appellant's arguments between "state evidentiary or procedural law," to which the probable-impact test applied, from his "constitutional" arguments, to which *Chapman* would have applied.²⁰⁷ And the existence of Appellate Rule 66(A) and its adoption of the *Fleener* holding make clear that the probable-impact test is not one-and-the-same with the *Chapman* standard.²⁰⁸

Nonetheless, in one opinion between *Fleener* and *Stephenson*, and prior to the adoption of Appellate Rule 66(A), the court conflated the probable-impact test and the *Chapman* standard.²⁰⁹ In *Lambert v. State*, Indiana's Supreme Court held that the trial court erroneously admitted irrelevant evidence.²¹⁰ The court then reviewed whether the error was reversible under both the probable-impact test "as well as" the "similar" *Chapman* standard.²¹¹ Again, that approach is contrary to the probable-impact test and the case-law history leading up to *Fleener*, and *Lambert* appears to be a one-off opinion in this respect.²¹²

201. *See supra* Part IV.

202. *See infra* Section V.A.

203. *See infra* Section V.B.

204. *See infra* Section V.C.

205. *See infra* Section V.D.

206. 656 N.E.2d at 1141-42.

207. 742 N.E.2d at 490-91 (citing *Fleener*, 656 N.E.2d at 1142).

208. *See supra* Part III.

209. *See Lambert v. State*, 675 N.E.2d 1060 (Ind. 1996).

210. *Id.* at 1064.

211. *Id.* at 1064-65.

212. *See supra* Part III and Section IV.A.

B. Confusing the Probable-Impact Test with Sufficiency Review

A more recent issue has confused the probable-impact test with sufficiency review. As explained above, the two are not the same;²¹³ the probable-impact test measures the likely degree to which an error may have influenced the outcome, while sufficiency review merely asks whether there is enough evidence to support the judgment.²¹⁴ The clear weight of Indiana Supreme Court case law makes this distinction implicitly, but a handful of cases also make it explicitly.²¹⁵ As the court stated in *Mason v. State* and other opinions, reversible error may occur even when the evidence is sufficient to support the judgment.²¹⁶ And the language of Appellate Rule 66(A), which asks the court on appeal to assess the error in light of the whole of the record, likewise makes this distinction.²¹⁷

Nonetheless, two opinions from the last decade determined that evidentiary errors were harmless based entirely on a sufficiency review.²¹⁸ Specifically, in *Turner v. State*²¹⁹ and in *Hoglund v. State*,²²⁰ Indiana's Supreme Court affirmed the trial courts' judgments despite evidentiary errors because the evidence "apart from" the erroneous evidence was "sufficient" to support the judgments.²²¹ To consider the evidence "apart from" the errors is contrary to the probable-impact test, and these opinions are incompatible with the clear weight of Indiana Supreme Court authority.²²²

C. The "Grave Doubt" and "With Certainty" Deviations

One of *Fleener's* objectives was to eliminate the various standards for how to determine reversible error.²²³ Unfortunately, two other tests have appeared recently that are inconsistent with the more-likely-than-not probable-impact test.

First, in the 2009 opinion of *Lafayette v. State*, Indiana's Supreme Court stated that a court on appeal should reverse only if the court is "left in grave doubt" about the outcome in the trial court.²²⁴ *Lafayette* makes no mention of the

213. See *supra* Part III and Section IV.A.

214. *Mason v. State*, 689 N.E.2d 1233, 1236-37 (Ind. 1997).

215. See, e.g., *id.*

216. 689 N.E.2d at 1237; see also *Hopkins v. State*, 759 N.E.2d 633, 638-39 (Ind. 2001) (finding reversible error even though the State presented sufficient evidence).

217. IND. R. APP. P. 66(A); see also *supra* Part III.

218. *Turner v. State*, 953 N.E.2d 1039 (Ind. 2011); *Hoglund v. State*, 962 N.E.2d 1230 (Ind. 2012).

219. 953 N.E.2d at 1059, 1054.

220. 962 N.E.2d at 1238-40.

221. *Turner*, 953 N.E.2d at 1059; *Hoglund*, 962 N.E.2d at 1238.

222. See *supra* Part III and Section IV.A.

223. See 656 N.E.2d at 1141-42.

224. 917 N.E.2d 660, 666-67 (Ind. 2009) (quoting *Hardin v. State*, 611 N.E.2d 123, 132 (Ind. 1993); see also *Williams v. State*, 43 N.E.3d 578, 583 (Ind. 2015) (also using the "grave doubt" language) (quoting *Lafayette*, 917 N.E.2d at 666-67).

probable-impact test, *Fleener*, or Appellate Rule 66(A).²²⁵

Conversely, in the 2020 opinion of *Gammons v. State*, the court stated that reversal is appropriate when the court cannot say “with certainty” that the result would have been the same without the error.²²⁶ And in *LaPorte Community School Co. v. Rosales*, the court stated that it was “unable to conclude that the jury’s verdict would have been the same” absent the error.²²⁷ *Rosales* quotes the probable-impact test from Appellate Rule 66(A) and then quotes a 2002 opinion “[a]pplying” Rule 66(A).²²⁸ But the 2002 opinion in fact makes no mention of Rule 66(A) and, instead, quotes opinions from 1990 and 1992, prior to *Fleener* and the adoption of Rule 66(A).²²⁹

The *Lafayette*, *Gammons*, and *Rosales* standards move the measurement of the impact of an error too far to one side and opposing sides at that. The probable-impact test is a more-likely-than-not standard.²³⁰ Setting the bar at “grave doubt” or “certainty” calls for more than that, and these two standards are outliers when compared to the weight of Indiana Supreme Court authority on how to measure the likelihood that an error is reversible.

D. Misplaced Reliance on Indiana Trial Rule 61

Finally, many opinions do not mention *Fleener* or Appellate Rule 66(A) but instead cite Indiana Trial Rule 61 as authority for determining reversible error. Trial Rule 61 states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the

225. *See id.*

226. 148 N.E.3d 301, 306 (Ind. 2020); *see also* *LaPorte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 525 (Ind. 2012) (stating that the court was “unable to conclude that the jury’s verdict would have been the same”). *Rosales* and *Gammons* involved errors in jury instructions. In another post-*Fleener* opinion, however, the Indiana Supreme Court stated, more consistently with the probable-impact test, that errors in the instruction of a jury “are harmless where a conviction is clearly sustained by the evidence” and the court on appeal can say “with . . . confidence” that the verdict would have been the same had the error not occurred. *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (quoting *White v. State*, 675 N.E.2d 345, 349 (Ind. Ct. App. 1996)).

227. 963 N.E.2d at 525.

228. *Id.* (quoting *Wal-Mart Stores v. Wright*, 774 N.E.2d 891,895 (Ind. 2002)).

229. *See Wal-Mart Stores*, 774 N.E.2d at 895-96 (Ind. 2002) (citing *Vergara v. Doan*, 593 N.E.2d 185, 187 (Ind. 1992); *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990)).

230. *See supra* Part III.

*substantial rights of the parties.*²³¹

Appellate Rule 66(A) and Trial Rule 61 are similar in that they both discuss error that does “not affect the substantial rights of the parties.”²³² And their similarity is enhanced by Trial Rule 61’s reference to proceedings “on appeal.”²³³ But the rules are not identical in that Trial Rule 61, unlike Appellate Rule 66(A), does not mention the probable-impact test.²³⁴

Neither Indiana’s appellate courts nor its appellate practitioners should rely on a rule of trial procedure rather than a rule of appellate procedure to determine whether a trial court error is reversible. In this context, the “on appeal” language of Trial Rule 61 does not apply. Rather, that language simply recognizes that, on occasion, Indiana’s trial courts also engage in a manner of appellate review, such as when they engage in judicial review of state or local government agency decisions.²³⁵ But a trial court’s judicial review differs from an appellate court’s review for reversible error. As the Indiana Code makes clear, a court engaged in judicial review of an agency action may grant relief to the person prejudiced by the agency action only in limited circumstances.²³⁶

Moreover, Trial Rule 61 is not the trial rule most closely related to Appellate Rule 66(A)—Indiana Trial Rule 59 is. As interpreted by case law, Trial Rule 59 provides that, in determining whether to grant a motion for a new trial on the basis of newly discovered evidence, a trial court should consider the “critical” factor of the “probable impact” of the purported, new evidence along with the evidence already presented, to assess whether “the result at any subsequent trial in all probability would be different.”²³⁷ Regardless, as a matter of practice in Indiana’s appellate courts, Appellate Rule 66(A) rather than Trial Rule 61 defines reversible error.

CONCLUSION

The probable-impact test is the elephant in the room of every Indiana appeal. Although Indiana’s doctrine of reversible error has an uneven history and has not always been consistently defined or applied, the Indiana Supreme Court’s holding in *Fleener* as codified in Appellate Rule 66(A) provides an unambiguous standard of review for reversible error: the court on appeal must affirm if the likely impact of an error, when compared with the whole of the record, does not undermine the

231. IND. TRIAL R. 61 (emphasis added).

232. *Id.*; IND. R. APP. P. 66(A).

233. IND. TRIAL R. 61.

234. Compare IND. TRIAL R. 61, with IND. APP. R. 66(A).

235. See IND. CODE §§ 4-21.5-5-1 to 16 (2020).

236. *Id.* § 4-21.5-5-14(d) (stating that relief is only available if the agency action is “(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) Contrary to constitutional right, power, privilege, or immunity; (3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) Without observance of procedure required by law; or (5) Unsupported by substantial evidence.”).

237. *Reed v. State*, 702 N.E.2d 685, 691 (Ind. 1998).

appellate court's confidence in the trial court's outcome.²³⁸ As a corollary, an appellate court is empowered to reverse if the likely impact of the error undermines the court's confidence in the outcome.²³⁹

Even after *Fleener*, numerous cases have deviated from the correct standard of appellate review.²⁴⁰ Opinions have conflated the probable-impact test with the *Chapman* constitutional-error test, confused reversible error with a review for the sufficiency of the evidence, and moved the impact-of-the-error calculus beyond a more-likely-than-not probable-impact determination.²⁴¹ Among those deviations, the tendency to confuse and conflate the probable-impact test with a simple review for the sufficiency of the evidence is perhaps the analytical mistake that is easiest to make and, as such, requires special attention to guard against.

Finally, despite its centrality in appellate practice, the probable-impact test is infrequently articulated, and often disregarded, in appellate briefs. A brief that expressly addresses and takes the probable-impact standard of review into account will present a more pertinent and persuasive argument for the court to consider. To do so, appellants in particular should address their arguments not only to show error but also to overcome the presumption of correctness and the appellate court's confidence in the judgment. The probable impact of an alleged error on the outcome of a trial court proceeding is the question presented and the common denominator in virtually every case before the Indiana Supreme Court and the Indiana Court of Appeals, and practitioners should focus their arguments on appeal accordingly.

238. *See supra* Part III.

239. *See supra* Part I.

240. *See supra* Part IV.

241. *See supra* Part V.