RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW: OCTOBER 1, 2014 TO SEPTEMBER 30, 2015

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INTRODUCTION

The Indiana Rules of Evidence ("Rules") were codified in 1994.[1] Since that time, the rules have been applied, explained, and interpreted through court decisions.[2] They have also been refined through statutory revisions.[3] This Article describes the developments in Indiana evidence law during the survey period of October 1, 2014, through September 30, 2015. This Article is not intended to provide an exhaustive discussion of every case applying an Indiana Rule of Evidence. Nor does the Article discuss every Indiana Rule of Evidence. Rather, it summarizes the more important developments in this area of practice. The discussion topics follow the order of the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

According to Rule 101(a), the Rules apply to all court proceedings in Indiana unless "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[4] Where issues are not specifically addressed in the Rules, common law and statutory law apply.[5] United States District Court Judge Robert L. Miller, Jr., of the Northern District of Indiana has explained this as follows:

> [I]n resolving an evidentiary issue, a court must consult the evidence rules first; if they provide an answer, all other sources, whether statutory or earlier case law, are to be disregarded. In deciding whether the evidence rules provide an answer, the rules are to be construed in accordance with the principles articulated in Rule 102. If the evidence rules provide no answer, the court must turn to common law and statutory sources.[6]

Rule 102 states the Rules should be construed so as "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the

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1. *See generally* IND. R. EVID.

2. *See, e.g.*, Caldwell v. State, 43 N.E.3d 258, 261 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 243 (Ind. 2015); Smart v. State, 40 N.E.3d 963, 967 (Ind. Ct. App. 2015); Bell v. State, 29 N.E.3d 137, 141 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 238 (Ind. 2015).

3. *See, e.g.*, IND. CODE § 26-1-2-202 (2015).

4. IND. R. EVID. 101.

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

6. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE § 102 cmt. 1 (2013).

development of evidence law, to the end of ascertaining the truth and securing a just determination."[7]

II. JUDICIAL NOTICE (RULE 201)

The court may take judicial notice of the types of matters referenced in Rule 201.[8] Among other things, the court may judicially notice any fact that "(A) is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction, or (B) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[9] In *Smart v. State*, the defendant challenged his conviction for unlawful possession of a syringe.[10] The defendant was convicted under Indiana Code section 16-42-19-18.[11] This statute made illegal the possession of a syringe "adapted for the use of a legend drug by injection in a human being."[12] Smart argued the State had the burden to demonstrate methamphetamine was categorized as a legend drug.[13] The court of appeals agreed with the defendant that for the conviction to stand, the State had to establish that methamphetamine was a legend drug.[14] It also agreed the State had failed to make the required showing.[15] The only evidence at the trial court that methamphetamine was a legend drug was the trial court's "judicial notice" of such.[16] The court of appeals, however, concluded whether methamphetamine qualified as a legend drug was not a fact "'not subject to reasonable dispute' or a fact that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"[17] Accordingly, the evidence was not sufficient to sustain the conviction for possession of a syringe.[18]

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

A. Relevance and Probative Value Versus Unfair Prejudice (Rules 401 and 403)

Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[19] Rule 402 "provides that

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7. IND. R. EVID. 102.
8. IND. R. EVID. 201.
9. *Id.*
10. Smart v. State, 40 N.E.3d 963, 967 (Ind. Ct. App. 2015).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 968.
16. *Id.*
17. *Id.* (quoting IND. R. EVID. 201(a)).
18. *Id.*
19. IND. R. EVID. 401.

relevant evidence is generally admissible and irrelevant evidence inadmissible."[20] On the other hand, courts are not required to admit all relevant evidence: they may refuse admission of otherwise relevant evidence if admission is prohibited by the Indiana or Federal Constitution, a statute, other provisions within the Indiana Rules of Evidence, or other court rules.[21]

Rule 403 also operates to limit the admission of relevant evidence. Under that rule, a court may determine evidence that is relevant to be inadmissible if its value as evidence is substantially outweighed by any of the following: potential confusion of issues, unfair prejudice, undue delay, or accumulation of evidence.[22]

The court of appeals elaborated upon and applied both Rules 401 and 403 in *Duncan v. State*.[23] The defendant was convicted of, among other things, felony pointing a firearm, felony possession of marijuana, and felony resisting law enforcement.[24] On appeal, the court considered the defendant's argument that ammunition found in his garage was either irrelevant or should have been excluded under Rule 403's balancing test.[25] First, the court rejected Duncan's argument that "the ammunition had nothing to do with any issue in this case . . . [because] he did not dispute that he possessed the gun or that he knew it was loaded, but instead only contested whether he voluntarily pulled the trigger."[26] The court found contrary to what Duncan seemed to argue, the universe of relevant evidence is not narrowed by a defendant's theory of defense.[27] Rather, the State had to prove every element of each offense beyond a reasonable doubt.[28] Nor did the defendant formally stipulate he possessed the gun or he knew it was real and loaded.[29] Even if the defendant had stipulated these facts, the court emphasized the State is entitled to prove its case by the evidence of its own choice.[30] Here, the court found the presence of ammunition of the same caliber as that used in the commission of the crime, located in a bag with the defendant's social security card and birth certificate, tended to make it more likely that the defendant "possessed the gun and loaded it, both facts that were relevant to the charges in this case."[31]

Second, the court found Rule 403 did not bar admission of the evidence at issue.[32] Again, the defendant's argument centered on his theory of defense:

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20. Bell v. State, 29 N.E.3d 137, 141 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 238 (Ind. 2015).

21. IND. R. EVID. 402.

22. IND. R. EVID. 403.

23. 23 N.E.3d 805 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 982 (Ind. 2015).

24. *Id.* at 807-08.

25. *Id.* at 809-10.

26. *Id.* at 810.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 811.

because he did not dispute that he possessed a gun, the probative value of the evidence should be weighed with that in mind.[33] The court, however, stated that a defendant's Rule 403 objection "and his offer to concede a point generally cannot prevail over the government's choice to offer evidence showing guilt and all the circumstances surrounding the offense."[34] Nor did the court agree that admitting the ammunition posed an overly great risk of unfair prejudice.[35] The amount of ammunition was not extraordinary—eighty-four nine millimeter cartridges.[36] Also, the ammunition was the same caliber and type as that found with the gun used in the commission of the charged offenses and did not therefore suggest the defendant owned more than one gun.[37]

The Indiana Court of Appeals considered another Rule 403 challenge in *Bell v. State*.[38] First, it noted the task of weighing probative value against potential dangers is "a discretionary task best performed by the trial court."[39] Further, on the question of "unfair prejudicial impact, courts should look for the dangers that the jury will substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury."[40] In the case before it, the court concluded the trial court had not erred in admitting the defendant's statement to the effect that he could "read a person by the way they acted."[41] The statement was relevant to the charges in the case, namely that the defendant committed rape by knowingly having sexual intercourse with a person who was "unaware that sexual intercourse was occurring."[42] Specifically, the statement made it more likely than not the defendant knew the victim was unaware that they were engaged in sexual intercourse.[43] On the other side of the balancing test, the court of appeals found no danger of unfair prejudice because the characteristic of being good at "reading" people was "not a negative one that might unfairly prejudice the jury against Bell."[44] Moreover, that the "statement may have been damaging to Bell's defense theory is not grounds for exclusion of the statement."[45]

B. Evidence of Character, Crimes, and Other Bad Acts (Rule 404)

In the above-mentioned *Bell v. State*, the court of appeals also addressed the

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33. *Id.* at 810-11.
34. *Id.* at 811 (quoting Kellett v. State, 716 N.E.2d 975, 979 (Ind. Ct. App. 1999)).
35. *Id.* at 811.
36. *Id.*
37. *Id.*
38. 29 N.E.3d 137, 142 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 238 (Ind. 2015).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 140-42.
43. *Id.* at 142.
44. *Id.*
45. *Id.*

defendant's argument that admitting the statement violated Rule 404(a)'s proscription against admitting character evidence "to prove that on a particular occasion the person acted in accordance with the character."[46] To support its conclusion that the statement did not constitute character evidence, the court referenced the Indiana Supreme Court's definition of character in *Malinski v. State*:[47] "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness."[48] The court of appeals also quoted federal District Court Judge Miller:

> Wigmore defined character as "the actual moral or psychical disposition, or sum of the traits." Graham defines character as "the nature of a person, his disposition generally, or his disposition in respect to a particular trait." McCormick defines it as "a generalized description of a person's disposition, or of the disposition in respect to a general trait.[49]

Applying these definitions, the court concluded Bell's statement about "his ability to 'read' people" was not a character trait.[50] Instead, the statement was "more of a bragging description of his ability, not his character."[51] Accordingly, the trial court acted properly in admitting it.[52]

Rule 404(b) sets out specific exceptions to Rule 404(a)'s proscription against admitting character evidence.[53] Under Rule 404(b)(1), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with [that] character."[54] Under Rule 404(b)(2), however, such evidence may be admitted for other reasons, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[55] The identity exception was the subject of the court of appeals' decision in *Caldwell*.[56] There, the defendant challenged his conviction for burglary and attempted rape and argued the trial court erred in admitting into evidence that he had looked into the window of another woman's house in the same neighborhood fifty-seven days

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46. *Id.*

47. 794 N.E.2d 1071 (Ind. 2003).

48. *Bell*, 29 N.E.3d at 142-43 (quoting Malinski v. State, 794 N.E.2d 1071, 1083 (Ind. 2003)).

49. *Id.* at 143 (quoting ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: INDIANA EVIDENCE § 404.101 (3d ed. 2014)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* IND. R. EVID. 404.

54. Caldwell v. State, 43 N.E.3d 258, 261 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 243 (Ind. 2015).

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

56. *Caldwell*, 43 N.E.3d 258.

after the crime at issue.[57] The court of appeals agreed.[58]

The court explained the identity exception was "crafted primarily for 'signature' crimes with a common modus operandi."[59] The rationale is the two crimes are so similar and unique that one could conclude the same person likely committed them. By way of illustration, the *Caldwell* court referenced a decision in *Allen v. State*.[60] In *Allen,* the evidence showed the victim had been bound with duct tape and raped.[61] At the scene, the police also found a note with the defendant's pager number and a reference to the name "Play." [62] Those facts were such that the Indiana Supreme Court upheld the trial court's decision to permit introduction of evidence connecting the defendant to another rape—one where the victim had been bound with duct tape, had the same pager number, and knew the defendant by the name "Play."[63] The *Caldwell* court, however, concluded in the case before it the required level of similarity between crimes was not present so as to allow application of the identity exception.[64] It said that although the victims were similar and the crimes occurred in the same area, there were "stark differences between the crimes."[65] Specifically, one involved a break-in and attempted rape,[66] while the other involved no break-in and no attempted rape.[67] Without more striking similarities between the crimes, the *Caldwell* court could not conclude they were "signature crimes."[68] Nevertheless, the court of appeals found admitting the evidence of the prior crime was harmless given the other substantial evidence linking the defendant to the crime.[69]

Whether "other crimes" evidence was properly admitted to demonstrate the defendant's "plan" to have sex with the victim was the subject of *Guffey v. State*.[70] In that case, the defendant was convicted of conspiring to molest the twelve-year-old son of his girlfriend.[71] On appeal, he argued the trial court improperly admitted evidence of recorded telephone conversations wherein he urged the victim's mother to have sex with the boy, stating the conversations related to uncharged conduct and were unrelated to a sexual offense charge.[72]

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57. *Id.* at 262-63.
58. *Id.* at 266.
59. *Id.* at 261.
60. 720 N.E.2d 707 (Ind. 1999).
61. *Id.* at 710.
62. *Id.*
63. *Id.* at 711-12.
64. *Caldwell*, 43 N.E.3d at 266.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 267.
70. 42 N.E.3d 152 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 243 (Ind. 2015).
71. *Id.* at 165.
72. *Id.* at 159.

The court of appeals disagreed.[73] Instead, it agreed with the State the conversations were relevant to a "matter other than Guffey's propensity to commit the charged act"—in this case, planning and grooming.[74] The court explained grooming is the "'process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point' where it is possible to perpetrate a crime against the victim."[75] The conversations in which the defendant encouraged his girlfriend to expose her son to alcohol and sexual acts were done to prepare the child to be more comfortable with the planned molestation.[76] Finally, the court of appeals also concluded the recorded conversations were relevant to a matter other than the defendant's propensity to commit the charged crime because they occurred close in time to the final phone conversation before the molestation and therefore completed the story of the crime.[77]

C. Evidence of Rape Victim's Character (Rule 412)

The Indiana Supreme Court considered the intersection between Indiana Rule of Evidence Rule 412 and the Sixth Amendment confrontation right in *Hall v. State*.[78] There, the defendant, who was convicted of child molesting, argued the court erred in prohibiting him from (1) asking questions of the victim's mother at deposition and (2) introducing the tape of a phone call at trial between the victim's mother and the defendant concerning the victim's past conduct involving consensual touching with a young boy of the same age as the victim.[79] Apparently, the victim had initially suggested that the touching during the past incident was without her consent.[80] Thus, the defendant argued the incident was relevant impeachment evidence to show the victim had previously made a false accusation of rape.[81] The trial court prohibited the defendant from inquiring about the incident during deposition and from admitting phone call evidence about it at trial, citing Rule 412 and its general prohibition against admitting evidence involving alleged sexual misconduct to prove a victim's prior sexual behavior or predisposition.[82] In a split decision, the court of appeals found the trial court abused its discretion in precluding both the deposition questions and the phone call evidence.[83]

The Indiana Supreme Court began its review of the case by explaining Rule

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73. *Id.* at 161.
74. *Id.* at 160-61.
75. *Id.* at 161 (quoting Piercefield v. State, 877 N.E.2d 1213, 1216 (Ind. Ct. App. 2007)).
76. *Id.*
77. *Id.*
78. 36 N.E.3d 459 (Ind. 2015).
79. *Id.* at 462-63, 466.
80. *Id.* at 462.
81. *Id.* at 466.
82. *Id.* at 463.
83. *Id.* at 466.

412 does not bar admission of alleged sexual misconduct evidence when it is offered to prove false accusations of rape for the purposes of impeaching witness credibility—as opposed to the witness's general character.[84] Under Rule 412 there is a distinction between evidence of sexual conduct, which is precluded, and evidence of *verbal* conduct such as a prior rape allegation, which is not precluded.[85] Because the answer to the deposition question posed to the victim's mother could have revealed potentially relevant trial evidence as to the victim's credibility, the Indiana Supreme Court found that the trial court "should have granted Hall's motion to compel discovery in order to fully secure his Sixth Amendment right to confront witnesses against him."[86] The court, however, concluded the evidence showed beyond a reasonable doubt the error did not contribute to the guilty verdict.[87] Because the error was harmless, it did not require reversal.[88]

As to the phone call, the defendant argued the State opened the door to additional questions about the call between himself and the victim's mother during its direct examination of the victim's mother.[89] The court agreed, noting the long-settled premise that otherwise inadmissible evidence may become admissible when a party opens the door such that without further information the evidence elicited would leave the trier of fact with a misleading impression of the facts.[90] In this case, as the jury heard it from the State's questioning on direct, during the phone call, the defendant was "*baselessly* fishing for ways to destroy [the alleged victim's] credibility."[91] The defendant, however, wanted to show he was seeking information about the incident during that phone call because it "*could* have been a prior accusation of sexual misconduct" by the victim.[92] Again, though, the court found the trial court's error was harmless beyond a reasonable doubt.[93] It stated that "although Hall was not able to play the phone conversation for the jury or question [the mother] about the call, the State presented ample evidence of Hall's guilt and demonstrated beyond a reasonable doubt that the confrontation error did not contribute to the verdict against him."[94]

Justices Rucker and Rush dissented from the decision in *Hall* with a separate opinion.[95] The justices agreed with the majority that the trial court violated the defendant's Sixth Amendment rights by improperly excluding the evidence about

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84. *Id.* at 467.
85. *Id.*
86. *Id.*
87. *Id.* at 468.
88. *Id.* at 467-70.
89. *Id.* at 471.
90. *Id.*
91. *Id.* (emphasis added).
92. *Id.*
93. *Id.* at 472.
94. *Id.* at 474.
95. *Id.* (Rucker, J., dissenting).

the incident.[96] The dissent, however, took issue with the majority's harmless error analysis, which it said was incorrect in focusing on the *entirety* of the evidence.[97] The dissent instead concluded when one focused on the witness specifically, the error was not harmless and, indeed, contributed to a guilty verdict.[98] Specifically, precluding the line of questioning about the victim's prior accusation denied the defendant his constitutional right to cross-examine the victim's mother and deprived him of impeachment evidence regarding the victim.[99] Finally, because the State did not demonstrate that the error did not "contribute to the verdict," the dissent could not conclude the error was harmless beyond a reasonable doubt.[100]

IV. WITNESS TESTIMONY (RULES 601-617)

In *Ferguson v. State*, the court of appeals was called upon to address for the first time in Indiana the question of whether certain comments by a judge violated Rule 605.[101] The defendant argued the trial court had acted as a witness during trial because it used the words "though heartfelt" when admonishing the jury.[102] Specifically, the judge instructed the jury that "[t]he opinions of other people, though heartfelt, are not something you can consider, all right."[103] The appellate court began its analysis of the issue by noting the trial judge was not sworn in as a witness and did not testify in the usual sense of the word.[104] It then looked to evidence regarding the purpose of Rule 605, which is that allowing a presiding judge also to be a witness in the case over which he is presiding would be inconsistent with his duty of impartiality.[105] The bright line rule is thus that a judge cannot be sworn in and take the stand in a case over which he is presiding.[106] The court, however, noted the absence of such a bright line to govern in cases where a judge might be acting as a witness in *less overt* ways.[107] The court of appeals stated whether a judge has become a witness in a less overt ways involves analysis under "judicial fair comment and not the evidentiary rule."[108] "Error is found where the judge's comments add to the evidence and are not merely summarizations of or fair comment on evidence already adduced at trial."[109] Applying this test, the court concluded the trial judge's "though

96. *Id.*
97. *Id.*
98. *Id.* at 476-77.
99. *Id.* at 476.
100. *Id.* at 477.
101. 40 N.E.3d 954, 955 (Ind. Ct. App.), *trans. denied*, 40 N.E.3d 858 (Ind. 2015).
102. *Id.* at 957.
103. *Id.* at 956.
104. *Id.* at 957.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 957-58.

heartfelt" comment was neither testimony nor improper comment on an issue to be decided by the jury.[110] Rather, the trial court was instructing the jury properly not to consider the opinions of others when analyzing the credibility of witnesses.[111] The words "though heartfelt" merely added emphasis to that instruction by saying it was not relevant how "heartfelt" such opinions may have been.[112]

Several recent Indiana cases address witness testimony as it relates to impeachment. In *Jacobs v. State*,[113] the Indiana Supreme Court considered the parameters of Rule 608 as they related to the defendant's claim that he should have been able to introduce certain impeachment evidence against the child victim in a case charging him with child molestation.[114] The court explained that pursuant to Rule 608(a), one may attack or support the credibility of a witness with evidence in the form of opinion or reputation for truthfulness.[115] Under Rule 608(b), however, one may not inquire into, or prove by extrinsic evidence, specific instances of bad conduct.[116] The court held because the defendant "attempted to delve into specific instances of [the child victim's] conduct, namely whether [he] had lied to his mother on prior occasions," the evidence was not admissible under Rule 608.[117] First, it was not opinion or reputation evidence.[118] Second, it specifically violated Rule 608(b)'s prohibition on evidence about specific instances of bad conduct.[119]

The Indiana Court of Appeals considered the applicability of Rules 607, 608(b), and 616 in *Wilson v. State*; a case where the defendant was convicted of murdering a pizza delivery person.[120] The defendant contended the trial court erred in not allowing him to cross-examine a witness at trial about the number of times he had previously been arrested.[121] The witness was not involved in the crime, but was present when the defendant stated in front of several people he had just shot someone.[122] The defendant argued the evidence was admissible to show a prior inconsistent statement, inasmuch as the witness stated during a deposition prior to trial he had only been arrested once previously, even though he had apparently been arrested four times.[123] According to the defendant, this evidence would show the witness was not credible at trial because he had lied in

110. *Id.* at 958.
111. *Id.*
112. *Id.*
113. 22 N.E.3d 1286 (Ind. 2015).
114. *Id.* at 1289.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. 39 N.E.3d 705, 711 (Ind. Ct. App.), *trans. denied*, 40 N.E.3d 857 (Ind. 2015).
121. *Id.* at 712.
122. *Id.* at 716-17.
123. *Id.* at 708.

a sworn deposition.[124]

On appeal, Wilson conceded Rules 404(b) and 609 would not permit extrinsic evidence regarding the acts for which the witness was arrested but not convicted.[125] He claimed, however, the evidence was admissible under Rules 607, 608(b), and 616.[126] The court of appeals disagreed.[127] First, it explained Rule 607 permits the introduction of evidence to attack a witness's credibility and Rule 616 permits attacking such credibility with evidence of bias or prejudice for or against a party.[128] The court rejected the defendant's argument that understating the number of prior arrests showed the witness was trying to minimize his culpability, noting the witness had no culpability in this case.[129] The court further stated it failed to see how any inconsistency in the number of prior arrests is relevant to bias, prejudice, or interest against the defendant.[130] The court also found Rule 608(b) inapposite.[131] As to non-conviction misconduct, the court may allow specific instances of misconduct to be inquired into "'if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.'"[132] The Rule, the court stated, would only apply in this case if the defendant wanted to cross-examine the witness "with regard to the character for truthfulness or untruthfulness *of another witness—and* [the witness] had already testified on direct examination about that witness's character for truthfulness."'[133]

Rule 613(b) and the parameters of allowing impeachment by inconsistent statement was the subject of the Indiana Supreme Court's decision in *Griffith v. State*.[134] At trial, Griffith sought to impeach the victim with two witnesses who the defendant said would testify the victim told them a version of events that differed from the victim's testimony at trial.[135] The question on appeal and before the supreme court turned on whether the defendant had satisfied Rule 613(b)'s prerequisites for impeachment.[136] Specifically, at the time of Griffith's trial, Indiana's Rule 613(b) provided a party may only impeach a witness with a prior inconsistent statement if "'the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.'"[137] The court noted

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124. *Id.* at 710.
125. *Id.* at 712.
126. *Id.*
127. *Id.* at 712-13.
128. *Id.* at 713.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* (emphasis added).
134. 31 N.E.3d 965, 966 (Ind. 2015).
135. *Id.*
136. *Id.* at 971.
137. *Id.* (quoting IND. R. EVID. 613(b))

it had affirmed in *Hilton v. State* a trial court ruling that excluded extrinsic evidence of a prior inconsistent statement where the defendant did not first take the opportunity to cross-examine the witness about the alleged inconsistent statement.[138] The court, however, clarified the holding in *Hilton* does not stand for the proposition that extrinsic evidence may *never* under any circumstances be admitted before the witness is given the chance to explain or deny a prior inconsistent statement.[139] Indeed, the court explained it did not explicitly address in *Hilton* the full scope of when Rule 613(b) permits the introduction of extrinsic evidence.[140]

As to that scope, the *Griffith* court stated it was inclined to follow the federal interpretation of the rule inasmuch as Indiana's Rule 613(b) uses the same language as the federal rule.[141] That interpretation affords great flexibility to trial courts. Specifically, the witness must still be given an opportunity to explain or deny, but not necessarily *before* extrinsic evidence of the statement is admitted.[142] Rather, the witness must only be permitted *at some point* to explain or deny.[143] Thus, the court held Rule 613(b) requires only that a witness be afforded the opportunity to explain or deny at some point during the proceedings.[144] It nevertheless cautioned the preferred method is to provide that opportunity to the witness before introducing extrinsic evidence because doing so has the benefit of insuring the witness remains available, and also may make it easier for the jury to understand the context of the intended impeachment.[145] Finally, the court urged trial courts to

> consider a variety of relevant factors in making the determination to admit or exclude extrinsic evidence, such as the availability of the witness, the potential prejudice that may arise from recalling a witness only for impeachment purposes, the significance afforded to the credibility of the witness who is being impeached, and any other factors that are relevant to the interests of justice.[146]

As to whether the trial court improperly denied Griffith's proposed extrinsic evidence in violation of Rule 613(b), the court found no abuse of discretion on the facts before it.[147] First, there was no evidence the witness was available to be recalled to explain or deny the alleged prior statements.[148] Second, the fact that two other eyewitnesses also identified Griffith as the initial aggressor diminished

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138. *Id.* at 970 (citing Hilton v. State, 648 N.E.2d 361, 362 (Ind. 1995)).
139. *Id.* at 971.
140. *Id.* at 970.
141. *Id.* at 971-72.
142. *Id.* at 970-71.
143. *Id.* at 971.
144. *Id.* at 972.
145. *Id.*
146. *Id.*
147. *Id.* at 973.
148. *Id.*

the importance at trial of attacking this witness's testimony.[149] Nor did the defendant explain to the trial court why he failed to cross-examine the witness while still on the stand or why the interests of justice otherwise required the admission of the proposed extrinsic evidence.[150] Although it found no abuse of discretion, the court also emphasized that on these facts, the trial court would not have erred had it instead allowed the witness to be recalled and questioned about the alleged prior inconsistent statement.[151]

V. LAY AND EXPERT WITNESSES (RULES 701-705)

The Rules employ limits on both lay and expert witness testimony. According to Rule 701, lay witnesses may provide "opinion" testimony only if "rationally based on the witness's perception; and . . . helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue."[152] The court of appeals addressed the proper foundation for lay witness opinion testimony in *Whitlock v. Steel Dynamics, Inc.*[153] The issue in that case was whether the plaintiff in a personal injury case had sufficiently demonstrated he was injured in a manner that would excuse him from failing to file his compliant within the statute of limitations.[154] The plaintiff alleged he was "incompetent" for some nine days after the initial injury, such that he was entitled to additional time to file.[155] To support his claim, he submitted affidavits from his wife and mother-in-law addressing his alleged mental incompetence and physical limitations.[156] Among other things, however, the court of appeals concluded the affidavits did not meet the requirements of Rule 701 because they "give general opinions without designating objective bases for the opinions."[157] Rule 701 requires the witness to identify such objective bases because otherwise the trial court has no way to assess whether the testimony is (1) rationally based on the witness's perceptions and (2) helpful to the trier of fact.[158] In this case, the affidavits contained statements to the effect that the plaintiff was "disoriented" and "not all there."[159] Because the opinions addressed the central issue of the plaintiff's mental competence, the court held greater detail was required.[160] Rather than setting out such conclusions, the witnesses "were required to give specific details which they perceived to be the basis for their conclusions that

149. *Id.*
150. *Id.*
151. *Id.*
152. IND. R. EVID. 701.
153. 35 N.E.3d 265 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).
154. *Id.* at 267-68.
155. *Id.* at 269.
156. *Id.* at 272-73.
157. *Id.* at 273.
158. *Id.* at 269.
159. *Id.* at 268.
160. *Id.*

[the plaintiff] was mentally incompetent."[161]

Judge May dissented in *Whitlock*, disagreeing that the affidavits failed to set forth the required factual bases for the opinions stated therein.[162] For example, Judge May noted the first affiant explained: "'He was disoriented, when he would wake up you would try to talk to him and he would have to think a long time about what he was saying before he said it.'"[163] The same affiant also said: "'[H]e was not all there, he would change the subject in the middle of what you were talking about and forget what you were talking about and just quit talking.'"[164] These, Judge May stated, were "specific details" explaining the basis for the affiant's opinions.[165]

The Indiana Supreme Court addressed the necessary foundation for skilled lay witness opinion testimony in *Buelna v. State*.[166] There, the defendant challenged his Class A felony conviction for manufacturing methamphetamine for insufficiency of the evidence.[167] The defendant argued the charge was improperly enhanced from a Class B felony because at least three grams of the drug were at issue.[168] The court of appeals rejected Buelna's argument, reasoning the liquid sample tested contained some final product, such that the entire thirteen-gram weight of the sample constituted "adulterated" methamphetamine counting towards the weight to satisfy the enhancement.[169]

The Indiana Supreme Court granted transfer to consider Buelna's argument that the enhancement was not proper because the thirteen gram liquid mixture was not "adulterated."[170] First, the court addressed as a matter of law the question of whether an intermediate mixture a manufacturer is caught creating constitutes "adulterated" methamphetamine within the meaning of the statute prohibiting the manufacture of the drug.[171] It concluded, based on an examination of the language of the statute, evidence of legislative intent, and its own case law, that "'adulterated' methamphetamine is the final, extracted product that may contain lingering impurities or has been subsequently debased or diluted by a foreign substance—not an intermediate mixture that has not undergone the entire manufacturing process."[172] Thus, if the State relies on an unfinished chemical mixture for the three-gram enhancement, it must show "how much final product a defendant's particular manufacturing process would have yielded had it not

161. *Id.*
162. *Id.* at 274 (May, J., dissenting).
163. *Id.*
164. *Id.*
165. *Id.*
166. 20 N.E.3d 137 (Ind. 2014).
167. *Id.* at 140.
168. *Id.* at 141.
169. *Id.*
170. *Id.*
171. *Id.* at 141-42.
172. *Id.* at 142.

been interrupted by police or other intervening circumstances."[173] Such evidence may come from a skilled witness under Rule 701—namely, a witness with expertise beyond that of ordinary jurors, but not sufficient expertise to qualify as an expert under Rule 702.[174] For these purposes, such a skilled witness would be one who regularly used or dealt in the drug or developed an acute ability to assess the weight of the drugs in which they deal.[175] Here, the court found the State presented direct testimony of actual, measured weight through the testimony of two such skilled witnesses—the defendant's co-manufacturer and a mutual friend.[176]

Skilled lay opinion testimony under Rule 701 was also the subject of *Satterfield v. State*.[177] In that case, the defendant challenged his conviction for murder and arson, arguing the trial court abused its discretion in admitting a detective's testimony characterizing the defendant's answers during a police interview as "evasive."[178] In particular, the defendant argued the detective was not qualified as a skilled lay witness under Rule 701 and also the detective was not permitted to offer "human lie detector" testimony.[179] The Indiana Supreme Court agreed the detective was not a skilled witness, but found his testimony was admissible as ordinary lay opinion testimony.[180] First, the court explained an ordinary or skilled lay witness may offer opinion testimony if (1) it is rationally based on the perception of the witness and (2) it is helpful to the trier of fact.[181] The first requirement means the "'opinion must be one that a reasonable person could normally form from the perceived facts.'"[182] The opinion testimony is helpful "'if the testimony gives substance to facts, which were difficult to articulate.'"[183] The court concluded the detective's offered opinion about the defendant's evasiveness was "no more insightful than what an ordinary lay witness could have observed."[184] The opinion testimony, however, was "helpful as a summary of the content and manner of answering questions," and was therefore properly admitted as ordinary lay opinion testimony.[185] Nor was the testimony otherwise improperly admitted "human lie detector" testimony.[186] It is true witnesses may not "'testify to opinions concerning intent, guilt, or innocence

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173. *Id.* at 146.
174. *Id.*
175. *Id.* at 147.
176. *Id.* at 148.
177. 33 N.E.3d 344, 352 (Ind. 2015).
178. *Id.* at 351.
179. *Id.*
180. *Id.* at 354.
181. *Id.* at 352.
182. *Id.* (quoting Davis v. State, 791 N.E.2d 266, 268 (Ind. Ct. App. 2003)).
183. *Id.* (quoting McCutchan v. Blanck, 846 N.E.2d 256, 262 (Ind. Ct. App. 2006)).
184. *Id.* at 352.
185. *Id.*
186. *Id.* at 354.

in a criminal case [or] . . . whether a witness has testified truthfully.'"[187] The court, though, found that taken in context, the detective's summary of the defendant's mode of answering questions—namely he minimized incriminating information and maximized harmless information—was not inadmissible commentary on the defendant's truthfulness.[188]

The Rules place additional limits on expert testimony. Experts must be qualified to testify based on knowledge, skill, training, or education.[189] In addition, they may only testify to the extent their testimony will "help the trier of fact to understand the evidence or to determine a fact in issue."[190] Experts, however, are permitted to base their testimony and opinions on inadmissible evidence as long as others in the same field reasonably rely on such evidence.[191] Before admitting *scientific* expert testimony, the trial court must first satisfy itself that the testimony is grounded in "reliable scientific principles."[192]

The admissibility of expert scientific testimony was the issue in *Sciaraffa v. State*.[193] The defendant argued the trial court erred in permitting a forensic scientist employed by the Indiana State Police to testify that a "glass bottle presumptively 'indicated the presence of [m]ethamphetamine'" without requiring the scientist to "explain the scientific principles and standards of a presumptively positive test."[194] The court of appeals disagreed.[195] It began its analysis of the issue by noting although the proponent of expert testimony bears the burden of showing the foundation and reliability of scientific principles, no specific test is required to satisfy Rule 702(b)'s requirements.[196] Instead, the trial court may admit expert scientific testimony as long as it finds the evidence is sufficiently trustworthy to assist the trier of fact.[197]

In this case, that standard was satisfied.[198] The scientist was a professional forensic scientist with extensive education and experience in drug analysis.[199] Further, she testified to the specific test performed and elaborated by explaining the specialized tests she performed "are part of the normal testing procedure" for methamphetamine and "require 'expert training to administer.'"[200] Both such tests are "generally accepted in the relevant scientific community."[201] The

187. *Id.* (quoting IND. R. EVID. 704).
188. *Id.*
189. IND. R. EVID. 702(a).
190. *Id.*
191. IND. R. EVID. 703.
192. IND. R. EVID. 702(b).
193. 28 N.E.3d 351 (Ind. Ct. App.), *trans. denied*, 32 N.E.3d 239 (Ind. 2015).
194. *Id.* at 355-57.
195. *Id.* at 357-58.
196. *Id.*
197. *Id.* at 357.
198. *Id.* at 358.
199. *Id.* at 357.
200. *Id.*
201. *Id.* at 358.

scientist did testify she could not perform the required confirmatory test in addition to the "presumptive test" for the presence of a controlled substance because "'there wasn't enough sample' to confirm the presumptive testing's result."[202] But, while this meant the scientist could not be "scientifically certain that it was methamphetamine," the inability to perform a confirmatory test did not invalidate the presumptive test or make it inadmissible.[203] Rather, the inability to confirm reflects on the weight of her testimony, which is a matter for the jury.[204]

In *5200 Keystone Limited Realty, LLC*, the court of appeals reached the opposite conclusion about the admissibility of scientific expert opinion testimony, holding the trial court did not err in excluding an environmental expert's opinion that was speculative.[205] The dispute involved responsibility for the environmental cleanup costs of commercial real estate.[206] The trial court excluded the plaintiff's proffered expert testimony to the effect that certain car detailing operations had contributed to contamination of the site by using "petroleum hydrocarbons and chlorinated solvents."[207] Because the expert admitted he had no knowledge of what chemicals the particular auto detailers were using at any time, the court of appeals agreed the testimony as applied to the instant case was based on nothing but "pure speculation," and thus, properly excluded under Rule 702.[208] The court distinguished the instant case from the *Vaughn* case cited by the plaintiff, stating the expert in *Vaughn* had at least based his opinion as to the safety of certain equipment on a drawing of that equipment rendered by a defendant in that case.[209] Here, by contrast, the proffered expert admitted he had no actual evidence of what chemicals the detailers used, meaning any testimony regarding their contribution to contamination would be based on speculation, as opposed to any evidence.[210]

The rules regarding witness testimony also prohibit both lay opinion witnesses and expert witnesses from testifying "to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."[211] In *Sampson v. State*, the Indiana Supreme Court addressed these limitations on opinion testimony in a child molestation case where the defendant argued a child forensic interviewer at Holly's House (a child and adult advocacy center for victims of intimate crimes) had "improperly vouched" for the child victim during her testimony in

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202. *Id.*

203. *Id.*

204. *Id.*

205. 5200 Keystone Ltd. Realty, LLC v. Filmcraft Labs, Inc., 30 N.E.3d 5, 17 (Ind. Ct. App. 2015).

206. *Id.* at 6.

207. *Id.* at 10.

208. *Id.* at 10-11.

209. *Id.* at 10 (referencing Vaughn v. Daniels Co., 841 N.E.2d 1133 (Ind. 2006)).

210. *Id.* at 11.

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

violation of Rule 704(b).[212] The interviewer testified at trial without objection that she was trained to detect signs that children had been coached to allege abuse and she did not observe any signs the child victim in this case had been coached.[213] Specifically, the interviewer testified coaching is "where someone has told a child what to say and typically it's somebody close to the child and it's usually an untrue statement."[214] She further testified the signs of coaching—which she did not observe in the child victim in this case—included, among other things, an inability to recall specific details regarding the incident.[215]

To reach its conclusion in *Sampson*, the supreme court was called upon to address two appellate court decisions (*Kindred* and *Archer*) that followed its own decision in *Hoglund v. State*.[216] Based on a review of the holdings in those two cases regarding "coaching testimony," the court stated:

> [t]he underling question posed by *Kindred* and *Archer* is whether the distinction between testimony that a child witness *has or has not been coached* and testimony that the witness *did or did not exhibit any "signs or indicators" of coaching* can be reconciled with the prohibition on indirect vouching this Court disapproved in *Hoglund*.[217]

After surveying relevant jurisprudence of other jurisdictions, the court answered the posed question in the negative.[218] Specifically, it held such subtle distinctions characterizing an expert's testimony "is insufficient to guard against the dangers that such testimony will constitute impermissible vouching" in violation of Rule 704(b) and *Hoglund*.[219] Rather,

> when a jury is presented with expert testimony concerning certain coaching behaviors, the invited inference that the child has or has not been coached because the child fits the behavioral profile is likely to be just as potentially misleading as expert testimony applying the coaching behaviors to the facts of the case and declaring outright that a given child has or has not been coached.[220]

In both cases, there is a danger the jury will misapply the evidence.[221] Nevertheless, the court stated expert testimony about the signs of coaching and whether a child exhibited such signs may be appropriate and is permissible "*provided [that] the defendant has opened the door to such testimony*" by calling

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212. Sampson v. State, 38 N.E.3d 985, 987-90 (Ind. 2015).

213. *Id.* at 988.

214. *Id.*

215. *Id.*

216. 962 N.E.2d 1230 (Ind. 2012); *see also* Archer v. State, 996 N.E.2d 341 (Ind. Ct. App. 2013); Kindred v. State, 973 N.E.2d 1245 (Ind. Ct. App. 2012).

217. *Sampson*, 38 N.E.3d at 990 (emphasis in original).

218. *Id.* at 991-92.

219. *Id.*

220. *Id.* at 991.

221. *Id.*

the child victim's credibility into question.[222] Thus, the court concluded the interviewer's testimony in *Sampson* was improper under Rule 704(b) because "'indirect vouching testimony is little different than testimony that the child witness is telling the truth.'"[223] Nevertheless, the error in admitting the evidence did not entitle Sampson to any remedy because he did not object to the testimony at trial, nor did admitting the testimony produce a fundamental error such that the defendant was denied the possibility of a fair trial.[224]

The court of appeals applied the *Sampson* holding in *Hamilton v. State*.[225] There, the defendant argued the trial court improperly admitted vouching testimony by two different witnesses in violation of Rule 704(b).[226] First, the defendant challenged the testimony of a forensic interviewer regarding whether she observed any indicators of coaching in two child molestation victims.[227] Second, the defendant challenged testimony about statements a detective made during a pre-trial interview with the defendant to the effect that the allegations of molestation were "powerful."[228]

Applying *Sampson*, the court of appeals concluded all of the testimony by the forensic interviewer about indicators of coaching constituted improper vouching testimony deemed to "improperly invade the province of the jury to assess witness credibility."[229] Further, the court of appeals disagreed with the trial court that the defendant had "opened the door" to the testimony.[230] Although the defense had asked the child witnesses on cross-examination whether they had been told what to say, the court of appeals stated this was "not equivalent to presenting evidence that they had been told what to say, or creating a false impression in the jury that they had been."[231] Because the court could not conclude that admitting the interviewer's testimony was harmless, it reversed and remanded.[232] For purposes of remand, the court next addressed the defendant's claim about the detective's use of the word "powerful" in describing the allegations of molestation.[233] It stated that although statements made by police during interrogations can potentially be problematic under Rule 704(b), it could not say the detective's statements in the case before it amounted to improper vouching given their context.[234] Specifically, the detective talked about the victim's powerful statements so as to attempt to elicit a response from the

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222. *Id.* at 992 (emphasis added).
223. *Id.* (quoting Hoglund v. State, 962 N.E.2d 1230, 1237 (Ind. 2012)).
224. *Id.* at 992-93.
225. 43 N.E.3d 628 (Ind. Ct. App.), *aff'd on reh'g*, 2015 WL 9598281 (Ind. Ct. App. 2015).
226. *Id.* at 631.
227. *Id.*
228. *Id.* at 630-31.
229. *Id.* at 633.
230. *Id.* at 632.
231. *Id.* at 633.
232. *Id.* at 634-35.
233. *Id.* at 634.
234. *Id.*

defendant during a police interview.[235] Further, the defendant responded by agreeing the allegations were powerful, but denying molesting.[236] Thus, viewing the detective's statements in the context of a police interview, the court did not believe they carry the "same vouching force as trial testimony to that effect."[237]

VI. HEARSAY (RULES 801-806)

Hearsay is a statement "not made by the declarant while testifying at the trial or hearing" and "offered in evidence to prove the truth of the matter asserted."[238] Hearsay is typically not admissible evidence at trial unless the evidence satisfies one of the rules setting out an exception to this general rule.[239]

A. Rule 801—Hearsay Versus Nonhearsay

The rule against admitting hearsay only applies if the challenged evidence satisfies the definition of hearsay. In *Blount v. State*, the Indiana Supreme Court considered whether a detective's statement that two witnesses had told him the defendant was the shooter was inadmissible hearsay.[240] The State defended the admission of the evidence, arguing it was not admitted for the truth of the matter asserted but rather constituted "course of investigation" evidence offered to show why the police officers proceeded to seek out and arrest the defendant.[241] The court analyzed the issue by applying the test announced in the *Craig* case: (1) whether the evidence describing an out-of-court statement asserted a fact that could be proved true or false; (2) whether the evidentiary purpose of the proffered statement was to prove the truth a fact asserted; and (3) whether the fact to be proved under the suggested purpose of the statement was relevant to an issue in the case and whether the danger of prejudice outweighed the probative value.[242] Applying this test led the court to conclude that the detective's testimony was inadmissible hearsay.[243] First, the statement that the defendant was the shooter was susceptible to being true or false.[244] Second, the State argued the statement was offered to show the "course of investigation," meaning that the statement was ostensibly not being offered for its truth.[245] But applying the third prong of the *Craig* test, the court concluded admitting the testimony was overly prejudicial, particularly because the relayed witness statements identified the defendant as the shooter, yet the witnesses were not available for cross-

235. *Id.*
236. *Id.*
237. *Id.*
238. IND. R. EVID. 801.
239. IND. R. EVID. 802.
240. 22 N.E.3d 559, 565-66 (Ind. 2015).
241. *Id.* at 565.
242. *Id.* at 567 (citing Craig v. State, 630 N.E.2d 207 (Ind. 1994)).
243. *Id.* at 568.
244. *Id.*
245. *Id.*

examination at trial.[246] Because the conviction was supported by independent evidence of guilt, however, the court found the trial court's error in admitting the evidence was not reversible.[247]

The court of appeals addressed the hearsay definition in *Phillips v. State*[248] in the context of a case charging the defendant with liability for the death of an infant she placed in a broken portable crib. First, the court found the trial court did not abuse its discretion when it admitted into evidence photographs of the warning labels affixed to the broken crib.[249] The court referenced the *Craig* case, stating when an out-of-court statement is challenged as being hearsay, the first question is whether the "statement asserts a fact susceptible of being true or false."[250] If no such assertion is present, the statement cannot be hearsay.[251] On the other hand, if the statement does contain an assertion of fact, the court must look to the evidentiary purpose of offering the statement to determine whether it is hearsay.[252] Here, the court found the majority of the statements on the labels contained no assertion of fact that could be proven true or false; instead, they were along the lines of instructions urging the crib's user not to do certain things.[253] Thus, they were not hearsay. As to the "declarative statements on the labels"—for example, that failure to heed the warnings given could result in injury or death—the court found they were also not hearsay because they were not offered to "prove the facts asserted."[254] Rather, they were offered to show only that warnings were given that would have been easily visible.[255]

B. Rule 801(d)(2)—Statement of a Party Opponent

The Indiana Court of Appeals considered the application of Rule 801(d)(2) in *Harrison v. State*.[256] The court rejected the defendant's argument that the trial court had erred in admitting a tape of a telephone call made from prison between himself and an individual named Gee.[257] The court explained any statements by the defendant on the recording were statements by a party-opponent and therefore admissible pursuant to Rule 801(d)(2) regardless of whether offered to prove the truth of the matter asserted.[258] As to the comments by Gee, the court stated they

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246. *Id.*
247. *Id.* at 568-69.
248. 25 N.E.3d 1284, 1288 (Ind. Ct. App. 2015).
249. *Id.* at 1288.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 1289.
254. *Id.*
255. *Id.*
256. 32 N.E.3d 240, 253-56 (Ind. Ct. App.), *trans. denied*, 35 N.E.3d 671 (Ind. 2015).
257. *Id.* at 255-56.
258. *Id.* at 255.

were relatively innocuous for the most part.[259] Only Gee's reply of "'Me, too'" when the defendant stated he had ammonia in his lungs (from making methamphetamine) was substantive.[260] Yet, to the extent that it was offered to prove the truth of the matter asserted—that Gee had ammonia in his lungs—the court stated it was not convinced that admission of the statement affected the defendant's substantial rights.[261] The defendant also challenged the admission of a recorded prison call between an inmate and the defendant's ex-girlfriend.[262] In this case, the court of appeals agreed with the defendant that admission violated the hearsay rule.[263] The court noted the call was being offered for the truth of the matter stated.[264] Nor did Rule 801(d)(2) apply to these particular statements and render them admissible, inasmuch as the defendant himself was not involved in the phone call.[265] However, the court concluded admitting the call was harmless error because it was cumulative of other admitted evidence.[266]

The court of appeals addressed the admissibility of an audio recording containing a conversation between the defendant and a government confidential informant (CI) in *Mack v. State*.[267] The court there held the tape did not contravene the rules against admitting hearsay evidence.[268] It explained it has long found statements by CIs are not hearsay because they are not admitted to prove the truth of the matters asserted by the CI, but rather to provide context for the defendant's own recorded statements.[269] Because the statements by the CI were not nonhearsay, the Confrontation Clause also did not apply to bar their admission.[270]

C. Rule 801(d)(1)(b)—Prior Consistent Statement

Whether a statement satisfied Rule 801(d)(1)(b)'s requirements for admitting a statement that otherwise would constitute inadmissible hearsay was the subject of the Indiana Court of Appeals' decision in *Townsend v. State*.[271] According to that rule,

> a statement is not hearsay if the declarant testifies and is subject to cross-examination about a prior statement, the statement is consistent with the declarant's testimony, and the statement is offered to rebut an express or

259. *Id.* at 256.
260. *Id.* at 255.
261. *Id.*
262. *Id.* at 254-55.
263. *Id.*
264. *Id.*
265. *Id.* at 254.
266. *Id.* at 254-55.
267. 23 N.E.3d 742, 753 (Ind. Ct. App. 2014), *trans. denied*, 31 N.E.3d 976 (Ind. 2015).
268. *Id.* at 754.
269. *Id.*
270. *Id.*
271. 33 N.E.3d 367, 370 (Ind. Ct. App.), *trans. denied*, 35 N.E.3d 1290 (Ind. 2015).

implied charge that the declarant recently fabricated the statement or acted from a recent improper influence or motive for testifying.[272]

The challenged evidence was a recording made at a police station wherein the victim accused the defendant of injuring her.[273] Also admitted by the State at trial over no objection was a letter by the victim to the defendant's counsel recanting her allegations of battery.[274] Here, the court agreed with the defendant that the recording was inadmissible hearsay.[275] It explained there is a difference between "merely challenging a witness's credibility" and what is required for the rule to operate—namely, a charge of "fabricated testimony or improper . . . motive" for testifying.[276] The court stated there was not even a suggestion at trial of such recent fabrication or improper motive.[277] Rather, the evidence showed only that defense counsel challenged the victim's credibility by questioning her in detail about the different stories she had told about whether the defendant had committed battery, noting they were "diametrically different accounts about what happened."[278]

D. Rule 803(1)—Present Sense Impression

In *Mack v. State*, the defendant also argued the trial court abused its discretion when it permitted a police officer to testify about statements made to him by a confidential informant (CI) to the effect that he had just discussed with the defendant buying a "degreaser" that could be used to counterfeit currency.[279] The question before the Indiana Court of Appeals was whether the testimony was properly admitted as being within the "present sense impressions" exception to the rule prohibiting hearsay.[280] The court concluded it was not.[281] It explained the exception for present sense impressions under Rule 803(1) allows introducing "[a] statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it."[282] To reach its conclusion the testimony was improper, the court considered the evidence indicating the CI's statement to the officer occurred anywhere from between "a few" and "ten minutes" after speaking with the defendant.[283] The court explained Rule 803(1) pertained to statements made "immediately after" perceiving an event.[284] The

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272. *Id.*
273. *Id.*
274. *Id.* at 369-70.
275. *Id.* at 372.
276. *Id.*
277. *Id.*
278. *Id.* at 371.
279. 23 N.E.3d 742, 754-55 (Ind. Ct. App. 2014), *trans. denied*, 31 N.E.3d 976 (Ind. 2015).
280. *Id.*
281. *Id.* at 755.
282. *Id.* (quoting IND. R. EVID. 803(1)).
283. *Id.*
284. *Id.*

reason for this restriction was to provide reliability and prevent against the opportunity for fabrication.[285] Here, the time periods at issue allowed "ample time for a declarant to deliberate and possibly fabricate a statement, especially where the declarant knows officers are looking for evidence of a particular type of crime and the declarant himself has been implicated in the commission of that crime."[286]

The court of appeals also concluded evidence did not meet the present sense impression exception in *Minor v. State*.[287] In *Minor*, the defendant argued the trial court erred in excluding an unsworn out-of-court statement that was relevant to his self-defense claim: a statement an individual, Dulin, made to the police to the effect that the murder victim had told him he had a gun on him.[288] The defendant acknowledged the proffered statement contained two levels of hearsay, but argued each satisfied an exception to the hearsay rule.[289] As to the first layer, the defendant argued the statement by the victim to Dulin constituted a present sense impression.[290] The court disagreed, explaining that to satisfy Rule 803(1), a statement must (1) "describe or explain an event or condition; (2) during or immediately after its occurrence; and (3) it must be based upon the declarant's perception of the event or condition."[291] Here, the statement at issue failed to satisfy the first two requirements.[292] First, the record was not specific as to the victim's exact statement.[293] Second, even if the statement did "adequately describe[] or explain[] the condition of having a gun, there is no indication as to when [the victim] purportedly made the statement," making it impossible to find that the statement satisfied the immediateness requirement.[294]

E. Rule 803(5)—Statements for Medical Treatment

In *Steele v. State*,[295] the court of appeals considered a defendant's argument that the trial court erred in admitting testimony and a medical report from a forensic nurse examiner "who is contacted when violence is suspected as the cause of a patient's injury."[296] The patient was the defendant's girlfriend and the victim in the State's battery case.[297] The precise statement about which the defendant complained was one that identified him as the perpetrator of the

285. *Id.*
286. *Id.*
287. 36 N.E.3d 1065, 1069-70 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).
288. *Id.*
289. *Id.* at 1070.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. 42 N.E.3d 138 (Ind. Ct. App. 2015).
296. *Id.* at 141.
297. *See id.*

violence.[298] The court began by explaining Rule 803(4) permits the admission of evidence that is otherwise hearsay if (1) "made by . . . [one] seeking medical diagnosis or treatment; (2) . . . reasonably pertinent to diagnosis or treatment; and (3) describe[s] "medical history, symptoms, pain or sensations and their inception or general cause."[299] The exception is premised on the rationale that individuals are unlikely to lie to medical personnel because doing so may jeopardize their chances of being properly treated.[300]

The court applied a two-part test to determine whether the hearsay evidence offered under this exception was sufficiently reliable to be admitted: (1) whether the declarant was motivated to speak truthfully so as "to promote diagnosis and treatment" and (2) whether the statement at issue was one on which an medical expert would rely "when rendering diagnosis or treatment."[301] It found the first prong was easily satisfied because "when a patient consults a physician," one can infer from the circumstances the purpose is to obtain diagnosis or treatment.[302] As to the second prong, the court explained even statements identifying perpetrators are admissible as long as they "assist medical providers in recommending potential treatment" for certain kinds of offenses, including cases of domestic violence.[303] To determine whether such statements do assist in treatment, the trial court may consider the health care provider's testimony.[304] Here, the court found such testimony was sufficient to establish that the identity of the person who committed the violence was necessary for treatment purposes.[305] Importantly, the forensic nurse testified that "the cause of an injury is important because the patient might be in danger and because the origin of the injury might impact the type of tests necessary to determine whether there are additional injuries 'that we're not seeing on the surface.'"[306] The court further noted the forensic nurse's report suggested counseling and gave phone numbers for domestic violence shelters.[307]

F. Rule 804—Unavailability

The Indiana Rules of Evidence contain additional exceptions to the rule against admitting hearsay in certain cases where the declarant is unavailable to testify at trial. One such exception is Rule 804(b)(2) which governs "dying declarations."[308] That rule allows the trial court to admit a declarant's out-of-

298. *See id.* at 141-42.
299. *Id.* at 142.
300. *Id.*
301. *Id.*
302. *Id.*
303. *See id.*
304. *See id.*
305. *See id.* at 142-43.
306. *Id.* at 143.
307. *Id.*
308. *See* IND. R. EVID. 804(b)(2); *see also* Bishop v. State, 40 N.E.3d 935, 944 (Ind. Ct. App.)

court statement made while believing the declarant's death to be imminent and which concerns the cause or circumstances of death.[309] The rationale for admitting such statements is that persons who believe they will imminently die are not likely to lie.[310] In *Bishop v. State*, the defendant challenged the trial court's decision to allow the State to introduce a victim's statement identifying Bishop as the person who shot him.[311] The defendant argued the statement did not satisfy the dying declaration rule because the circumstances showed the victim "did not believe his death was imminent and had not abandoned all hope of recovery."[312] In particular, Bishop pointed out that although the victim's blood pressure was low at the time he made the statement, paramedics had told him he would be okay.[313] The State countered by noting the victim had suffered multiple gunshot wounds and was bleeding.[314] Moreover, he asked the paramedic multiple times whether he was going to die, thus demonstrating the possibility of death was at the center of his thoughts.[315]

The court of appeals agreed with the State that the evidence was sufficient to satisfy Rule 804(b)(2).[316] It explained that to satisfy the dying declaration rule, the statement must be made by one who knows his "death . . . [is] imminent and ha[s] abandoned all hope for recovery."[317] At the same time, the court stated to reach a conclusion about the declarant's state of mind, a "trial court may consider the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound, or state of his illness.'"[318] In this case, the evidence showed, among other things, the victim had been shot five times, his wounds were severe, he was yelling for help after being shot, at some point he had no blood pressure, and he asked the paramedics numerous times whether he was going to die.[319] Moreover, the victim died within hours of being transported to the hospital.[320]

The application of the "statement against interest" exception contained in Rule 804(b)(3) was the subject of *Beasley v. State*.[321] There, the court of appeals

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(explaining "[o]ut-of-court statements offered in court for the truth of the matter asserted are generally inadmissible hearsay," but one of many exceptions to the inadmissibility of hearsay is a "dying declaration"), *trans. denied*, 40 N.E.3d 858 (Ind. 2015).

309. *See Bishop*, 40 N.E.3d at 944 (citing IND. R. EVID. 804(b)(2)).

310. *Id.*

311. *Id.* at 943.

312. *Id.*

313. *Id.* at 938, 944.

314. *Id.* at 943-44.

315. *Id.* at 944-45.

316. *Id.* at 945.

317. *Id.* at 944.

318. *Id.* (quoting Wright v. State, 916 N.E.2d 269, 275 (Ind. Ct. App. 2009)).

319. *Id.* at 944-45.

320. *Id.*

321. 30 N.E.3d 56, 65-67 (Ind. Ct. App. 2015), *aff'd in part, vacated in part*, 46 N.E.3d 1232

explained that Rule 804(b)(3) pertains to statements

> that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.[322]

Citing to the Indiana Supreme Court's decision in *Jervis v. State*, the court of appeals noted:

> the rationale for allowing statements against interest into evidence is that the declarant would only make such a statement if it were true because the content of the statement goes against the declarant's interests, and that this rationale fails if the declarant did not believe the state *was* against his or her interest.[323]

Analyzing the content of the statement at issue, the court of appeals concluded the statement against interest exception was not applicable.[324] Among other things, the declarant stated he observed the defendant reaching into his waistband for a gun and the declarant then reached for it.[325] The declarant further stated the two fought for control of the gun and it went off such that the declarant shot someone in the face.[326] These statements, said the court of appeals, suggested only the declarant was forced to defend himself from an attack by the defendant, making it a stretch to suggest the declarant knew that by so stating he was placing himself in legal jeopardy.[327]

VII. AUTHENTICATION OF EVIDENCE AND BEST EVIDENCE (RULES 901 AND 1002-1004)

Under Rule 901, the proponent of evidence must authenticate it by showing the evidence is what the proponent claims it to be.[328] The proponent may authenticate evidence by either direct or circumstantial evidence.[329] For example, one may authenticate an item through a witness with knowledge who testifies that the item is what it is claimed to be.[330] One may also produce evidence about

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(Ind. 2016).

322. *Id.* at 65 (quoting IND. R. EVID. 804(b)(3)).

323. *Id.* at 66-67 (citing Jervis v. State, 679 N.E.2d 875 (Ind. 1997)).

324. *Id.* at 67.

325. *Id.* at 66.

326. *Id.*

327. *Id.* at 67.

328. *See* IND. R. EVID. 901.

329. *See* Strunk v. State, 44 N.E.3d 1, 5 (Ind. Ct. App.), *trans. denied*, 41 N.E.3d 691 (Ind. 2015) (citing Newman v. State, 675 N.E.2d 1109, 1111 (Ind. Ct. App. 1996)) (stating that "[a]uthentication of an exhibit can be established by either 'direct or circumstantial evidence'").

330. *Strunk*, 44 N.E.3d at 5.

the item's distinctive characteristics taken together with all the circumstances.[331] Once the proponent shows by a "reasonable probability" the item is what the proponent claims it to be,[332] "any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility."[333]

In *Strunk v. State*, the court of appeals applied these standards in the context of the defendant's claim that the State had failed to authenticate properly as belonging to him a Facebook message wherein he essentially acknowledged he had molested his child victim.[334] The court concluded the message was properly admitted, having been authenticated by witness testimony.[335] The court noted the victim testified she was familiar with the defendant's Facebook page and with the profile picture of a wolf that he used on the page, and she had communicated with him through the same profile page on previous occasions.[336] The victim's mother also identified the defendant's Facebook profile page, stating she had seen it before because she was one of the defendant's mutual friends.[337]

The court of appeals reached a similar conclusion in *Wilson v. State*, a case where the defendant argued certain Twitter posts purportedly authored by him and connecting him to gang activity and guns were not properly authenticated.[338] The court noted it had addressed a similar fact pattern in *Pavlovich*, a case involving the authentication of text and email messages.[339] In *Pavlovich*, the court concluded such messages were properly authenticated despite no direct evidence linking the defendant to the phone number or email address that sent the messages.[340] There, the messages were properly authenticated under Rule 901 by witness testimony and other circumstantial evidence relating to the content of the messages.[341] In *Wilson*, the court also concluded the State had presented sufficient evidence to authenticate the Twitter posts.[342] A witness testified she communicated with the defendant on Twitter and the account from which the messages were sent belonged to him based on the name used and the header of the account.[343] In addition, pictures on the account showed the defendant holding

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331. *Id.*

332. Wilson v. State, 30 N.E.3d 1264, 1268 (Ind. Ct. App.), *trans. denied*, 35 N.E.3d 671 (Ind. 2015).

333. *Strunk*, 44 N.E.3d at 5.

334. *See id.*

335. *Id.*

336. *Id.*

337. *See id.*

338. Wilson v. State, 30 N.E.3d 1264, 1265-68 (Ind. Ct. App.), *trans. denied*, 35 N.E.3d 671 (Ind. 2015).

339. *Id.* at 1268 (citing Pavlovich v. State, 6 N.E.3d 969, 976 (Ind. Ct. App.), *trans. denied*, 9 N.E.3d 678 (Ind. 2014)).

340. *Id.*

341. *Id.*

342. *Id.* at 1269.

343. *Id.* at 1268-69.

guns that matched those used in the murder.[344] Moreover, the same witness testified the defendant was a member of the Glen Park gang and he often used the terms in the Twitter messages in other communications over the Internet.[345]

The court of appeals considered whether a video recording violated best evidence principles in *Wise v. State*.[346] The best evidence principles provide that "'[a]n original writing, recording, or photograph is required to prove its content' unless the Rules of Evidence or a statute provide otherwise."[347] Nevertheless, "a duplicate . . . [may be admitted] to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."[348] In *Wise*, the defendant complained about the admission of video recordings made by the victim in a rape case who alleged the defendant had sexual intercourse with her while she was asleep after he had slipped Xanax into her canned sodas.[349] The videos at issue were originally stored on the defendant's phone (tending to show that he was having sex or attempting to have sex with the victim while she was asleep), but the victim used a camcorder to make a separate recording of those videos.[350] In doing so, she also changed the titles and dates on the recordings so the defendant would know she had seen the videos.[351] By the time of trial, the defendant's phone was no longer available and the original videos could not be retrieved from it.[352] The court of appeals agreed with the trial court that permitting the State to introduce the camcorder version of the videos did not violate the best evidence rule under the circumstances.[353]

Specifically, the court noted under Rule 1004(a), "the best evidence rule permits admission into evidence of a duplicate recording when 'all originals . . . [have been] lost or destroyed, and not by the proponent acting in bad faith.'"[354] Here, the videos on the phone were lost because the defendant replaced the phone on which they were stored.[355] Further, while the victim's camcorder version of the videos reflected the changed dates and titles on the original videos, the court noted the "handheld camera recording of the videos on . . . [the defendant's] cellular phone display no evidence of tampering or other alteration, let alone loss of the content of the videos themselves."[356] Thus, they were admissible.[357]

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344. *Id.* at 1269.
345. *Id.*
346. 26 N.E.3d 137, 140 (Ind. Ct. App.), *trans. denied*, 31 N.E.3d 975 (Ind. 2015).
347. *Id.* at 143 (citing IND. R. EVID. 1002).
348. *Id.* (citing IND. R. EVID. 1003).
349. *Id.* at 139-41.
350. *Id.* at 142.
351. *Id.* at 139-40.
352. *Id.* at 142.
353. *Id.* at 142-43.
354. *Id.* at 143 (citing IND. R. EVID. 1004(a)).
355. *Id.*
356. *Id.*
357. *Id.* at 143-44.

CONCLUSION

As this survey shows, Indiana courts are regularly confronted with challenges to the admission of evidence requiring them to consult, interpret, and apply the Indiana Rules of Evidence. By summarizing the more important recent developments in this area of practice, this survey hopes to serve as a useful guide for attorneys, judges, and other interested parties.