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Developments in the Law of Evidence

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INTRODUCTION

The purpose of this Article is to alert Indiana practitioners to significant 1991 developments in the law of evidence. The Article first discusses Indiana developments. It then briefly highlights Seventh Circuit and United States Supreme Court decisions of note.

I. INDIANA DEVELOPMENTS

A. Hearsay

Perhaps the most momentous change in Indiana evidence law in 1991 was the Indiana Supreme Court's announcement in *Modesitt v. State*¹ of the abandonment of the exception to the hearsay rule first enunciated in *Patterson v. State*.² In *Patterson*, the Indiana Supreme Court sought to prevent a "misapplication" of the hearsay rule that occurs when out-of-court statements are excluded even though the concerns underlying the hearsay rule about the availability of cross-examination are not implicated.³ The court ruled that out-of-court statements need not be excluded as substantive evidence when the declarant is present and available for cross-examination at trial.⁴ The court noted that a then newly adopted Federal Rule of Evidence⁵ required that the use of such statements be conditioned additionally upon their having been given under oath, but concluded that this safeguard is unnecessary.⁶ In *Modesitt*, the Indiana Supreme Court abandoned the *Patterson* rule and held that

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1. 578 N.E.2d 649 (Ind. 1991).

2. 324 N.E.2d 482 (Ind. 1975).

3. *Id.*

4. *Id.* at 484-85.

5. FED. R. EVID. 801(d)(1)(A).

6. *Id.*

from this point forward,⁷ a prior statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the person.⁸

In so holding, the Indiana Supreme Court essentially adopted the language embodied in Federal Rule of Evidence 801(d)(1).⁹

The State had charged Modesitt with molesting his girlfriend's daughter at a time when the three of them were living together. The prosecutor's first three witnesses at trial were the victim's mother, a welfare caseworker, and a psychologist. "All three witnesses were permitted to testify, over objection, as to what the victim had told each of them concerning what Modesitt had done to her. . . . Only after this testimony was completed was the victim called to testify."¹⁰ The victim corroborated most but not all of the reported acts of molestation. She was not asked whether she had made the statements testified to by the three prior witnesses or whether the statements were true.

In its discussion, the Indiana Supreme Court first asked whether the *Patterson* rule had been abused.¹¹ The court concluded that it had because the victim's charges were repeated by three witnesses before the victim was called to testify and because the prosecution had failed to lay a foundation for the three witnesses' testimony by asking the victim whether she remembered making the statements.¹² In analyzing whether abuse of the rule had occurred, the court discussed *Patterson* and subsequent cases that refined and qualified its rule.¹³ The court concluded that the rationale

7. The Indiana Supreme Court expressly ruled that this decision should not have any retroactive application to pending or previously decided cases. *Modesitt v. State*, 578 N.E.2d 649, 654 (Ind. 1991).

8. *Id.* at 653-54.

9. The only difference between the two formulations is that the federal rule explicitly states that it applies if the declarant testifies at trial *or hearing*, whereas the supreme court's formulation in *Modesitt* only mentioned a declarant's testimony at trial. It seems unlikely that this serves as a meaningful distinction between the two rules.

10. *Modisett*, 578 N.E.2d at 650.

11. *Id.* at 651.

12. *Id.* at 651-52.

13. *Id.* at 651.

behind those cases was that reliability was safeguarded by the availability of the declarant at trial.¹⁴ The abuse in the instant case, however, occurred because the victim was not available for cross-examination until after her statements had been repeated by the three witnesses.¹⁵ The court stated, "We believe that immediate cross examination is the most effective, and that delayed cross examination is the least effective."¹⁶ Writing in the negative, the court held that it could not find that "the drumbeat repetition" of the victim's story did not unduly prejudice the jury.¹⁷

The court's discussion did not end there. The court went on to announce that the *Patterson* rule should be overruled.¹⁸ Although maintaining the validity of the original rationale motivating the adoption of the rule, that relevant and sufficiently reliable evidence should be presented to the jury, the court nonetheless observed that in the sixteen years since *Patterson* was decided, "numerous decisions by courts throughout this State have confused the application and clouded the original purpose of the rule."¹⁹ The court listed a number of refinements that had been drawn in various cases following *Patterson*²⁰ and concluded that "*Patterson* is no longer recognizable because of the grafting onto it of additional requirements and limitations."²¹ Again defending the rationale behind *Patterson*,²² the court turned to an examination of the practice in other jurisdictions and focused on Federal Rule of Evidence 801(d)(1) as a "well-considered approach that constructs workable guidelines for allowing prior statements to be used during trial."²³ In so ruling, the court apparently abandoned the position expressed in *Patterson* that the oath requirement in Federal Rule 801(d)(1)(A) is unnecessary.²⁴

The question practitioners face at this point is where to look for guidance in interpreting this new aspect of state law on hearsay. Before the adoption of *Patterson*, prior inconsistent statements could be introduced not as substantive evidence, but to impeach²⁵ or to refresh recollection,²⁶ and prior consistent statements could only be used to rehabilitate.²⁷ The

14. *Id.*

15. *Id.* at 651-52.

16. *Id.* at 651.

17. *Id.* at 651-52.

18. *Id.* at 652.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 652-53.

23. *Id.* at 653.

24. *Patterson v. State*, 324 N.E.2d 482, 485 (Ind. 1975).

25. *Id.* at 488 (DeBruler, J., dissenting); *Adams v. State*, 314 N.E.2d 53, 57 (Ind. 1974); *Lee Bros., Inc. v. Jones*, 54 N.E.2d 108, 116 (Ind. Ct. App. 1944) (en banc).

26. *Patterson*, 324 N.E.2d at 488 (DeBruler, J., dissenting).

27. *Carroll v. State*, 338 N.E.2d 264 (Ind. 1975).

use of prior inconsistent statements subject to the conditions specified in *Modesitt* is unprecedented in Indiana law. The nearly verbatim adoption of Federal Rule of Evidence 801(d)(1) suggests that federal precedent will be a useful source of guidance. Indiana courts have referred to federal practice occasionally when resolving Indiana evidentiary issues.²⁸ In any event, practitioners will be forced to resort to these decisions until Indiana courts have the opportunity to construe *Modesitt*. However, in the absence of any pronouncement by the Indiana Supreme Court, federal decisions can be useful, but not binding, upon Indiana courts.²⁹

The hearsay exception for statements against penal interest was adopted in *Thomas v. State*.³⁰ After summarizing past English and federal experience with the use of such statements,³¹ the court noted its approval of Federal Rule of Evidence 804(b)(3), which allows the admission of statements exculpatory of the accused and inculpatory of the declarant when circumstances corroborate the trustworthiness of the statement.³² "This rule [804(b)(3)] serves to assure a defendant his due process right to present evidence in his favor while protecting the trial court's ability to exclude evidence that is irrelevant or insufficiently trustworthy."³³

Following this approach, the court reversed the defendant's conviction because the defendant was not allowed to present the admissions of guilt of another suspect in the same crime.³⁴ The court distinguished *Partlow v. State*³⁵ and *Taggart v. State*,³⁶ in which statements against penal interest were not admitted because of the absence of circumstances corroborating the statements.³⁷

28. See, e.g., *Hensley v. State*, 573 N.E.2d 913, 917-18 (Ind. Ct. App. 1991) (comparing federal practice under Fed. R. Evid. 410 in determining proper use of statements made in plea discussions); *Baker v. Wagers*, 472 N.E.2d 218, 221 (Ind. Ct. App. 1984) (discussing Fed. R. Evid. 803(6) in analyzing business records exception in Indiana).

29. *Hamilton County Dep't of Pub. Welfare v. Smith*, 567 N.E.2d 165, 170 n.2 (Ind. Ct. App. 1991) ("Court decisions interpreting federal statutes with similar language and purpose as the state statute under consideration, while not binding on this court, may aid us in construing the state statute.").

30. 580 N.E.2d 224 (Ind. 1991).

31. *Id.* at 225-26.

32. *Id.* at 226-27.

33. *Id.* at 226.

34. *Id.* at 227.

35. 453 N.E.2d 259 (Ind. 1983), cert. denied, 464 U.S. 1072 (1984).

36. 382 N.E.2d 916 (Ind. 1978).

37. *Thomas v. State*, 580 N.E.2d 224, 227 (Ind. 1991). The *Thomas* opinion left open the important question of what degree of corroboration will be required in order for a criminal defendant to be permitted to introduce an exculpatory statement made by an unavailable third party. Constitutional questions may arise if too high a standard is used. See *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Some courts, however, have required a high degree of corroboration and excluded

B. Confrontation Clause

A second major development in Indiana evidence law also occurred in the context of a child molestation case. At issue in *Brady v. State*³⁸ was the admission of the alleged victim's testimony, which was videotaped in her home in the presence of the judge, the prosecuting and defense attorneys, the victim's mother, an investigator, and an equipment operator.³⁹ The tape was subsequently played for the jury at trial.

This procedure was done pursuant to and in compliance with section 35-37-4-8 of the Indiana Code.⁴⁰ During the roughly two hour videotaping, the defendant was stationed in the garage of the home where the child was testifying. The defendant could see and hear the child through closed circuit television, but the child could neither see nor hear him and was unaware of his presence. The defendant could communicate with his attorney, who was in the house, through a microphone hook-up.

The defendant contended that section 35-37-4-8 was unconstitutional on its face because it infringed upon his right, guaranteed by the Sixth Amendment of the United States Constitution⁴¹ and article I, section 13 of the Indiana Constitution,⁴² to confront the witnesses against him.⁴³ After summarizing those two provisions, the Indiana Supreme Court noted

exculpatory statements. See *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983).

38. 575 N.E.2d 981 (Ind. 1991).

39. *Id.* at 984.

40. At the time of Brady's trial, this statute provided that the prosecutor could move for a court order either to have a child's testimony taken outside the courtroom and transmitted in by closed circuit television, with questioning by both the prosecutor and the defense attorney transmitted to the child in like fashion, IND. CODE § 35-37-4-8(b) (1988), or to have the testimony videotaped before trial, *id.* § 35-37-4-8(c), the method used in this case. Neither procedure was available unless the conditions specified in Indiana Code § 35-37-4-8(d) were met, including that some sort of evidence be presented as proof that testifying in court would be a traumatic experience for the child. In those instances where the videotape procedure of Indiana Code § 35-37-4-8(c) was used, subsection (f) delineated those persons who were allowed to be in the same room as the child, including, "[t]he defendant, who can observe and hear the testimony of the child without the child being able to observe and hear the defendant. However, if the defendant is not represented by an attorney, the defendant may question the child." *Id.* § 35-37-4-8(f)(7). If the court ordered that either the procedure in subsection (b) or (c) be used, then only the judge, the prosecuting attorney, and the defense attorney or the *pro se* defendant could question the witness. *Id.* § 35-37-4-8(g).

41. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .").

42. IND. CONST. art. I, § 13 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face. . . .").

43. *Id.*

that it had upheld a prior version of this statute⁴⁴ under both provisions in *Miller v. State*,⁴⁵ but that the current statute was significantly different.⁴⁶

The court first addressed the challenge brought under the federal Constitution. Relying on *Delaware v. Fensterer*⁴⁷ and *Maryland v. Craig*,⁴⁸ the court concluded that "the defendant's opportunity for cross-examination has been interpreted as being the essential purpose of the federal confrontation right."⁴⁹ The Indiana Supreme Court noted the United States Supreme Court's conclusion in *Craig* that sometimes the state's interest in protecting the child witness from trauma will justify permitting the child to testify out of court and outside the presence of the defendant.⁵⁰ The court then compared Indiana's statute to the Maryland statute at issue in *Craig*, found them similar in most respects, and concluded that Indiana Code section 35-37-4-8 "as written, when tested by the Sixth Amendment, would be constitutional if construed to also include the Sixth Amendment requirement that such trauma stem from testifying in the presence of the accused, since the statute permits the witness to testify without being able to see or hear the accused."⁵¹ The court said that the Indiana statute, which does not specify how the defendant is to see and hear the witness, will satisfy the federal Constitution if this is done via closed circuit television.⁵² Also passing federal constitutional muster is the Indiana provision whereby the court might prevent the child from seeing and hearing the defendant while the child testifies.⁵³

The one dissimilarity between the Indiana and Maryland statutes noted by the Indiana Supreme Court is that the Maryland statute did not authorize the use of statements videotaped before trial.⁵⁴ The court concluded, however, that the difference in the two methods of presenting the child's testimony does not affect the balance struck in *Craig* between the state's interest in protecting the child witness and the Confrontation Clause.⁵⁵

44. IND. CODE § 35-37-4-6 (1988).

45. 517 N.E.2d 64 (Ind. 1987). The *Miller* court held the taped statements in that case inadmissible, however, for a failure to provide an opportunity for cross-examination.

46. For example, the statute analyzed in *Miller* did not contain the equivalent of the closed circuit television procedure in Indiana Code § 35-37-4-8(b) (1988), and the *Miller* statute required "corroborative evidence of the act that was allegedly committed against the child" before a videotape could be admitted into evidence. IND. CODE § 35-37-4-6(d) (1988).

47. 474 U.S. 15 (1985) (per curiam).

48. 110 S.Ct. 3157 (1990).

49. *Brady v. State*, 575 N.E.2d 981, 985 (Ind. 1991).

50. *Id.* at 986.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

The outcome of the analysis under the Indiana Constitution was different. The court stated that “[a] face-to-face meeting occurs when persons are positioned in the presence of one another so as to permit each to see and recognize the other.”⁵⁶ Although the court recognized that the Confrontation Clause of the federal Constitution and article I, section 13 of the Indiana Constitution have much in common, the court found that Indiana’s provision “has a special concreteness and is more detailed.”⁵⁷

Focusing on article I, section 13 alone, the court proceeded to catalogue a number of limits on the right to a face-to-face meeting: it can be waived, it does not apply when a deposition is taken, and it does not exist with respect to witnesses other than those called by the prosecution.⁵⁸ Furthermore, in cases of necessity, the right will not preclude the subsequent use of testimony when there is a prior face-to-face meeting at a hearing or trial with an opportunity to cross-examine the witness before the trier of fact in the same case.⁵⁹

The court then discussed prior cases which “exemplify [the] Court’s tradition of recognizing that Indiana’s confrontation right contains both the right to cross-examination and the right to meet the witnesses face-to-face.”⁶⁰ The two rights are not co-extensive.

The Indiana Constitution recognizes that there is something unique and important in requiring the face-to-face meeting between the accused and the State’s witnesses as they give their trial testimony. While the right to cross-examination may be the primary interest protected by the confrontation right in Article I, § 13 of the Indiana Constitution, the defendant’s right to meet the witnesses face to face cannot simply be read out of our State’s Constitution.⁶¹

The Indiana Supreme Court then cited federal cases to demonstrate that face-to-face confrontation is an important part of the Sixth Amendment as well. Indeed, although the United States Supreme Court upheld the closed circuit television procedure used in *Craig* in light of the state’s interest in protecting the child witness,⁶² four members of the court dissented. Writing for the dissenters, Justice Scalia argued, “Whatever else it may mean in addition, the defendant’s constitutional right ‘to be confronted with the witnesses against him’ means, always and everywhere,

56. *Id.* at 987.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 988.

61. *Id.*

62. *Maryland v. Craig*, 110 S. Ct. 3157, 3170 (1990).

at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'"⁶³

Federal case law aside, the Indiana Supreme Court concluded that subsections (c) and (f)(7) of section 35-37-4-8 violated article I, section 13 of the Indiana Constitution.⁶⁴ However, the court found that the remainder of the statute was left in administrable form.⁶⁵ In particular, when testifying in court in the presence of the accused will be a "potentially traumatic experience" for a witness⁶⁶ (although how much so the court did not specify), a procedure for receiving a child's testimony and transmitting questions via closed circuit television when the witness can see the accused and the accused can see and hear the witness will not offend the right to meet the witness face to face.⁶⁷

Shortly after *Brady* was decided, the Indiana Supreme Court faced the question in *Hart v. State*⁶⁸ of whether a conviction must be reversed because of the admission at trial of the pre-recorded videotaped testimony of an alleged child victim. The court concluded that the failure to provide the defendant with a face-to-face meeting with the witness was not fundamental error when the videotaped testimony of the child is "remarkably consistent with traditional judicial fact-finding procedures."⁶⁹ The witness, the court noted, was previously videotaped in the courtroom, and although the defendant was not there, the jury was able to view the witness's movements on tape in order to assess credibility.⁷⁰ Accordingly, because the error was not fundamental and because the defendant did not specifically object at trial, the conviction was affirmed.⁷¹

C. Cross-Examination and Impeachment

During 1991, Indiana courts dealt with a number of interesting issues pertaining to the examination of witnesses on the stand and permissible uses of testimony given outside the courtroom.

In *Pelican, Inc. v. Downey*,⁷² the First District Court of Appeals explored when impeachment should be allowed and the circumstances

63. *Id.* at 3172 (Scalia, J., dissenting) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)).

64. *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991). These two subsections of the statute provided for the pre-trial videotaping of testimony and that the child witness would not be able to see or hear the defendant.

65. *Id.* at 988-89.

66. *Id.* at 989.

67. *Id.*

68. 578 N.E.2d 336 (Ind. 1991).

69. *Id.* at 337.

70. *Id.*

71. *Id.*

72. 567 N.E.2d 847 (Ind. Ct. App. 1991).

under which a witness is considered hostile so that the proponent may ask leading questions. Downey sued The Pelican restaurant after a Coke glass shattered and severely lacerated his left hand while he was at the restaurant. On appeal, the appellant argued that the trial court abused its discretion in refusing to allow it to ask leading questions on direct examination in order to impeach a witness with prior inconsistent statements. The witness was Kelly Whitehead, a woman seated at Downey's table at the time of the incident, and the prior statements she allegedly made to her supervisor were that she had observed the incident (contrary to her direct testimony), that Downey was intoxicated and had slammed the glass on the table in anger, and that she intended to lie about the events and to testify that the glass was overturned when a waitress knocked the table.⁷³

With respect to the issue of whether leading questions should have been allowed, the court of appeals noted that Whitehead's testimony on direct that she had not witnessed the accident did not exculpate Downey.⁷⁴ A witness is considered hostile when her testimony exculpates the opponent and the witness has admitted, explained, or denied the prior statement.⁷⁵ Whitehead's testimony was that she had not seen the accident; this did not exculpate Downey.⁷⁶ Moreover, the fact established on the record that Whitehead was a close friend of Downey was also insufficient to show that she was a hostile witness when called by the appellant.⁷⁷ Accordingly, the court of appeals found that the trial court had not abused its discretion in refusing to allow leading questions.⁷⁸

As to whether impeachment should have been allowed, the court of appeals stated that "[a] witness may be impeached when he shows his hostility during examination and his friendliness to the opponent, and is informed of the time and place of his contradictory statement so he may admit or deny it."⁷⁹ The court emphasized that "it is not necessary that one's witness be declared hostile before commencing an impeachment."⁸⁰ In this case, the court of appeals noted that because Whitehead denied making the statements, they could not be admitted as substantive evidence.⁸¹ Because the statements could only be used for impeachment purposes, and because they were cumulative of the testimony of another witness,

73. *Id.* at 849.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 850.

78. *Id.*

79. *Id.* at 849 (citation omitted).

80. *Id.* (citation omitted).

81. *Id.* at 850.

the court of appeals ruled that the appellant was not prejudiced by their exclusion.⁸² The court also quoted a Nebraska decision that stated:

[T]he rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be revealed to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury a favorable extrajudicial statement previously made by the prior witness.⁸³

Affirming the trial court, the court of appeals concluded that it "refuse[d] to reverse the trial court to permit improper use of the impeachment rule."⁸⁴

Although Indiana courts have previously dealt with the issue of a witness's competency to testify when the witness is under the influence of drugs or intoxicating liquor at the time of the incident about which the witness was to testify,⁸⁵ in *Boyko v. State*,⁸⁶ the Third District Court of Appeals dealt with the relatively novel issue of a witness's competency when he is under the influence of narcotics at the time of his testimony.⁸⁷ Boyko was on trial for murder. While incarcerated the night before he was to testify, Boyko took an antidepressant.

The court of appeals observed that other jurisdictions generally do not apply a per se incompetency rule for witnesses who have used drugs.⁸⁸ "These authorities have generally required a demonstration of impairment of one of the essential elements of competency before reversal is warranted."⁸⁹ Following this approach, the Third District Court of Appeals noted that "[a] witness is competent if he has sufficient mental capacity to perceive, to remember and to narrate the incident he has observed and to understand and appreciate the nature and obligation of an oath."⁹⁰ The trial court would be reversed only upon a showing of a "manifest abuse" of discretion.⁹¹

82. *Id.*

83. *Id.* (quoting *State v. Keithley*, 418 N.W.2d 212, 215 (Neb. 1988)).

84. *Id.*

85. *See, e.g.*, *Jones v. State*, 445 N.E.2d 92 (Ind. 1983) (marijuana use); *State v. Kubiak*, 4 N.E.2d 193 (Ind. 1936) (alcohol consumption). These decisions have treated such situations as raising credibility rather than competency issues. *Boyko v. State*, 566 N.E.2d 1060, 1062 n.1 (Ind. Ct. App. 1991).

86. 566 N.E.2d 1060 (Ind. Ct. App. 1991).

87. *Dicta* in *Kubiak*, did suggest that intoxication at the time of testimony might raise competency issues. *Kubiak*, 4 N.E.2d at 193-94.

88. *Boyko*, 566 N.E.2d at 1062-63.

89. *Id.* at 1063.

90. *Id.* at 1062 (citation omitted).

91. *Id.*

In a one paragraph analysis, the court of appeals concluded that Boyko had not made the requisite showing with respect to the elements of competency.⁹² The court of appeals noted that the trial court had held a hearing to determine the extent of Boyko's incompetence.⁹³ Testimony from this hearing indicated that the drug taken by the defendant would remain in his system anywhere from eight to twenty-four hours after consumption.⁹⁴ The trial judge then continued the trial until sixteen hours had passed from when Boyko took the drug.⁹⁵ The defendant wished to take the stand despite his recognition that he was a bit groggy. Although the court of appeals did not touch upon each of the elements of competency, it noted that Boyko "testif[ied] in a lucid, coherent manner."⁹⁶ Applying a deferential level of review, the court of appeals found no abuse of discretion on the part of the trial court.⁹⁷

In *Kelley v. State*,⁹⁸ the court of appeals dealt with the question of whether the trial court erred in prohibiting the defendant in a child molestation case from presenting testimony of the victim's prior false reports of sexual molestation.⁹⁹ The court noted that Indiana's rape shield law¹⁰⁰ does not bar this type of evidence because it "goes to the victim's credibility, not her history of sexual conduct."¹⁰¹

Kelley wanted to question the mother of the victim about a prior occasion when the victim had accused a schoolteacher of molesting her.¹⁰² "Evidence of false allegations of similar sexual misconduct is admissible on the subject of the victim's credibility so long as the allegations are demonstrably false."¹⁰³ Upon questioning by the trial judge, defense counsel acknowledged that he did not have evidence that the victim admitted the falsity of the prior allegations or that the accused teacher had been tried and acquitted.¹⁰⁴ Without elaborating on what other circumstances, if any, would satisfy the "demonstrably false" requirement, the court of appeals found that the evidence was properly excluded.¹⁰⁵

92. *Id.* at 1063.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 566 N.E.2d 591 (Ind. Ct. App. 1991).

99. *Id.* at 592.

100. IND. CODE § 35-37-4-4 (1988).

101. *Kelley*, 566 N.E.2d at 593.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

D. Privileges

1991 also brought forth developments in the law of privileges. The principal ones were as follows.

1. *Psychologist-Patient; Social Workers.*—In *Jorgensen v. State*,¹⁰⁶ the Indiana Supreme Court reviewed an important exception to the psychologist-patient privilege. In this appeal of a conviction for murder and conspiracy to commit murder, Jorgensen claimed that Cochran, not she, had murdered her husband. The evidence adduced at trial included testimony that Cochran had told a friend that he wanted to kill the victim.¹⁰⁷ The trial court was also aware of Cochran's written confessions to the murder, although Jorgensen ultimately chose not to offer them into evidence because the trial court denied her motion to redact certain portions of them.¹⁰⁸

The alleged error discussed by the supreme court was the trial court's denial of the defendant's request to take the depositions of a social worker and a psychologist she claimed had counseled Cochran and to whom she thought Cochran might have made incriminating statements. The supreme court first declared itself unaware of any privilege applicable to the social worker.¹⁰⁹ Then, with respect to the psychologist, to whom a privilege does apply, it pointed out that any information possessed by him that "relate[d] directly to the fact or immediate circumstances of [the] homicide" would meet a statutory exception to the psychologist-patient privilege and was therefore discoverable.¹¹⁰ Finally, the supreme court held that the trial court should have allowed the defendant to conduct some discovery of the two counselors for the purpose of ascertaining whether they possessed any information material to the defense.¹¹¹ The supreme court explained

106. 574 N.E.2d 915 (Ind. 1991) [hereinafter *Jorgensen II*].

107. *Id.* at 916.

108. *Jorgensen v. State*, 567 N.E.2d 113, 124 (Ind. Ct. App. 1991) [hereinafter *Jorengensen I*], *aff'd*, 574 N.E.2d 915 (Ind. 1991).

109. *Jorgensen II*, 574 N.E.2d at 917.

110. The privilege and the exception referred to are found at IND. CODE § 25-33-1-17 (1988), which provides:

A psychologist certified under this article may not disclose any information acquired from persons with whom the psychologist has dealt in a professional capacity, except under the following circumstances:

(1) Trials for homicide when the disclosure relates directly to the fact or immediate circumstance of said homicide. . . .

111. In so holding, the court was applying the familiar test for ruling on a criminal defendant's discovery requests: if (1) the defendant makes a "sufficient designation of the items sought to be discovered" and (2) the items are "material to the defense," then the court must grant the discovery request unless (3) "the State makes a showing of paramount interest in non-disclosure." *Kindred v. State*, 540 N.E.2d 1161, 1174 (Ind. 1989). The first element was clearly satisfied because the defendant had specified "the identity of those persons she wished to depose." *Jorgensen II*, 574 N.E.2d at 917.

that to deny Jorgensen's request on the ground that she had not shown the evidence she sought would be material, without first allowing her some opportunity to conduct discovery, placed her in an impossible "catch-22" situation.¹¹²

2. *Physician-Patient*.—In *Terre Haute Regional Hospital, Inc. v. Trueblood*,¹¹³ the First District Court of Appeals held that a plaintiff claiming unnecessary surgeries is not permitted to discover the medical records of other patients of the same doctor who underwent similar surgeries during the relevant time period.¹¹⁴ Trueblood brought suit against the hospital for negligent hiring and supervision of the staff physician who operated on her. She sought the other patients' records in order to show actual or constructive knowledge by the hospital of the doctor's misconduct. The court held that there could be no compelled discovery of the medical records of nonparty patients who had not waived their privilege, regardless of the measures taken through redaction to prevent disclosure of the nonparty patients' identities.¹¹⁵

3. *Self-Incrimination*.—In *Lock v. State*,¹¹⁶ the Indiana Supreme Court addressed the Fifth Amendment privilege against self-incrimination.¹¹⁷ Lock testified voluntarily at her first trial, which ended in a mistrial, but chose not to testify at her second trial and was convicted. On appeal, she claimed that the trial court violated her Fifth Amendment privilege when it allowed the prosecutor to introduce as evidence at the second trial her testimony from the first trial, portions of which she later came to regret.

The supreme court agreed that in testifying at her first trial the defendant had not waived her Fifth Amendment privilege for purposes of her second trial and therefore could not be forced to testify at her second trial.¹¹⁸ The court found nonetheless that the admission of her first-trial testimony did not violate her Fifth Amendment privilege.¹¹⁹ It recited the hearsay exception that makes prior recorded testimony admissible and then stated that her first-trial testimony was admissible "in

112. *Jorgensen II*, 574 N.E.2d at 917. It is possible, however, that the court would not so readily have allowed a fishing expedition had Cochran not, on other occasions, spoken and written of his involvement in the murder because this evidence provided some basis for believing that his social worker or psychologist might also have received such information from him.

113. 579 N.E.2d 1342 (Ind. Ct. App. 1991).

114. *Id.* at 1346.

115. *Id.* In so holding, the court was interpreting Indiana Code §§ 34-1-14-5(3) (physician-patient privilege) and 16-4-8-3 (limitation of access to medical records).

116. 567 N.E.2d 1155 (Ind. 1991).

117. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . .").

118. *Lock*, 567 N.E.2d at 1160.

119. *Id.* at 1160-61.

the same manner as a statement or admission against interest given prior to a trial is admissible at a later trial even if the defendant chooses not to testify at such trial."¹²⁰

4. *Attorney-Client*.—There were two decisions of note in 1991 concerning the attorney-client privilege. In *Korff v. State*,¹²¹ for the first time, the Indiana Supreme Court held that an attorney's communication to his client of the date, time, and place of a hearing is not "confidential" and therefore, is not privileged.¹²² Thus, when the defendant was charged with failure to appear at his trial for battery with a deadly weapon, the trial court did not err in denying the defendant's motion to suppress the testimony of his former attorney that the attorney had informed the defendant of the date, time, and place of his trial.¹²³

Second, in *Liberty Mutual Insurance Co. v. Blakesley*,¹²⁴ the Third District Court of Appeals held that when a client admits that he received advice from his attorney concerning a transaction, he does not waive his attorney-client privilege with respect to the content of the discussion.¹²⁵ Therefore, the trial court did not err in preventing the client's former attorney from testifying about the advice he gave to his client, even though the client had admitted on cross-examination that he had obtained advice from his then attorney.¹²⁶

E. Presumptions

*Collins v. State*¹²⁷ involved an appeal from a conviction under section 9-12-3-1 of the Indiana Code for operating a motor vehicle after suspension of a driver's license for being a habitual traffic violator.¹²⁸ The Indiana Supreme Court ruled that the trial court committed fundamental error in using the following final instruction:

Evidence that a letter properly addressed, stamped and deposited in the U.S. Mail is prima facie proof that the letter was received by the person to whom it was addressed. Whether the denial of

120. *Id.* at 1160. The court did not indicate whether it ultimately relied on the hearsay exception for prior testimony of a witness or the exception for admissions of a party-opponent, or both. A principal difference between the two is that under the admissions exception the unavailability of the declarant is irrelevant. See 13 ROBERT L. MILLER, INDIANA PRACTICE § 801.423, at 132 (1984) [hereinafter INDIANA PRACTICE].

121. 567 N.E.2d 1146 (Ind. 1991).

122. *Id.* at 1148.

123. *Id.* at 1147.

124. 568 N.E.2d 1052 (Ind. Ct. App. 1991).

125. *Id.* at 1059.

126. *Id.* at 1058-59.

127. 567 N.E.2d 798 (Ind. 1991).

128. *Id.* at 799.

receipt by the person to whom the letter was addressed is sufficient to overcome the prima facie case is for the trier of fact to determine from all of the evidence.

“Prima facie evidence” means such evidence as is sufficient to establish a given fact and which will remain sufficient if uncontradicted.¹²⁹

Because this instruction could reasonably be construed as stating that proof of mailing constituted proof of receipt, thereby shifting the burden of proof to the defendant, the supreme court found that it created an impermissible mandatory presumption.¹³⁰

F. Expert and Opinion Testimony

Four 1991 decisions on the subject of expert and opinion testimony are worthy of note. Two concern the lay opinion rule and two address expert testimony.

1. *The Lay Opinion Rule.*—The lay opinion rule “generally demands that a nonexpert witness testify only to facts known to the witness; the witness’ opinions or conclusions are generally inadmissible.”¹³¹ In *Humphries v. State*,¹³² the Fourth District Court of Appeals applied this rule in curious ways.

Humphries involved the appeal of a conviction for disorderly conduct under the Indiana statute that provides: “A person who recklessly, knowingly, or intentionally: . . . (2) makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct”¹³³ At trial, the State’s only witness was the arresting officer, who testified that when he stopped the defendant, Humphries “became belligerent,” “began to curse at [him] and the other officers,” and was requested twice to “quiet down” or else face arrest for disorderly conduct.¹³⁴ Instead of complying, the defendant became “more agitated” and “continually asked why he had been stopped.”¹³⁵ The officer then began to “consider himself to be in physical danger.”¹³⁶ The court of appeals concluded that the

129. *Id.* at 801. In order to establish the offense of driving after having been adjudged a habitual traffic violator, the State must prove the defendant’s knowledge of his or her suspension as a result of this status. *Id.* at 800; *State v. Keihn*, 542 N.E.2d 963, 968 (Ind. 1989).

130. *Collins*, 567 N.E.2d at 801. The conviction was affirmed, however, because the defendant’s objection was not timely, and the court found the error to be harmless in light of other evidence admitted. *Id.*

131. 13 INDIANA PRACTICE, *supra* note 120, § 701.101, at 3.

132. 568 N.E.2d 1033 (Ind. Ct. App. 1991).

133. IND. CODE § 35-45-1-3 (1988).

134. *Humphries*, 568 N.E.2d at 1035.

135. *Id.*

136. *Id.* at 1036.

officer's statements about the defendant's "manner of speech, demeanor and conduct" were improper lay opinions, but noted that the defendant had not raised this objection at trial.¹³⁷ The court then declared that although admitted without objection, these statements alone could not sustain the conviction because they did not constitute "substantial evidence having probative value" of guilt.¹³⁸ The court reasoned that since lay opinions are inadmissible *because* they have no probative value, the statements supplied no evidence of guilt.¹³⁹

Ultimately, however, the court affirmed the conviction, finding other evidence of guilt in the record. It held that the officer's testimony that he had twice asked the defendant to "quiet down" or face arrest created inferences of two of the elements of disorderly conduct as defined in the statute: first, it suggested that the defendant had been speaking unreasonably loudly; second, it suggested that he had been asked to stop doing so.¹⁴⁰ Moreover, the court said, the fact that the officer later arrested the defendant created an inference that the defendant had continued to speak unreasonably loudly.¹⁴¹

The court's analysis is problematic in several respects. First, the court remarked that lay opinions are inadmissible because they lack all probative value. The usual view in Indiana and elsewhere is that lay opinions are excluded for reasons of judicial economy.¹⁴² If the court had recognized the actual rationale underlying the lay opinion rule, it would merely have found that the defendant, having failed to require the State to introduce facts from which the jury could draw its own conclusions about the defendant's demeanor, had waived his right to object to the State's establishing those conclusions directly by the introduction of otherwise inadmissible lay opinion testimony. In other words, instead of finding that the officer's conclusory statements about the defendant's "manner of speech, demeanor and conduct" were altogether unprobative, the court would have found that they proved the very conclusions which they embodied.

Even under this approach, however, a court should have found that the evidence of the defendant's "manner of speech, demeanor and conduct" did not sustain his conviction. Whereas the *Humphries* court reached this conclusion by labeling this evidence not probative, it failed to see an even more basic problem with it. The officer's statements that the

137. *Id.*

138. *Id.* at 1037.

139. *Id.* at 1036.

140. *Id.* at 1037.

141. *Id.*

142. 13 INDIANA PRACTICE, *supra* note 120, § 701.101; JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (James H. Chadbourn rev. ed. 1978).

defendant "cursed at" him, was "belligerent," and was "agitated" say nothing about whether the defendant engaged in the conduct prohibited by the statute, that is, whether he made unreasonable noise. A better analysis, therefore, would have been to find these statements immaterial.

An additional problem with sustaining the conviction on the basis of statements about the defendant's cursing and belligerence is that these connote content, rather than volume. A conviction on the basis of these statements alone would raise serious First Amendment concerns that could perhaps be overcome, but would have to be addressed.¹⁴³ The *Humphries* court recognized that a person stopped by the police has a right under the federal and Indiana Constitutions "to question and argue with the police."¹⁴⁴ The court refused, however, to admit that this right may have been abridged in this case.¹⁴⁵

The *Humphries* court's final error was to treat the officer's statement that he had to ask the defendant to quiet down as evidence that the defendant was speaking unreasonably loudly. The court should have inferred from this statement only that *in the officer's opinion* the defendant was speaking unreasonably loudly. It is ironic that having misapplied the lay opinion rule to find certain of the officer's statements insufficient to support the conviction, while ignoring the fact that those opinions were in any case not relevant to guilt, the court then affirmed the conviction by finding a different statement relevant to guilt, while failing to recognize it as an impermissible lay opinion.

In contrast, the supreme court in *Tunstill v. State*¹⁴⁶ displayed a clear grasp of the lay opinion rule, vacating Tunstill's sentence for voluntary manslaughter.¹⁴⁷ The supreme court disapproved of the sentencing court's consideration of Tunstill's prior arrests as an aggravating circumstance under the statutory provision allowing sentence enhancement for "a history of criminal or delinquent activity."¹⁴⁸ The supreme court concluded that

143. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) ("The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'").

144. *Humphries v. State*, 568 N.E.2d 1033, 1036 (Ind. Ct. App. 1991) (citing *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973)).

145. *Id.* These First Amendment issues were addressed directly in *Brown v. State*, 576 N.E.2d 605 (Ind. Ct. App. 1991), which found no constitutional violation and held that there was sufficient evidence to support a conviction for disorderly conduct, when the evidence showed the defendant became loud and abusive after his arrest for receiving stolen property and when the words used clearly fell within the "fighting words" category of unprotected speech. *Id.* at 605-07.

146. 568 N.E.2d 539 (Ind. 1991).

147. *Id.* at 547.

148. IND. CODE § 35-38-1-7(b)(2) (1988) (since repealed but replaced with identical language now found at IND. CODE § 35-38-1-7.1(b)(2) (Supp. 1991)).

“[t]he act of placing a person under arrest indicates only a belief, albeit strong, that the arrested person is guilty of a crime, but does not itself constitute a determination of the historical fact of that person’s guilt.”¹⁴⁹

2. *Expert Testimony*.—A case decided by the Fifth District Court of Appeals addressed the problem of allowing a judge to testify as an expert in a malpractice action arising from a case over which he had presided as judge. In *Cornett v. Johnson*,¹⁵⁰ a client sued his attorney for negligently failing to present certain evidence in a divorce proceeding. The trial court in the malpractice case allowed the judge in the divorce proceeding to testify for the client that the attorney’s omission was the proximate cause of the harm alleged in the divorce court’s division of the marital property.

On appeal, the Fifth District held that the appropriate standard for proximate cause under these circumstances is what the “reasonable judge” (rather than the actual presiding judge) would have done if the attorney had presented the evidence.¹⁵¹ The court reasoned that an objective standard is dictated both by general principles of proximate cause and by policy concerns in the particular situation of a judge testifying as an expert.¹⁵² These concerns are the danger of prejudice to one party from the possibility that the judge may appear to side with the other party or may create an appearance of impropriety in violation of the Code of Judicial Conduct,¹⁵³ and the court’s fear of opening the door to the reconvening of a jury to be questioned as to how it would have resolved a case if the evidence had been different.¹⁵⁴ The court did not address the manner in which a party would prove what a reasonable judge would have done. Perhaps this would require calling a judge as an expert witness.

*Southlake Limousine & Coach, Inc. v. Brock*¹⁵⁵ addressed a novel issue concerning expert testimony and hedonic damages. In this wrongful death action, the court of appeals held that an expert economist’s testimony as to the value of the decedent’s life is inadmissible as an aid to the jury in determining the loss of affection, love, parental training, and guidance to the surviving spouse and children.¹⁵⁶ The court found that

149. *Tunstill*, 568 N.E.2d at 544. The supreme court then noted, however, that prior arrests *are* relevant at sentencing under the catch-all provision, IND. CODE § 35-38-1-7(d) (1988) (since repealed but replaced with identical language now found at IND. CODE § 35-38-1-7.1(d) (Supp. 1991)). The court reasoned that committing a crime despite prior brushes with the law indicates an undeterrable character. *Tunstill*, 568 N.E.2d at 545.

150. 571 N.E.2d 572 (Ind. Ct. App. 1991).

151. *Id.* at 575.

152. *Id.*

153. See INDIANA CODE OF JUDICIAL CONDUCT CANON 2(B).

154. *Cornett*, 571 N.E.2d at 575.

155. 578 N.E.2d 677 (Ind. Ct. App. 1991).

156. *Id.* at 682.

the jury needed no expert assistance in valuing these losses; thus, the testimony invaded the province of the jury.¹⁵⁷

Finally, two 1991 cases on the subject of expert psychiatric and psychological testimony are significant. In *Lowrance v. State*,¹⁵⁸ the court of appeals made clear that Indiana still allows expert testimony on a criminal defendant's sanity, despite the prohibition against legal opinions.¹⁵⁹ Then, in *Byrd v. State*,¹⁶⁰ the court of appeals held that a psychiatrist could testify that in his opinion the results of a Minnesota Multi-Phasic Personality Inventory (MMPI) test showed that the defendant's personality profile was inconsistent with the knowledge element of his murder charge.¹⁶¹

A subtle distinction between the sanity and the *mens rea* rules as revealed by these two cases is that in *Lowrance* the court said an expert may give his opinion of the defendant's sanity directly, whereas in *Byrd* the court stressed that the expert could not properly testify that in his opinion the defendant had not satisfied the knowledge element. Instead, the expert in *Byrd* could only testify that in his opinion the MMPI results already in evidence were inconsistent with the knowledge element.

G. Novel Scientific Evidence

In 1991, the Supreme Court of Indiana, in a case of first impression, addressed the question of the admissibility of DNA evidence to identify the perpetrator of a crime. *Hopkins v. State*¹⁶² quoted the three-prong version of the *Frye* test¹⁶³ given in a New York state court opinion on the admissibility of DNA evidence.¹⁶⁴ *Hopkins* held that DNA evidence

157. *Id.*

158. 565 N.E.2d 375 (Ind. Ct. App. 1991)

159. *Id.* at 378. See generally 13 INDIANA PRACTICE, *supra* note 120, § 704.102 (Supp. 1991) (contrasting Indiana and federal law).

160. 579 N.E.2d 457 (Ind. Ct. App. 1991).

161. *Id.* at 461. The *Byrd* court also held that a psychiatrist could testify that the defendant might legitimately be suffering from retrograde amnesia, when the State had repeatedly challenged the defendant's claim that he could not remember. *Id.* at 461-62.

162. 579 N.E.2d 1297 (Ind. 1991).

163. So named after *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

164. *People v. Castro*, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989). In *Castro*, the New York court described the *Frye* test in the context of DNA evidence as follows:

Prong I. Is there a theory, which is generally accepted in the scientific community, which supports the conclusion that DNA forensic testing can produce reliable results?

Prong II. Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification and which are generally accepted in the scientific community?

Prong III. Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?"

Id. at 987, quoted in *Hopkins*, 579 N.E.2d at 1302.

is admissible as a matter of law because it satisfies the first two prongs of the analysis, that is, because "the theory and techniques of DNA identification currently available are generally accepted in the scientific community as capable of producing reliable results."¹⁶⁵ The supreme court based its conclusions on case law and on the record in the case before it, but noted that these conclusions were in accord with an Indiana statute concerning DNA evidence that was passed after Hopkins's trial took place.¹⁶⁶

Hopkins further held:

[O]nce the trial court has ruled the witness qualified as a matter of law to give expert testimony regarding DNA analysis, subsequent evaluation of that evidence goes only to its weight as a matter of fact. Any battle of qualified experts . . . or other conflict as to the reliability of evidence is to be resolved by the trier of fact.¹⁶⁷

Thus, the defendant's argument that the testing laboratory had not performed the accepted techniques in this particular case did not affect the admissibility of the DNA evidence and was an issue to be resolved by the trier of fact.¹⁶⁸ In so holding, *Hopkins* differed from the New York opinion to which it owed the three-prong analysis it applied. The New York case concluded that the third prong of the analysis must be raised at a pre-trial hearing before the court.¹⁶⁹

In an interesting concurring opinion, Justice Dickson questioned whether court determination of the *Frye* general acceptance standard (prongs one and two of the test) should be a prerequisite to the admissibility of expert testimony.¹⁷⁰ Justice Dickson noted that many courts and commentators have suggested that after a determination by the court that the expert is qualified and his evidence relevant, all questions concerning the reliability

165. *Hopkins*, 579 N.E.2d at 1302.

166. IND. CODE § 35-37-4-13(b) (Supp. 1991) (originally enacted in 1990 as IND. CODE § 35-37-4-10(b)) ("In a criminal trial or hearing, the results of forensic DNA analysis are admissible in evidence without antecedent expert testimony that forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.").

167. *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). *Accord Davidson v. State*, 580 N.E.2d 238, 243 (Ind. 1991) (citing *Hopkins*, the court found it unnecessary to hold an admissibility hearing out of the jury's presence on the issue of whether the testing laboratory performed the accepted techniques in the particular case because there was no objection to the qualifications of the experts; any irregularities in the procedures went only to the weight, not the admissibility, of the evidence).

168. *Hopkins*, 579 N.E.2d at 1303.

169. *People v. Castro*, 545 N.Y.S.2d 985, 988 (N.Y. Sup. Ct. 1989).

170. *Hopkins*, 579 N.E.2d at 1305 (Dickson, J., concurring).

of the evidence should be left to the trier of fact. He further urged that the majority's opinion not be taken to compel the use of the *Frye* methodology for the admission of all novel scientific evidence.¹⁷¹

H. Extrinsic Offenses

The general rule of extrinsic offenses¹⁷² states that evidence of a defendant's prior misconduct is inadmissible to show that the defendant is the kind of person who commits crimes and therefore is guilty of the crime charged.¹⁷³ In *Street v. State*,¹⁷⁴ the Fifth District Court of Appeals provided a useful summary of the law of extrinsic offenses and a detailed analysis of several exceptions to the general rule.

Street was appealing his conviction for receiving stolen property and dealing in marijuana to a minor. Street had allegedly given marijuana to Wright (the minor) in exchange for goods Wright had stolen. The trial court allowed Wright to testify that a week and a half before the charged events the defendant had given him marijuana in exchange for some personal property belonging to Wright. The court of appeals reversed the conviction, holding that permitting the testimony was reversible error.¹⁷⁵

In determining that the minor's testimony with respect to the dealing charge was inadmissible,¹⁷⁶ the *Street* court recognized that the traditional exceptions allowing extrinsic offense evidence to prove a defendant's intent, motive, purpose, or identity only properly apply when these matters are at issue in the case.¹⁷⁷ That the court accepted this principle is clear from its holding that the minor's testimony was not admissible under either the state of mind or the identity exception because the only issue with respect to the dealing charge was whether the defendant had engaged in

171. See *id.* at 1307.

172. The Indiana Supreme Court has expressed a preference for this phrase "to describe a defendant's other crimes, wrongs or acts that remain uncharged in the case under consideration." *Gibbs v. State*, 538 N.E.2d 937, 939 n.1 (Ind. 1989).

173. See, e.g., *Street v. State*, 567 N.E.2d 1180, 1183-84 (Ind. Ct. App. 1991).

174. 567 N.E.2d 1180 (Ind. Ct. App. 1991).

175. *Id.* at 1187-88.

176. The court noted that Wright's testimony was inadmissible to prove the charge of receiving stolen property because it had no relevance to that charge. The court reasoned that the only issue with respect to the receiving charge was whether the defendant *knew* the goods he accepted from the minor were stolen; testimony about a prior exchange of marijuana for goods actually owned by the minor, not stolen, was irrelevant to that issue. *Id.* at 1185.

177. Without this *caveat*, the exceptions would swallow the rule. See *id.* But see 12 INDIANA PRACTICE, *supra* note 120, § 404.208, at 266-68 (noting that Indiana courts infrequently exclude extrinsic offense evidence on the ground that intent is not at issue).

marijuana dealing, not whether he had intentionally or knowingly done so, or whether the State had arrested the right man.¹⁷⁸

The court then analyzed and found inapplicable the identity and common scheme or plan exceptions. First, the court concluded that even if identity had been an issue, Wright's evidence did not satisfy the identity exception.¹⁷⁹ This was because that exception only makes admissible extrinsic offenses that "share enough unusual, distinctive characteristics to create a 'signature' of the perpetrator," which the prior exchange in this case did not.¹⁸⁰

Second, the court stated that to be admissible under the common scheme or plan exception, the extrinsic offense must be "so related in character, time, and place of commission as to establish some plan which embraced both."¹⁸¹ The court held that this standard was not met merely because the extrinsic offense evidence showed repetition of the charged offense close to the same time and place and between the same parties.¹⁸² It quoted with approval from *United States v. Beasley*,¹⁸³ a Seventh Circuit case that remarked, "something more than a pattern and temporal proximity is required" because "[t]he inference from 'pattern' by itself is *exactly* the forbidden inference."¹⁸⁴ The *Street* court found that the "something more" that is needed is a "tangible connection" between the offenses.¹⁸⁵

Although the court said that under this approach it would have found Wright's testimony inadmissible,¹⁸⁶ it was unable to rest its holding on a *Beasley* approach. This was because the *Street* court found that the Indiana Supreme Court in *Clark v. State*¹⁸⁷ "appear[ed] to approve a rule that in drug cases the required nexus may be shown through evidence of criminal acts linked only by repetition, provided there is proximity in time."¹⁸⁸ Instead, the *Street* court went on to hold that the common

178. *Street*, 567 N.E.2d at 1185. See also *Haynes v. State*, 578 N.E.2d 369, 370 (Ind. Ct. App. 1991) (citing *Street*, court found extrinsic drug offenses inadmissible to prove knowledge and intent when these matters were not at issue).

179. *Street*, 567 N.E.2d at 1185.

180. *Id.* at 1184.

181. *Id.* at 1185 (quoting *Gibbs v. State*, 538 N.E.2d 937, 939 (Ind. 1989)).

182. *Id.*

183. 809 F.2d 1273 (7th Cir. 1987).

184. *Id.* at 1278.

185. *Street v. State*, 567 N.E.2d 1180, 1185-86 (Ind. Ct. App. 1991) (citing *Clark v. State*, 536 N.E.2d 493, 495 (Ind. 1989)). But see *Benefiel v. State*, 578 N.E.2d 338, 346-47 (Ind. 1991) (prior attacks on other women admissible under common scheme or plan exception, in addition to other reasons, where prior attacks were merely similar to charged events and where, though six and eight years prior to it, they were deemed not to be too remote).

186. *Street*, 567 N.E.2d at 1186.

187. 536 N.E.2d 493 (Ind. 1989).

188. *Street*, 567 N.E.2d at 1186.

scheme or plan exception was not satisfied because the testimony failed to establish any plan *by the defendant* to deal in marijuana.¹⁸⁹ Wright's testimony showed that, during the second transaction with the defendant, Street offered to buy the stolen goods and in the end traded marijuana for the goods only *at Wright's suggestion*.¹⁹⁰

In contrast with the extended and largely lucid discussion of extrinsic offenses in *Street*, the supreme court's discussion in *Guenthersperger v. State*¹⁹¹ was cursory and somewhat obtuse. In *Guenthersperger*, the defendant was convicted of murdering his wife by shooting her. The supreme court upheld the trial court's admission of evidence that seven years earlier, when the couple was having difficulties and the wife was staying with friends, the defendant visited her.¹⁹² While talking with her, he fired a gunshot that hit a wall about five feet from where his wife sat.

The supreme court's rationale for finding the evidence admissible consists of a series of rules of general applicability. Apart from citations, and an explanation that prior assaults and threats are no less admissible than prior batteries, that rationale reads, in its entirety:

Evidence of uncharged misconduct is admissible to show intent, motive, common scheme or plan, or identity. Evidence of a defendant's prior assaults, batteries, or threats against a homicide victim is admissible to prove motive. We have also said that motive is always relevant in the proof of a crime. Identity was an issue in this case because appellant filed a notice of alibi and claimed that he was not the person who perpetrated the crime.¹⁹³

This analysis leaves much to be desired. For example, it is difficult to grasp why the prior incident tended to prove a motive for a crime that occurred seven years later. Moreover, the statement "motive is always relevant in the proof of a crime" does not explain why motive evidence is admissible in this case. If the statement means that motive is always provable, there would be no need for the general rule of extrinsic offenses or any of the other exceptions to it because prior bad acts would always be admissible in criminal trials.¹⁹⁴ A final problem with the court's analysis

189. *Id.* at 1187.

190. *Id.* It is this finding that makes *Street* reconcilable with *Hawn v. State*, 565 N.E.2d 362 (Ind. Ct. App. 1991), a recent case which held admissible the prior drug dealings of a defendant charged with later drug offenses, where the uncharged acts occurred within a year of the charged ones, "and the circumstances tended to prove a common scheme or plan of drug dealing." *Id.* at 365.

191. 566 N.E.2d 61 (Ind. 1991).

192. *Id.* at 62.

193. *Id.* (citations omitted).

194. *Johnson v. State*, 260 N.E.2d 782 (Ind. 1970), which *Guenthersperger* cites

is that the court's description of the two incidents fails to establish the "signature" or "modus operandi" normally required to make an extrinsic offense admissible to show identity.¹⁹⁵

A new statute adopted by the Indiana legislature in 1991 adds procedural burdens for certain uses of the extrinsic evidence rule.¹⁹⁶ The statute first states that in trials for battery, aggravated battery, murder, and voluntary manslaughter, "evidence of a previous battery is admissible into the state's case-in-chief for purposes of proving motive, intent, identity, or common scheme and design."¹⁹⁷ The prior battery is admissible even if no charges were filed,¹⁹⁸ but the statute only affects prior batteries less than five years old.¹⁹⁹

The purpose and effect of these substantive provisions are unclear. The common-law rules of extrinsic offenses are broader and make all extrinsic offenses, charged or uncharged, admissible to prove motive, intent, identity, or common scheme and plan in any trial.²⁰⁰ It is clear, however, that the statute is not intended to restrict the use of extrinsic offense evidence because it expressly states that it "shall not be construed to limit the admissibility of evidence of a previous battery in any civil or criminal proceeding."²⁰¹

On the other hand, the statute may have the effect of expanding the common-law rules somewhat if, for example, it is interpreted to limit judicial discretion to find irrelevant and hence inadmissible a four-year-old battery committed under different circumstances from the charged offense. However, such interpretations would probably be incorrect, given that the statute only makes the prior batteries admissible "to prove"

for the proposition that motive is always relevant in the proof of the crime, clearly did not mean that motive is always provable. After stating the proposition in the shorthand way copied by *Guenthersperger, Johnson* then elaborated by quoting an expanded statement of the rule which specifies that motive must be in issue. *Id.* at 785.

195. See, e.g., *Brown v. State*, 577 N.E.2d 221 (Ind. 1991) (evidence of prior murder admissible under "identity/modus operandi" exception in trial for murder and child molesting, when in both cases victims were young, black girls who were walked away by a man and a woman to a secluded area, when both died of asphyxia by strangulation, when pieces of a bedsheet were found at the scenes of both crimes, and when strips of cloth from both victims' shirts were found torn into strips and knotted); *Byrd v. State*, 579 N.E.2d 457 (Ind. Ct. App. 1991) (evidence that defendant killed enemy troops in Vietnam by grinding their faces into the dirt in exactly the same manner as victim was killed admissible under identity exception). See generally 12 INDIANA PRACTICE, *supra* note 120, § 404.214.

196. IND. CODE § 35-37-4-14 (1988) (adopted May 12, 1991, and made effective July 1, 1991, by IND. CODE § 1-1-3-3 1988).

197. *Id.* § 35-37-4-14(c).

198. *Id.* § 35-37-4-14(a).

199. *Id.* § 35-37-4-14(b).

200. See 12 INDIANA PRACTICE, *supra* note 120, § 404.201.

201. IND. CODE § 35-37-4-14(e) (1988).

motive. This language appears to leave a court room to find that a prior battery does not “prove,” that is, is not relevant to, motive. Moreover, because *Guenthensperger* demonstrates that Indiana courts have no trouble finding even seven-year-old offenses relevant,²⁰² it is difficult to see the time provision as an expansion of existing law.

The procedural requirements of the statute are new, however, and may prove burdensome to the courts. They include a requirement that if the State plans to use evidence covered by the statute it file a written notice ten days before trial, together with an affidavit stating an offer of proof; a requirement that, if the court finds the written offer sufficient it hold a hearing on the offer of proof out of the jury’s hearing; and a requirement that the court make an order detailing what evidence is admissible and the type of questions that are permissible.²⁰³

I. *Real and Demonstrative Evidence*

The admissibility of transparent overlays was analyzed in *Solomon v. State*,²⁰⁴ an appeal from a conviction for attempted murder, resisting law enforcement, and criminal mischief. During the trial, both prosecution and defense used not-to-scale drawings of the streets where the events at issue took place, with transparent overlays placed on top.²⁰⁵ Both sides drew markings on the transparencies to indicate various locations and movements.²⁰⁶ Because the overlays were admitted into evidence without objection, Solomon argued on appeal that the admission of these overlays constituted fundamental error in that the markings on the overlays, drawn to illustrate testimony, lacked communicative content in themselves and hence could not be subjected to appellate review.²⁰⁷

The court of appeals agreed that the overlays lacked communicative content and were not subject to appellate review but nonetheless found that their admission did not constitute fundamental error and further found that it would not likely amount to any error at all.²⁰⁸ “Charts and drawings may be admitted into evidence if they are reasonably accurate and likely to help a jury understand testimony; such exhibits need not be perfect representations, and their admissibility is a matter of trial judge discretion.”²⁰⁹ The court reasoned that because drawings and charts could lack expressive value just as these overlays had and because such charts

202. See *supra* text accompanying notes 191-93.

203. IND. CODE § 35-37-4-14(d) (1988).

204. 570 N.E.2d 1293 (Ind. Ct. App. 1991).

205. *Id.* at 1297.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (citations omitted).

and drawings were not condemned, there was no reason to foreclose use of the overlays.²¹⁰ The court also apparently rejected insusceptibility to appellate review as a basis for objecting to the admission of exhibits.²¹¹

J. Preserving Error

In 1991, Indiana courts provided guidance to trial lawyers on preserving error and raising objections in various contexts. *Osborne v. Wenger*²¹² presented the issue of whether the failure to raise a "competency of the evidence" objection at a deposition results in a waiver of the right to object at trial to the admission of that portion of the deposition. The Third District Court of Appeals, in holding that the objection had not been waived,²¹³ construed the exception to Trial Rule 32(D)(3)(a). That rule, with its exception, states, "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."²¹⁴

Osborne sought at trial to admit a medical expert's deposition testimony that Osborne was "uninsurable and therefore unemployable."²¹⁵ Wenger sought to exclude the testimony on the grounds that the doctor was not qualified to opine on insurability and that the testimony was prejudicial, but he had failed to raise these objections at the deposition when the question eliciting the doctor's opinion on insurability and employability was asked. The appellate court said the burden was on Osborne to show that the doctor possessed the necessary credentials to render his opinion admissible and, therefore, that an objection presented at the deposition would have "obviated or removed" the ground for the objection.²¹⁶

In *Smith v. State*,²¹⁷ the supreme court found a defendant's continuing objection sufficient to preserve for appeal the issue of the admissibility of the fruits of an allegedly illegal search and seizure.²¹⁸ The trial court had held a hearing on the defendant's motion to suppress in open court and on the record. At the end of the hearing, the trial court denied the motion to suppress and granted the defendant's request to show a continuing objection. The defendant repeated his continuing objection when-

210. *Id.* at 1297-98.

211. *Id.*

212. 572 N.E.2d 1343 (Ind. Ct. App. 1991).

213. *Id.* at 1344.

214. IND. TRIAL R. 32(D)(3)(a).

215. *Osborne*, 572 N.E.2d at 1344.

216. *Id.* at 1345.

217. 565 N.E.2d 1059 (Ind. 1991).

218. *Id.* at 1061.

ever evidence to which it pertained was used by the State. The defendant did not, however, restate his grounds for objecting; he merely referred to the grounds "previously raised." In finding this continuing objection sufficient because it referred to grounds stated on the record in open court, the *Smith* court distinguished a defendant's continuing objection made "for reasons that we previously argued in chambers," which had been found insufficient in *Abner v. State*.²¹⁹

K. Miscellaneous Indiana Decisions of Note

Certain other decisions issued by Indiana courts in 1991 are also worth mentioning. In *Reed v. Dillon*,²²⁰ the court of appeals held that a motion to strike a document from the record may remove that document from the record, but does not bar introduction of the document into evidence at some later point in the proceedings.²²¹

In *Smith v. State*,²²² the Second District Court of Appeals dealt with the issue of whether a juvenile was convicted of robbery based on an allegedly involuntary confession. The defendant made this confession after a twenty minute consultation with his mother, after which both he and his mother signed waivers of their rights.²²³ Under Indiana Code section 31-6-7-3(a)(2), the juvenile's rights could be "knowingly and voluntarily" waived by a mutual act of the juvenile and the custodial parent after a "meaningful consultation."²²⁴ In this case, Smith alleged that his mother misunderstood the ramifications of the statement made to her by police that Smith's companion, but not Smith, had been identified.²²⁵

Pursuant to Indiana Code Section 31-6-7-3(d)(2), the court treated the mother's alleged misunderstanding as "a factor affecting the voluntariness of the confession."²²⁶ The court, in evaluating the "totality of the circumstances," doubted that the mother lacked an appreciation of the effect of her son's confession and found that the evidence supported the trial court's conclusion that the defendant's rights were waived.²²⁷

II. FEDERAL DEVELOPMENTS

A. Rule 403 Balancing

Two 1991 decisions by the Seventh Circuit describe interesting applications of the Rule 403 balancing test.²²⁸ In *United States v.*

219. 479 N.E.2d 1254, 1259 (Ind. 1985).

220. 566 N.E.2d 585 (Ind. Ct. App. 1991).

221. *Id.* at 588.

222. 580 N.E.2d 298 (Ind. Ct. App. 1991).

223. *Id.* at 300.

224. *See* IND. CODE § 31-6-7-3(a)(2) (1988).

225. *Id.* at 300-01.

226. *Id.* at 300.

227. *Id.* at 301.

228. The rule provides, "Although relevant, evidence may be excluded if its probative

Masters,²²⁹ the court of appeals held that the trial court did not abuse its discretion in refusing to allow the defense to cross-examine a witness in detail concerning his habit of wearing women's underwear.²³⁰ The defendants maintained that they were innocent of a woman's murder and claimed, based on the witness's habit and on the absence of underpants on the victim, that the witness had killed her for the missing underpants. After the witness, in response to a defense question, admitted his habit, the trial judge cut off further questioning.

The Seventh Circuit found that the details of the witness's habit were properly excluded under Rule 403.²³¹ It reasoned that because there was no indication that violence was an aspect of transvestism in general or the witness's habit in particular, the details were "peripheral."²³² The court of appeals also noted that the defense's theory of the murder was "hardly . . . impressive,"²³³ since women's underwear is readily available for purchase and need not be acquired through murder.

In *United States v. Allen*,²³⁴ the Seventh Circuit held that the trial court did not abuse its discretion under Rule 403 in allowing a government witness to correct in court her earlier misidentification of the defendant, which was also given in court.²³⁵ The Seventh Circuit held that there was no substantial danger of unfair prejudice or of misleading the jury, where both identifications were made before the jury, where the defense and prosecution were permitted to explore the discrepancy thoroughly on cross and on redirect examination, and where there was no indication that the witness had been coached to change her testimony.²³⁶

B. Sequestration of Witnesses

In *United States v. Hargrove*,²³⁷ the Seventh Circuit rejected a defendant's claim that the trial court should have excluded the testimony of a government witness who was present during the testimony of another

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

229. 924 F.2d 1362 (7th Cir. 1991).

230. *Id.* at 1368.

231. *Id.*

232. *Id.*

233. *Id.*

234. 930 F.2d 1270 (7th Cir. 1991).

235. *Id.*

236. *Id.* at 1273.

237. 929 F.2d 316 (7th Cir. 1991).

government witness she was called to contradict because the trial court had entered a sequestration order pursuant to Rule 615.²³⁸ The government had called Baker, a paralegal present at the FBI's interview of Beckett, to rebut Beckett's courtroom testimony, which Baker had heard, that Beckett was coerced to name the defendant as his drug source.

The court found that Baker's testimony did not contravene the purpose of Rule 615, which "is to prevent witnesses from tailoring their testimony to that which has already been presented and to help in detecting testimony that is less than candid."²³⁹ This was because Baker's testimony was in rebuttal to Beckett's and not in conformance with his, because Baker did not testify concerning the substance of Beckett's interview with the FBI but only concerning the lack of coercion during it, and because the government had no intention of calling Baker until Beckett asserted coercion on the stand.²⁴⁰

C. *Opinions on the Ultimate Issue*

In *United States v. Foster*,²⁴¹ the Seventh Circuit addressed the interplay between Rule 704(b) and expert testimony on drug courier profiles. The issue at trial was whether Foster knew he was carrying drugs. The court held that a DEA agent's expert testimony that Foster fit the drug courier profile did not violate Rule 704(b)'s prohibition on experts testifying as to whether the defendant had the mental state required of the crime charged.²⁴² The court reasoned that the testimony was permissible because the agent did not specifically opine that Foster had the requisite state of mind.²⁴³ The testimony "merely assisted the jury in coming to a conclusion as to Foster's mental state [but] did not make that conclusion for them."²⁴⁴

D. *Notable United States Supreme Court Decisions*

Certain rulings by the United States Supreme Court in 1991 should also be mentioned. In *Arizona v. Fulminante*,²⁴⁵ the Supreme Court, in a five to four decision, announced that the admission of coerced confessions would be subject to a harmless error analysis, based on Justice

238. That rule provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. . . ." FED. R. EVID. 615.

239. *Hargrove*, 929 F.2d at 320.

240. *Id.* at 320-21.

241. 939 F.2d 445 (7th Cir. 1991).

242. *Id.* at 454.

243. *Id.*

244. *Id.*

245. 111 S. Ct. 1246 (1991).

Rehnquist's characterization of such errors as "error in the trial process," rather than a "structural defect affecting the framework within which the trial proceeds."²⁴⁶ In *Payne v. Tennessee*,²⁴⁷ the Supreme Court abandoned its previous decisions in *Booth v. Maryland*²⁴⁸ and *South Carolina v. Gathers*²⁴⁹ and held that the Eighth Amendment to the United States Constitution does not *per se* bar the introduction of victim impact evidence at the penalty phase of a capital trial.²⁵⁰

III. CONCLUSION

As this Article demonstrates, a number of evidentiary developments occurred in 1991. Readers should understand, however, that while the Article addresses some of the more significant topics, it is not intended to be comprehensive.

246. *Id.* at 1264-65.

247. 111 S. Ct. 2597 (1991).

248. 482 U.S. 496 (1987).

249. 490 U.S. 805 (1989).

250. *Payne*, 111 S. Ct. at 2608.